

# **Exhibit 23**

## **DotMusic Limited Reconsideration Request (“RR”)**

March 10, 2018

### **1. Requestor Information**

Requestors:

**Name:** DotMusic Limited

Contact Information Redacted

**Address:**

**Email:** Constantinos Roussos Contact Information Redacted

Requestor is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, 1900 K Street, NW Washington, DC 20006-1110

Contact Information Redacted

**Email:**

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

DotMusic Limited (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180110-1, dated February 10, 2018 (the “DIDP Response”), which denied the disclosure of certain documents requested pursuant to ICANN’s DIDP.

On January 10, 2018, Requestor sought disclosure of documentary information relating to ICANN's Board Governance Committee's (the "BGC") review of the Community Priority Evaluation ("CPE") process through an independent review by FTI Consulting, Inc. ("FTI") (the "DIDP Request").<sup>1</sup> Specifically, the Requestor submitted nineteen (19) requests:

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

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<sup>1</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the “CPE Provider’s working papers associated with” DotMusic’s CPE;
12. “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”
13. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”
14. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”
15. FTI’s investigative plan used during its independent review;
16. FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”
17. All communications between ICANN and FTI regarding FTI’s independent review;
18. All communications between ICANN and the CPE Provider regarding FTI’s independent review; and
19. All communications between FTI and the CPE Provider regarding FTI’s independent review.<sup>2</sup>

In its Response, ICANN refused to disclose any of the requested documents.<sup>3</sup>

ICANN argued that it appropriately determined that “certain documents are not appropriate for disclosure” pursuant to its Nondisclosure Conditions, and it can therefore deny the document

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<sup>2</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), pp. 3-6, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>3</sup> See Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

request “without contravening its commitment to transparency.”<sup>4</sup> According to ICANN, a significant number of Nondisclosure Conditions apply to the DIDP Request. For instance, ICANN claimed that, because its outside counsel retained FTI, “FTI’s draft and working materials are protected by the attorney-client privilege under California law.”<sup>5</sup> ICANN further argued that the requests include confidential information from the CPE Provider that cannot be disclosed because “the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations.”<sup>6</sup> Under its Nondisclosure Conditions, then, ICANN determined that it was not obligated to disclose documents requested in the DIDP Request.

Under the DIDP, however, ICANN can disclose documents covered by the Nondisclosure Conditions under certain circumstances. If ICANN determines that “the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure,”<sup>7</sup> then it can publish the documents. ICANN did not make such a determination, instead finding that:

ICANN organization’s internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>8</sup>

ICANN organization’s communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>9</sup>

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<sup>4</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>5</sup> *Id.*, p. 11. ICANN also argued that, “even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization’s outside counsel’s direction, and FTI’s draft and working materials, ‘might prejudice an[] internal . . . investigation’—that is, the CPE Process Review.” *Id.*

<sup>6</sup> *Id.*, p. 9.

<sup>7</sup> *Id.*, p. 7.

<sup>8</sup> *Id.*, p. 10.

<sup>9</sup> *Id.*, p. 11.

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]<sup>10</sup>

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]<sup>11</sup>

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]<sup>12</sup>

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]<sup>13</sup>

ICANN thus refused to disclose most of the requested documents to the Requestor.

In addition, ICANN asserted that it could not disclose Requests No. 10 and 16, FTI's engagement letter with ICANN and FTI's follow-up communications with the CPE Provider, respectively, because they do "not exist."<sup>14</sup>

**4. Date of action/inaction:**

ICANN acted on February 9, 2018 by issuing its Response to the DIDP Request.<sup>15</sup>

**5. On what date did you become aware of action or that action would not be taken?**

The Requestor became aware of the action on February 9, 2018, when the DIDP Response was received.

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<sup>10</sup> *Id.*, p. 13.

<sup>11</sup> *Id.*, p. 15.

<sup>12</sup> *Id.*, p. 18.

<sup>13</sup> *Id.*, p. 19.

<sup>14</sup> *Id.*, p. 16, 19. ICANN explained that "FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist." *Id.*, p. 16.

<sup>15</sup> Requestor received the DIDP Response on February 9, 2018, even though the DIDP Response is dated February 10, 2018. *See* Exhibit 3, Email to A. Ali from ICANN (Feb. 9, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>

**6. Describe how you believe you are materially affected by the action or inaction:**

Requestor is materially affected by ICANN's refusal to disclose certain information concerning FTI's review of the CPE process because ICANN intends to rely on the FTI's three reports (the "FTI Reports") to make a decision on Requestor's Reconsideration Request 16-5 ("Request 16-5"). ICANN's reliance on the procedurally and substantively deficient reports will directly affect Requestor's rights regarding its community application for the .MUSIC gTLD, which is the focus of Request 16-5. However, Requestor cannot fully analyze the FTI Reports because ICANN refuses to disclose their underlying documents. ICANN's decision therefore both prevents Requestor from properly and fairly contesting the results and implications of a facially deficient "independent" review and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

ICANN is required to "operate in a manner consistent with [its] Articles and its 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."<sup>16</sup> It has failed to do so.

ICANN has not complied within international law and conventions in violation of its Bylaws. There is an "an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems."<sup>17</sup> This principle is violated "when a decision is based

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<sup>16</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>17</sup> Exhibit 5, Charles T. Kotuby Jr., "General Principles of Law, International Due Process, and the Modern Role of Private International Law" 23 *Duke J. of Comparative and Int'l L.* 411, 422 (2013).

upon evidence and argumentation that a party has been unable to address.”<sup>18</sup> The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.<sup>19</sup> While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,”<sup>20</sup> it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-5—the FTI Reports.

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>21</sup> These standards require that ICANN “employ[ ] open and transparent policy development mechanisms;”<sup>22</sup> “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>23</sup> and “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>24</sup> ICANN’s DIDP is especially important to ICANN’s commitment to transparency. As a “principle element of ICANN’s

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<sup>18</sup> Exhibit 6, Charles T. Kotuby and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 179 (Mar. 15, 2017).

<sup>19</sup> Exhibit 7, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. ... While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

<sup>20</sup> Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>21</sup> *See* Exhibit 4, ICANN Bylaws (July 22, 2017), Arts. 1, 3-4, <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>22</sup> *Id.*, Art. 3, § 3.1.

<sup>23</sup> *Id.*, Art. 1, § 1.2(v).

<sup>24</sup> *Id.*, Art. 1, § 1.2(vi).



approach to transparency and information disclosure,”<sup>25</sup> the DIDP “is intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>26</sup>

ICANN has violated these Bylaws, and the commitments contained therein, by refusing to disclose the requested documents. ICANN’s decision raises questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Reconsideration Request 16-5.<sup>27</sup>

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising how ICANN maintains that it can instruct FTI to undertake such a review, and accept the conclusions of that review, without disclosing the materials that informed FTI’s findings. If ICANN fails to disclose the requested documents, it will underscore the serious questions that have been raised about the impartiality, independent legitimacy, and credibility of FTI’s investigation, which already have been raised by Requestor.<sup>28</sup> Such an action would harm the global public interest, Requestor, and the global music community that has supported Requestor’s Application.

ICANN cannot claim that there is no legitimate public interest in disclosing the requested documents given FTI’s conclusions, which are contrary to the findings of other panels and experts.

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<sup>25</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>26</sup> *Id.*

<sup>27</sup> See Exhibit 10, Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>28</sup> Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

This is clearly shown through FTI’s conclusion that it found no evidence that ICANN influenced the CPE Provider.<sup>29</sup> In clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.<sup>30</sup> Without the underlying documents, there is no tenable way to analyze whether ICANN unduly influenced the CPE Provider. The documents are given even greater import because ICANN argued that it did not disclose certain documents because “the CPE Provider has not agreed . . . and has threatened litigation.”<sup>31</sup> In light of the Dot Registry IRP Declaration, a reasonable person would conclude that the CPE Provider’s litigation threats suggests that there were serious and improper conduct during the CPE. Without the requested documents, however, there is no means to determine whether such conduct occurred.

To make matters worse, ICANN admits that “ICANN organization’s outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI’s draft and working materials are protected by the attorney-client privilege under California law.”<sup>32</sup> Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.

Given the above considerations, this is clearly a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested

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<sup>29</sup> Exhibit 11, FTI, Scope 1 Report (Dec. 13, 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>30</sup> See Exhibit 12, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>31</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 9 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>32</sup> *Id.*, p. 11.

disclosure.”<sup>33</sup> ICANN has not disclosed any “compelling” reason that outweighs the public interest in disclosure. In fact, rejecting full disclosure of the requested items undermines both the integrity and the scope of the FTI investigation that the ICANN Board and the BAMC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s actions materially affects the global music community that has supported the Requestor’s application. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN’s identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

An opaque ICANN materially damages its credibility, accountability, and trustworthiness. Moreover, an ICANN that lacks transparency undermines its due diligence and decision-making process in matters that relate to the global public interest and determinations that could materially

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<sup>33</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en> (“Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”).

harm affected parties. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that FTI used to review the CPE process, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.<sup>34</sup> This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the music community members, which have supported Requestor's application for .MUSIC, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

#### **8. Detail of Staff/Board Action/Inaction – Required Information**

The Requestor filed a community-based Top-Level Domain ("gTLD") application for the ".MUSIC" string. However, the CPE Provider recommended that ICANN reject the Requestor's community application.<sup>35</sup> Requestor subsequently made various submissions, including independent expert reports supporting their community application, showing that the CPE Provider's decision is fundamentally erroneous.<sup>36</sup> These submissions explain how the CPE Provider disparately treated Requestor's application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community applications, failing to follow its own guidelines, discriminatorily treating the application, making several factual errors, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria.

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<sup>34</sup> Exhibit 13, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

<sup>35</sup> Exhibit 14, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>36</sup> Exhibit 15, "Request 16-5: DotMusic Limited" ICANN (last visited Mar. 8, 2018), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

ICANN began its own review of the CPE process in late 2016, assigning the task to the BGC.<sup>37</sup> It did not disclose any substantive information about this review to the Requestor or other participants in the CPE process. However, since the review concerns an examination of the CPE process, it was apparent to the Requestor early on that the review will directly affect the outcome of Request 16-5. Thus, on May 5, 2017, the Requestor filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “First DIDP Request”) in an attempt to learn more about the review.<sup>38</sup> In submitting this request, the Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes”<sup>39</sup> and disclose the requested documents. ICANN failed to do so when it denied certain requests made in the First DIDP Request on June 4, 2017.<sup>40</sup>

After Requestor submitted its First DIDP Request, ICANN finally disclosed some additional information regarding the CPE review. It announced that FTI was reviewing the CPE process, and collecting information and materials from ICANN and the EIU regarding the process.<sup>41</sup> In response to the information disclosed about FTI, on July 25, 2017, the Requestor jointly filed another DIDP Request on 10 June 2017 (the “Second DIDP Request”) to learn about

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<sup>37</sup> Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>38</sup> Exhibit 17, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>39</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>40</sup> Exhibit 18, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

<sup>41</sup> Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

FTI and the purview of its review.<sup>42</sup> This request was also denied in violation of ICANN's commitment to transparency.<sup>43</sup>

Requestor finally learned substantive information about FTI's review on December 13, 2017, when ICANN decided to publish the results of FTI's work: the FTI Reports.<sup>44</sup> Upon review of the FTI Reports, Requestor found that they contained significant problems both in the substance of the reports and the procedures that FTI used to in its review.<sup>45</sup> For instance, FTI did not re-evaluate the CPE applications, examine the substance of the reference material cited in its own reports, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants. As FTI's review is intended to "assist in the CPE review,"<sup>46</sup> Requestor sought to learn about FTI and its flawed reports on the CPE process, which makes several conclusions that may significantly impact Request 16-5.<sup>47</sup> Therefore, Requestor submitted to ICANN the DIDP Request.

ICANN first responded to the DIDP Request on February 9, 2018.<sup>48</sup> In its Response, ICANN determined that the Nondisclosure Conditions applied to most of the requests and that the public interest did not warrant disclosing the following documents:

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<sup>42</sup> Exhibit 20, DotMusic Limited's Second DIDP Request (Jun. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>43</sup> Exhibit 21, ICANN's Response to DotMusic Limited's DIDP Request (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

<sup>44</sup> Exhibit 22, "ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process" ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>45</sup> See Exhibit 8, Email from DotMusic to ICANN attaching the "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>46</sup> Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>47</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>48</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>49</sup>

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>50</sup>

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]<sup>51</sup>

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]<sup>52</sup>

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]<sup>53</sup>

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]<sup>54</sup>

In relation to Item 10, ICANN stated that it cannot share the engagement letter between FTI and ICANN because:

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.<sup>55</sup>

In relation to Item 16, ICANN states that there is no written follow-up communication from the FTI to the CPE Provider and as such, "no such documents exist:"

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.<sup>56</sup>

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<sup>49</sup> *Id.*, p. 10.

<sup>50</sup> *Id.*, p. 11.

<sup>51</sup> *Id.*, p. 13.

<sup>52</sup> *Id.*, p. 15.

<sup>53</sup> *Id.*, p. 18.

<sup>54</sup> *Id.*, p. 19.

<sup>55</sup> *Id.*, p. 16.

<sup>56</sup> *Id.*, p. 19.

ICANN, in providing such responses to the DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. Requestor thus submits this Reconsideration Request in response. Disclosure of such information to the gTLD applicant is necessary to ensure that FTI's "independent" review remains a fair, transparent, and independent process.

**9. What are you asking ICANN to do now?**

Requestor asks ICANN to disclose all items and documents requested in the DIDP Request.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requestor is a community applicant for the .MUSIC string and the organization that submitted the DIDP Request to ICANN. Requestor is thus materially affected by ICANN's decision to deny the DIDP Request. Further, the global music community that is supporting the .MUSIC community application is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No. The Reconsideration Request is filed on behalf of DotMusic Limited.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

Not applicable.



**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

March 10, 2018

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Date

# **Exhibit 24**

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-1  
5 JUNE 2018**

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The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (2018 DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .MUSIC (Application or DotMusic Application), which was placed in a contention set with other .MUSIC applications.<sup>3</sup> The Requestor participated in CPE, but did not prevail. The Requestor has challenged the CPE Provider's evaluation of its Application in Reconsideration Request 16-5, which is pending.<sup>4</sup>

While Request 16-5 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>5</sup> The Board Governance Committee (BGC) thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the

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<sup>1</sup> Request 18-1, § 3, at Pg. 1-5, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

<sup>2</sup> *Id.*, § 6, at Pg. 6-10.

<sup>3</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>.

<sup>4</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>5</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

subject of certain pending Reconsideration Requests relating to the CPE process.<sup>6</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-5, would be placed on hold until the CPE Process Review was completed.<sup>7</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>8</sup>

On 10 January 2018, the Requestor submitted the 2018 DIDP Request. The Requestor sought 19 categories of documents and information relating to the CPE Process Review.<sup>9</sup> On 9 February 2018, ICANN org responded to the 2018 DIDP Request (2018 DIDP Response). ICANN provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the 2018 DIDP Response. Notwithstanding the Nondisclosure Conditions, ICANN org "also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>10</sup> Additionally, in response to two of the requested items, ICANN org explained that the requested documentary information did not exist.<sup>11</sup>

On 10 March 2018, the Requestor filed the instant Reconsideration Request 18-1 (Request 18-1), which challenges certain portions of the 2018 DIDP Response. The Requestor

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<sup>6</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>7</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>8</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>9</sup> 2018 DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf>.

<sup>10</sup> Response to DIDP Request No. 20180110-1; Request 18-1 Ex. 2, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>11</sup> *Id.*

claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>12</sup>

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>13</sup>

Pursuant to Article 4, Section 4.2(I) of the Bylaws, ICANN org transmitted Request 18-1 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>14</sup>

The BAMC has considered Request 18-1 and all relevant materials and recommends that the Board deny Request 18-1 because ICANN org adhered to established policies and procedures in its response to the 2018 DIDP Request.

## **II. Facts.**

### **A. The CPE Provider's Evaluation of the DotMusic Application.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited and the Requestor accepted to participate in CPE.<sup>15</sup>

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<sup>12</sup> Request 18-1, § 6, at Pg. 6-10.

<sup>13</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>14</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-1, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-ombudsman-action-17apr18-en.pdf>.

<sup>15</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>; *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

On 10 February 2016, the CPE panel issued a CPE report, concluding that the Application earned 10 out of 16 possible points on the CPE criteria.<sup>16</sup> Because a minimum of 14 points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.<sup>17</sup> On 24 February 2016, the Requestor filed Request 16-5, seeking reconsideration of the CPE determination and approval of the Requestor's community application.<sup>18</sup>

On 29 April 2016, the Requestor submitted a DIDP request seeking documents relating to the CPE Report (2016 DIDP request).<sup>19</sup> On 15 May 2016, ICANN org responded to the 2016 DIDP Request.<sup>20</sup> ICANN org provided links to all the responsive, publicly available documents, furnished an email not previously publicly available, explained that it did not possess documents responsive to several of the requests, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>21</sup> The Requestor thereafter filed Request 16-7, challenging ICANN org's response to the 2016 DIDP Request.<sup>22</sup> On 26 June 2016, the BGC denied Request 16-7.<sup>23</sup>

## **B. The CPE Process Review.**

While Request 16-5 was still pending, ICANN's Board directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally

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<sup>16</sup> *Id.*; see also CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>17</sup> See CPE Report at 1.

<sup>18</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>19</sup> 2016 DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

<sup>20</sup> 2016 DIDP Response, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-request-redacted-30may16-en.pdf>.

<sup>23</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).<sup>24</sup>

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.<sup>25</sup> The BGC determined that, in addition to reviewing the process by which ICANN org interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>26</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the pending Reconsideration Requests relating to the CPE process, including Request 16-5, would be on hold until the CPE Process Review was completed.<sup>27</sup>

On 13 December 2017, ICANN org published the three reports issued in connection with the CPE Process Review.<sup>28</sup>

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the

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<sup>24</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>25</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>26</sup> *Id.*

<sup>27</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>28</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review (the 2018 Resolutions).<sup>29</sup>

**C. Relevant Prior DIDP Requests from the Requestor Seeking Documents Regarding the CPE Process Review.**

While the CPE Process Review was pending, the Requestor submitted two DIDP Requests seeking documents and information<sup>30</sup> relating to the CPE Process Review. The Requestor subsequently filed two Reconsideration Requests, Requests 17-2 and 17-4, which challenged certain portions of ICANN org’s Responses to those two DIDP Requests.<sup>31</sup> The Board denied both Requests 17-2 and 17-4.<sup>32</sup>

**D. The 2018 DIDP Request.**

On 10 January 2018, the Requestor submitted the 2018 DIDP Request, seeking 19 categories of documents.<sup>33</sup>

On 9 February 2018, ICANN org responded to the 2018 DIDP Request. ICANN org provided links to all responsive, publicly available documents. With respect to those requested materials that were in ICANN org’s possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions. Notwithstanding the Nondisclosure Conditions, ICANN org “also

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<sup>29</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>30</sup> See DIDP Request No. 20170505-1, filed 5 May 2017, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf> (2017 DIDP Request).

<sup>31</sup> Request 17-2, <https://www.icann.org/resources/pages/reconsideration-17-2-dotmusic-request-2017-06-19-en>; Request 17-4, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>. Request 17-4 was filed in conjunction with dotgay LLC.

<sup>32</sup> Board Action Regarding Request 17-2, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.a>; Board Action Regarding Request 17-4, <https://www.icann.org/resources/board-material/resolutions-2017-10-29-en#1.a>.

<sup>33</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf>, (alterations in original) (internal citations omitted).



evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”<sup>34</sup> Additionally, ICANN org explained that the documentary information requested in two of the requested categories did not exist.<sup>35</sup>

On 15 March 2018, the Requestor filed Request 18-1, seeking reconsideration of ICANN org’s determination not to produce all requested documents, which is discussed in detail below.

On 23 March 2018, the Requestor and dotgay LLC submitted a letter to the BAMC concerning the CPE Process Review.<sup>36</sup> Among other things, the Requestor asserted that “[i]f transparency and accountability are indeed the Board’s objectives, then” ICANN org should disclose all of the documents requested in the 2018 DIDP Request.<sup>37</sup> The Requestor asserted that if ICANN org did not agree to all of its conditions, “the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.”<sup>38</sup>

On 5 April 2018, the Requestor reiterated that, “[i]n order to provide ICANN with further substantive comments on the CPE Process Review,” the Requestor “must have” the items it sought in its 23 March 2018 letter, including the documents requested in the 2018 DIDP.<sup>39</sup>

#### **E. Relief Requested.**

The Requestor asks the BAMC to “disclose all items and documents requested in the [2018] DIDP Request.”<sup>40</sup>

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<sup>34</sup> Response to DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>35</sup> *Id.* at Items 10, 16.

<sup>36</sup> 23 March 2018 letter from A. Ali to ICANN Board at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

<sup>37</sup> *Id.* at Pg. 4-5.

<sup>38</sup> *Id.* at Pg. 5.

<sup>39</sup> Attachment 1, 5 April 2018 email from R. Wong to ICANN org.

<sup>40</sup> Request 18-1, § 9, at Pg. 15.

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN org complied with established ICANN policies in responding to the DIDP Request; and
2. Whether ICANN org complied with its Core Values, Mission, and Commitments.<sup>41</sup>

### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

#### **A. Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it 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.<sup>42</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>43</sup> Where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the

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<sup>41</sup> Request 18-1.

<sup>42</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(a), (c), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>43</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(k), (l).

Ombudsman, and provide a recommendation to the Board.<sup>44</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>45</sup>

On 16 April 2018, the BGC determined that Request 18-1 is sufficiently stated and sent Request 18-1 to the Ombudsman for review and consideration.<sup>46</sup> The Ombudsman thereafter recused himself from this matter.<sup>47</sup> Accordingly, the BAMC has reviewed Request 18-1 and all relevant materials, and issues this Recommendation.

## **B. The DIDP.**

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN org's operational activities. In that regard, ICANN org publishes many categories of documents on its website as a matter of course.<sup>48</sup> In addition, the DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already

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<sup>44</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>45</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>46</sup> Ombudsman Action Regarding Request 18-1, Pg. 1-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-ombudsman-action-17apr18-en.pdf>.

<sup>47</sup> *Id.* at Pg. 1.

<sup>48</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

publicly available is made available to the public unless there is a compelling reason for confidentiality.<sup>49</sup>

The DIDP was developed through an open and transparent process involving the broader community. It was the result of an independent review of standards of accountability and transparency within ICANN org, which included extensive public comment and community input.<sup>50</sup>

Neither the DIDP nor ICANN org's Commitments and Core Values supporting transparency and accountability obligate ICANN org to make public every document in ICANN org's possession. The DIDP is limited to requests for *documentary information* already in existence within ICANN org that is not publicly available. Requests for information are not appropriate DIDP requests. Moreover, ICANN org is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>51</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN org adheres to the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests" (DIDP Response Process).<sup>52</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN org's website]."<sup>53</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

<sup>51</sup> <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>, at pg. 17.

<sup>52</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>53</sup> *Id.*; see also "Defined Conditions for Nondisclosure," available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

The Nondisclosure Conditions identify circumstances for which ICANN org's other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that are presumed not to be appropriate for public disclosure (and that the *Amazon EU S.A.R.L.* Independent Review Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). They include, among others:

- i. Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents (Internal Deliberative Process);
- ii. Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications (Constituent Deliberative Process);
- iii. Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations (Personal Privacy);
- iv. Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement (Nondisclosure Agreements);
- v. Confidential business information and/or internal policies and procedures (Confidential Business Information);
- vi. Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (Drafts); and

- vii. Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation (Privilege/Investigation).<sup>54</sup>

Notwithstanding the above, documentary information that falls within any of the Nondisclosure Conditions may still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>55</sup>

## **V. Analysis and Rationale.**

### **A. ICANN Org Adhered to Established Policies and Procedures in Responding to the 2018 DIDP Request.**

#### **1. The 2018 DIDP Response Complies with Applicable Policies and Procedures.**

The Requestor's 2018 DIDP Request sought the disclosure of documents relating to the CPE Process Review. As an initial matter, Request 18-1 noted ICANN org's conclusion that the documents requested in Items 10 and 16 do not exist, and offered no specific challenge to this conclusion.<sup>56</sup> Accordingly, Request 18-1 is best interpreted as focusing on Items No. 1-9, 11-15, and 17-19. Even as to those Items, the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the 2018 DIDP Response. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.<sup>57</sup> This represents a substantive disagreement with ICANN org's discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. However, the BAMC has reviewed the 2018 DIDP Response and, for the reasons

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<sup>54</sup> DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>55</sup> *Id.*

<sup>56</sup> See Request 18-1, § 3, at Pg. 5, § 8, at Pg. 14.

<sup>57</sup> *Id.*, § 6, at Pg. 9-10.

discussed below, concludes that the 2018 DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

In the course of evaluating Request 18-1, ICANN org conducted a review of the documents identified by FTI as part of its review and determined that those documents responsive to Items No. 1-9, 11-15, and 17-19 that were not already publicly available are subject to Nondisclosure Conditions and that the public interest in disclosure does not outweigh the harm that may be caused by disclosing the information, for the reasons discussed below. In the course of that review, ICANN org staff also confirmed that most of the documents do not relate to ICANN org's operational activities, and are therefore not appropriate subjects of DIDP requests.<sup>58</sup>

a. The Response to Items No. 1, 2, 4, 5, and 9 Complies with Applicable Policies and Procedures.

Items 1, 2, 4, 5, and 9 sought the disclosure of emails relating to the CPE process:

- All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 1);
- All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 2);
- All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request (Item No. 4);
- All emails provided to FTI that (1) are “largely administrative in nature,” (2) “[d]iscuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines” (Item No. 5); and

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<sup>58</sup> See DIDP.

- All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff (Item No. 9).<sup>59</sup>

Consistent with the DIDP Response Process, ICANN org identified documents

responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information;
- Drafts; and
- Privilege/Investigation.<sup>60</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>61</sup>

The Requestor does not challenge the applicability of these Nondisclosure Conditions. Indeed, as ICANN org noted in the 2018 DIDP Response, the Requestor *conceded* that the materials FTI relied on in the CPE Process Review reflect “ICANN’s deliberative and decision-making process concerning the CPE process,”<sup>62</sup> and are therefore subject to the first Nondisclosure Condition identified above.

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<sup>59</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (alterations in original) (internal citations omitted).

<sup>60</sup> 2018 DIDP Response, at Pg. 9-12.

<sup>61</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.*

<sup>62</sup> DIDP Request No. 20180110-1, at Pg. 3.



According to the Requestor, the documents at issue in Request 18-1 “are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has threatened litigation.”<sup>63</sup> The Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure. As discussed further in Section V.B.1. below, ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>64</sup> ICANN org explained in the DIDP Response that it sought consent from the CPE Provider to release the information, but as the Requestor recognized in Request 18-1, the CPE Provider has not agreed to ICANN org’s request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. Nonetheless, the Requestor claims that ICANN org should still be required to produce these documents.<sup>65</sup> But the Requestor points to no policy, procedure, or other commitment undertaken by ICANN that would require it to breach its contractual obligations to accommodate the Requestor. For the reasons discussed in Section V.B.1 below, ICANN org’s policies and procedures do not require ICANN org to breach its contract with the CPE Provider to accommodate the Requestor’s request.

b. The Response to Items No. 6-8 and 11-12 Complies with Applicable Policies and Procedures.

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<sup>63</sup> Request 18-1, § 6, at Pg. 9 (internal quotation marks omitted).

<sup>64</sup> New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A, § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>65</sup> Request 18-1, § 6, at Pg. 8-9.

Items No. 6-8, 11, and 12 sought the disclosure of the CPE Provider's work product:

- All draft CPE Reports concerning .MUSIC, both with and without comments (Item No. 6);
- All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider (Item No. 7);
- All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey" (Item No. 8);
- All of the "CPE Provider's working papers associated with" DotMusic's CPE (Item No. 11); and
- "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets" (Item No. 12).<sup>66</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Drafts; and
- Privilege/Investigation.<sup>67</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the

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<sup>66</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

<sup>67</sup> 2018 DIDP Response, at Pg. 15-19.

disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>68</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP Response Process when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process and ICANN org’s contractual confidentiality obligations to the CPE Provider—applied to the requested items.

c. The Response to Items No. 3 and 13-15 Complies with Applicable Policies and Procedures.

Items No. 3 and 14-16 sought the disclosure of FTI’s work product in the course of the CPE Process Review:

- The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials” (Item No. 3);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel” (Item No. 13);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel” (Item No. 14); and
- FTI’s investigative plan used during its independent review (Item No. 15).<sup>69</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Conditions;

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<sup>68</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.*

<sup>69</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

- Drafts; and
- Privilege/Investigation.<sup>70</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>71</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process and ICANN org’s contractual confidentiality obligations to the CPE Provider—applied to the requested items.

d. The Response to Items No. 17-19 Complies with Applicable Policies and Procedures.

Items No. 17-19 sought the disclosure of correspondence and documents relating to the CPE Process Review and its scope:

- All communications between ICANN and FTI regarding FTI’s independent review (Item No. 17);
- All communications between ICANN and the CPE Provider regarding FTI’s independent review (Item No. 18); and
- All communications between FTI and the CPE Provider regarding FTI’s independent review (Item No. 19).<sup>72</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

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<sup>70</sup> 2018 DIDP Response, at Pg. 13-14.

<sup>71</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials its prior DIDP Requests. *See id.*

<sup>72</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information; and
- Privilege/Investigation.<sup>73</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.<sup>74</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process and ICANN org’s contractual confidentiality obligations to the CPE Provider—applied to the requested items.

**2. ICANN Org Adhered to Established Policy and Procedure in Finding Certain That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public’s Interest in Disclosing the Information.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>75</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN org must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to

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<sup>73</sup> 2018 DIDP Response, at Pg. 19-21.

<sup>74</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.*

<sup>75</sup> *Id.*

whether any apply.<sup>76</sup> In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in the 2018 DIDP Response.

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in Items No. 1-9, 11-15, and 17-19. Instead, the Requestor claims that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.<sup>77</sup> According to the Requestor, the public interest in disclosing the requested documents stems from its claim that FTI's conclusions in the CPE Reports "are contrary to the findings of other panels and experts."<sup>78</sup> The Requestor asserts that "in clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider."<sup>79</sup> The Requestor claims that "[w]ithout the underlying documents," it cannot "analyze whether ICANN unduly influenced the CPE Provider."<sup>80</sup> The Requestor's claims do not support reconsideration.

The Board's decision to initiate the CPE Process Review was in part in response to issues raised in the Dot Registry IRP Panel Declaration.<sup>81</sup> The Dot Registry IRP Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be "intimately involved in the [CPE] process."<sup>82</sup> At the same time, the Panel emphasized that the Panel was "not assessing whether ICANN staff or the [CPE

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<sup>76</sup> *Id.*

<sup>77</sup> Request 18-1, § 3, at Pg. 4, § 6, at Pg. 8-10.

<sup>78</sup> *Id.*, § 6, at Pg. 8.

<sup>79</sup> *Id.*, § 6, at Pg. 9.

<sup>80</sup> *Id.*

<sup>81</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>82</sup> Dot Registry IRP Panel Declaration, ¶ 93, at Pg. 35, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook].”<sup>83</sup> In response, the Board undertook serious consideration of the Panel’s comments concerning how ICANN org may have interacted with the CPE provider and the CPE reports, and directed ICANN org to undertake the CPE Process Review.<sup>84</sup>

Critically, the Board did *not* direct that the CPE Process Review come to one conclusion over another, and the Requestor has provided no evidence to the contrary. Instead, FTI was retained to assess—and reach its own conclusions—on three topics: (1) ICANN org’s interactions with the CPE Provider; (2) the way the CPE Provider applied the CPE criteria; and (3) a compilation of the research referenced in the CPE Reports that had been placed on hold. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. Accordingly, the Requestor’s belief that the conclusions in the CPE Process Review Reports are inconsistent with earlier analyses undertaken under different circumstances (such as the Dot Registry IRP) is no more than that—a belief—and it is immaterial. The Requestor provides no evidence to support this claim, because there is none. Its baseless belief does not justify requiring ICANN org to permit the Requestor to conduct its own re-evaluation of the CPE process or of the CPE Process Review Reports, and does not demonstrate that the public interest in disclosing the documents FTI reviewed in the course of the CPE Process Review outweighs the harm that may come from disclosing those documents. This argument does not support reconsideration.

The Requestor next argues that the documents at issue in Request 18-1 “are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has

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<sup>83</sup> *Id.*, ¶ 152, at Pg. 60.

<sup>84</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

threatened litigation.”<sup>85</sup> The Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure.

The Requestor asserts that “ICANN cannot claim that there is no legitimate public interest in disclosing the requested documents.”<sup>86</sup> But ICANN org did not conclude that there is “no legitimate public interest in disclosing the requested documents.” Instead, ICANN org concluded that “there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”<sup>87</sup> The Requestor also argues that ICANN org “has not disclosed any ‘compelling’ reason that outweighs the public interest in disclosure.”<sup>88</sup> This argument fails because ICANN org *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>89</sup> There is no policy or procedure requiring ICANN org to provide *additional* justification for nondisclosure.<sup>90</sup> Further, ICANN org did explain why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. For example, ICANN org explained that the draft CPE reports and FTI’s notes of interviews of CPE Provider personnel reflected the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports and the Personal Information of

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<sup>85</sup> Request 18-1, § 6, at Pg. 9 (internal quotation marks omitted).

<sup>86</sup> Request 18-1, § 6, at Pg. 8.

<sup>87</sup> 2018 DIDP Response at Pg. 21, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>. Accordingly, there is no merit to any suggestion that ICANN did not make this required determination. See Request 18-1, § 3, at Pg. 4 (“If ICANN determines that the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure, then it can publish the documents. ICANN did not make such a determination.” (internal quotation marks and citation omitted)).

<sup>88</sup> Request 18-1, § 6, at Pg. 10.

<sup>89</sup> 2018 DIDP Response at Pg. 9-21.

<sup>90</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.



CPE Provider personnel, two categories of information for which ICANN org is contractually obligated to maintain confidentiality.<sup>91</sup> Accordingly, reconsideration on this basis is not warranted.

Relatedly, the Requestor asserts that rather than state compelling reasons for nondisclosure, ICANN org “ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.”<sup>92</sup>

As an initial matter, the Requestor provides no basis—because there is none—for its unfounded assertions that: (1) ICANN org relied on outside counsel to “ensure[]” that documents would not be subject to public disclosure “based on the attorney-client privilege loophole,” or (2) the documents in question “could expose both ICANN and the CPE Provider” in some unidentified wrong.

Second, the Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the 2018 DIDP Request.<sup>93</sup> No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor’s request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason not to disclose certain documents.<sup>94</sup>

Third, the Requestor’s desire that ICANN org waive that privilege does not demonstrate that the public interest in disclosure outweighs the harm that may occur if privileged materials are disclosed. Weakening the attorney-client privilege by forcing a client—here, ICANN org—to waive that privilege at the request of a third party like the Requestor poses a significant threat

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<sup>91</sup> See, e.g., 2018 DIDP Response, at Pg. 11-12.

<sup>92</sup> Request 18-1, § 6, at Pg. 9.

<sup>93</sup> *Id.*

<sup>94</sup> DIDP Nondisclosure Conditions.

to ICANN org’s ability to trust that its future communications with counsel will be protected, and therefore undermines ICANN org’s ability to communicate candidly with counsel.<sup>95</sup> This potential harm outweighs the public interest in disclosing privileged materials.

The BAMC notes that it is a fundamental principle of law that invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. The BAMC therefore rejects the Requestor’s assertion that the attorney-client privilege is merely a “loophole” that ICANN org sought to take advantage of here, and its suggestion that ICANN org’s invocation of the privilege indicates that ICANN org had anything to hide. Accordingly, reconsideration is not warranted on these grounds.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because “ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology.”<sup>96</sup> Initially, the Requestor is incorrect in its assertion that ICANN org determined that applicants would not be interviewed or submit materials in the course of the CPE Process Review. FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports.<sup>97</sup> FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the investigation because neither the Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Guidebook and the CPE Guidelines, the

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<sup>95</sup> *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”).

<sup>96</sup> Request 18-1, § 6, at Pg. 9.

<sup>97</sup> See, e.g., Scope 2 Report, at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

CPE Provider did not interview the applicants.<sup>98</sup> Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.<sup>99</sup> Despite that conclusion, FTI ensured that it understood the concerns applicants raised in reconsideration requests and IRP proceedings concerning the CPE process.<sup>100</sup> The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one. Accordingly, the Requestor has not demonstrated that FTI's decision not to interview or accept materials submitted by CPE applicants supports the public interest in disclosing the documents that FTI did consider in the course of the CPE Process Review. Reconsideration is not warranted on this basis.

**B. ICANN Org Adhered to Its Commitments and Core Values in Responding to the 2018 DIDP Request.**

**1. ICANN Org Adhered to Its Commitments to Accountability, Openness, and Transparency in Responding to the 2018 DIDP Request.**

The Requestor asserts that ICANN org's determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments to "operate to the maximum extent feasible in an open and transparent fashion,"<sup>101</sup> "apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"<sup>102</sup> and "[r]emain accountable to the Internet community through

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<sup>98</sup> *Id.* at Pg. 8.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

<sup>102</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(v).

mechanisms defined in [the] Bylaws that enhance ICANN’s effectiveness.”<sup>103</sup> The Requestor believes that ICANN org “has violated these Bylaws, and the Commitments contained therein, by refusing to disclose the requested documents.”<sup>104</sup>

As a preliminary matter, the BAMC notes that the DIDP was developed as the result of an independent review of standards of accountability and transparency, which included extensive public comment and community input. The DIDP—and particularly the Nondisclosure Conditions—balance ICANN org’s commitments to transparency and accountability against its competing commitments and obligations.<sup>105</sup>

This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

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

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.<sup>106</sup>

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<sup>103</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(vi); *see* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-1. *See* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The BAMC considers Request 18-1 under the Bylaws in effect when the Requestor submitted the reconsideration request, which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor’s claims under the 22 July 2017 version of the Bylaws.

<sup>104</sup> Request 18-1, § 6, at Pg. 8.

<sup>105</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

<sup>106</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.”<sup>107</sup>

A critical competing Core Value is ICANN org’s Core Value of operating with efficiency and excellence<sup>108</sup> by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>109</sup> Confidential Information includes “all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information.”<sup>110</sup> The materials that the CPE Provider shared with ICANN org, ICANN org’s counsel, and FTI reflect the CPE Provider’s Confidential Information, including confidential information relating to its operations, products, and services (e.g., its methods and procedures for conducting CPE analyses), and Personal Information (e.g., its employees’ personally identifying information).

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<sup>107</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(c).

<sup>108</sup> ICANN Bylaws, Art. 1, Section 1.2(b)(v).

<sup>109</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A, § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>110</sup> *Id.*

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.<sup>111</sup> Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org’s request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN org’s contract with the CPE Provider.<sup>112</sup> Accordingly, the Requestor’s generalized invocations of ICANN org’s commitments to transparency, openness, and accountability do not support reconsideration here.

**2. ICANN Org Adhered to Its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the 2018 DIDP Request.**

The Requestor asserts that “[t]here is an ‘international minimum standard of due process as fairness-based on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.’”<sup>113</sup> The Requestor argues that the CPE Process Review did not provide due process to the Requestor

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<sup>111</sup> See, e.g., Response to Request 20150312-1 at Pg. 2, available at

<https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf>.

<sup>112</sup> See DIDP (Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement”).

<sup>113</sup> Request 18-1, § 6, at Pg. 6-7 (quoting Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law,” 23 Duke J. of Comparative and Int’l L. 411, 422 (2013) and Charles T. Kotuby & Luke A. Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes 179 (Mar. 15, 2017)).

because “it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available.”<sup>114</sup>

The BAMC recognizes ICANN org’s commitment to conform to *relevant* principles of international law and conventions.<sup>115</sup> Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>116</sup> ICANN org established the DIDP in support of its commitment to transparency and accountability and with extensive community input. That procedure and those specific commitments are not outweighed by ICANN org’s general commitment to conform to relevant principles of international law. ICANN org was not required to establish a DIDP, but instead did so voluntarily. Accordingly, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment to conform to relevant principles of international law.

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. “[T]he fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.<sup>117</sup> Accordingly, the Board was not obligated to direct ICANN org to undertake the

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<sup>114</sup> *Id.*, § 6, at Pg. 7.

<sup>115</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

<sup>116</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

<sup>117</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

CPE Process Review at all, let alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor.<sup>118</sup>

The Requestor’s conclusory statement that it has been deprived of due process because it did not have access to every document underlying the CPE Process Review Reports does not support reconsideration. The Requestor asserts—based entirely on speculation—that the CPE Process Review Reports are “the one piece of significant evidence relevant to its Request 16-5.”<sup>119</sup> The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-5.

Further, when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>120</sup> The Board noted that arguments and challenges to the merits of the report issued by the CPE Provider in connection with the community application for the .MUSIC gTLD can be addressed in connection with Request 16-5.<sup>121</sup> Moreover, the BAMC is required to act “on the basis of the public written record, including information submitted by the Requestor.”<sup>122</sup> Accordingly, there is no basis for the Requestor’s assumption that the CPE Process Review Reports are “the one piece of significant evidence relevant to . . . Request 16-5,” particularly in light of the volume of materials submitted by the Requestor in support of Request 16-5.<sup>123</sup> This argument does not support reconsideration.

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<sup>118</sup> For the same reasons, the Board was not required to direct FTI to “attempt[] to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process” or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. *See* 16 January 2018 letter from Ali to ICANN Board, at Pg. 3, 5, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

<sup>119</sup> Request 18-1, § 6, at Pg. 7.

<sup>120</sup> *See* ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>121</sup> *See id.*

<sup>122</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(p).

<sup>123</sup> Request 18-1, § 6, at Pg. 7.



For all of the reasons discussed above, reconsideration is not warranted.

## **VI. Recommendation.**

The BAMC has considered the merits of Request 18-1, and, based on the foregoing, concludes that ICANN org did not violate ICANN’s Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the 2018 DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 18-1.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical, in which case the BAMC “shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request.”<sup>124</sup> Request 18-1 was submitted on 10 March 2018. To satisfy the thirty-day target deadline, the BAMC would have to have acted by 9 April 2018. Due to scheduling, the first opportunity that the BAMC has to consider Request 18-1 is 5 June 2018, which is within 90 days of receiving Request 18-1.<sup>125</sup>

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<sup>124</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

<sup>125</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

# **Exhibit 25**

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

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Resources

▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-board-2012-02-25-en\)](#)

# AMENDED AND RESTATED ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

As approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016

▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)

The undersigned certify that:

▶ [Accountability \(/resources/accountability\)](#)

1. They are the president and the secretary, respectively, of Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation.

▼ [Governance \(/resources/pages/governance-2012-02-25-en\)](#)

2. The Articles of Incorporation of this corporation are amended and restated to read as follows:

▼ [Governance Documents \(/resources/pages/governance-2012-02-25-en\)](#)

[Guidelines \(/resources/pages/guidelines-2012-05-15-en\)](#)

- I. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the “**Corporation**”).
- II. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “**Code**”), or the corresponding provision of any future

<p>Articles of Incorporation (/resources/pages/governance/articles-en)</p>	<p>United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks,</p>
<p>Current (/resources/pages/governance/articles-en)</p>	<p>owned by no single nation, individual or organization, the Corporation shall, except as limited by <u>Article IV</u> hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting</p>
<p>Archive (/resources/pages/articles-2012-02-25-en)</p>	<p>the global public interest in the operational stability of the Internet by carrying out the mission set forth in the bylaws of the Corporation ("<b>Bylaws</b>"). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by</p>
<p>Bylaws (/resources/pages/governance/bylaws-en)</p>	<p>the multistakeholder community through an inclusive bottom-up multistakeholder community process.</p>
<p>Board Code of Conduct (/resources/pages/code-of-conduct-2012-05-15-en)</p>	<p>III. The Corporation shall operate in a manner consistent with these Articles and its 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 and through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.</p>
<p>Board Conflicts of Interest Policy (/resources/pages/coi-2012-02-25-en)</p>	<p>IV. Notwithstanding any other provision of these Articles:</p>
<p>Board Statements of Interest (/resources/pages/sois-2012-02-25-en)</p>	<p>a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501(c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170 (c)(2) of the Code.</p>
<p>Lobbying Disclosures &amp; Contribution Reports (/resources/pages/lobbying-disclosures-contributions-2015-11-18-en)</p>	<p>b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.</p>
<p>Summary of Conflicts of Interest and Ethics Practices Review (/resources/files/summary-ethics-review-2013-05-13-en)</p>	<p>c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.</p>
<p>Agreements (/resources/pages/agreements-2012-02-25-en)</p>	<p>d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in <u>Article II</u> hereof.</p>

Annual Reports  
(/resources/pages/annual-report-2012-02-25-en)

Financials  
(/resources/pages/financials-2012-02-25-en)

Planning  
(/resources/pages/planning-2012-02-25-en)

Presentations  
(/resources/pages/archive-a1-2012-02-25-en)

RFPs  
(/resources/pages/rfps-2012-02-25-en)

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(/resources/pages/litigation-2012-02-25-en)

Newsletter  
(/resources/pages/newsletter-2014-03-18-en)

Correspondence  
(/resources/pages/correspondence-2012-09-24-en)

Quarterly Reports  
(/resources/pages/quarterly-reports-2014-11-13-en)

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Groups  
(/resources/pages/groups-2012-02-06-en)

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Business  
(/resources/pages/business)

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Civil Society  
(/resources/pages/civil-society-2016-05-24-en)

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Complaints Office  
(/resources/pages/complaints-office-2017-04-26-en)

V. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article V shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.

VI. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article II hereof and, if possible, to a § 501(c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.

VII. Any amendment to these Articles shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community, a California nonprofit association established by the Bylaws (the "**Empowered Community**"), following procedures set forth in Article 25.2 of the Bylaws.

VIII. Any transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN (Internet Corporation for Assigned Names and Numbers)'s assets shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community prior to the consummation of the transaction, following procedures set forth in Article 26 of the Bylaws.

3. The foregoing amendment and restatement of Articles of Incorporation has been duly approved by the board of directors.

4. The corporation has no members.

Contractual Compliance  
(/resources/pages/compliance-2012-02-25-en)

We further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

Date: 30 September 2016

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Registrars  
(/resources/pages/registrars-0d-2012-02-25-en)

\_\_\_\_\_

Göran Marby, President

---

Registry Operators  
(/resources/pages/registries-46-2012-02-25-en)

\_\_\_\_\_

John Jeffrey, Secretary

---

Domain Name  
(Domain Name)  
Registrants  
(/resources/pages/domain-name-registrants-2017-06-20-en)

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GDD Metrics  
(/resources/pages/metrics-gdd-2015-01-30-en)

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Identifier Systems  
Security (Security – Security, Stability and Resiliency (SSR)),  
Stability (Security, Stability and Resiliency) and Resiliency  
(Security Stability & Resiliency (SSR)) (OCTO IS-SSR)  
(/resources/pages/octo-ssr-2016-10-10-en)

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ccTLDs  
(/resources/pages/cctlds-21-2012-02-25-en)

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Internationalized Domain Names  
(/resources/pages/idn-2012-02-25-en)

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Universal Acceptance Initiative

[\(/resources/pages/universal-acceptance-2012-02-25-en\)](#)

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Policy  
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Public Comment  
[\(/public-comments\)](#)

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Root Zone (Root Zone) KSK Rollover  
[\(/resources/pages/ksk-rollover-2016-05-06-en\)](#)

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Technical Functions  
[\(/resources/pages/technical-functions-2015-10-15-en\)](#)

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[\(/resources/pages/help-2012-02-03-en\)](#)

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<https://community.icann.org>



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<a href="#">Participate</a> ( <a href="/en/about/participate">/en/about/participate</a> )	<a href="#">Security Team</a> ( <a href="/about/staff/security">/about/staff/security</a> )	<a href="#">Independent Review Process</a> ( <a href="/resources/pages/irp-2012-02-25-en">/resources/pages/irp-2012-02-25-en</a> )	<a href="#">Specific Reviews</a> ( <a href="/resources/reviews/aoc">/resources/reviews/aoc</a> )	<a href="#">Name Collision</a> ( <a href="/en/help/name-collision">/en/help/name-collision</a> )
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	<a href="#">For Journalists</a> ( <a href="/en/news/press">/en/news/press</a> )			



# **Exhibit 26**

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ARIF HYDER ALI



January 30, 2017

**VIA E-MAIL**

ICANN Board Governance Committee c/o Chris Disspain, ICANN BGC Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094	Mr Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094
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Dear President Marby and members of the BGC:

We are writing on behalf of our client, DotMusic Limited (“DotMusic”), to remind ICANN about the Board Governance Committee’s (the “BGC”) delay in making a final recommendation to the ICANN Board (the “Board”) regarding DotMusic’s Reconsideration Request 16-5 (“Reconsideration Request”). Over 11 months have passed since DotMusic submitted the Reconsideration Request to the BGC, however, the BGC has not made a final recommendation to the Board with respect to DotMusic’s Reconsideration Request. This is inconsistent with the BGC’s obligation under ICANN’s Bylaws to review a reconsideration request on a timely basis. Specifically,

- Under Section 4.2(q) of ICANN’s Bylaws (October 1, 2016): “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.” (emphasis added); *see also* Section 4.2(q) of ICANN’s Bylaws (May 27, 2016) (same); and

- Under Article IV(2)(16) of ICANN's Bylaws (February 11, 2016): “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.” (emphasis added); *see also* Article IV(2)(16), ICANN's Bylaws (July 30, 2014) (same).

The BGC has been provided with substantial evidence for making a final recommendation on DotMusic's Reconsideration Request: (1) DotMusic has submitted extensive materials to assist the BGC in assessing DotMusic's Reconsideration Request, including multiple independent expert opinions prepared by renowned experts in the music industry, such as an independent joint expert opinion by Dr. Noah Askin and Dr. Joeri Mol and independent expert opinions by Honorary Professor Dr. Jorgen Blomqvist and Dr. Richard James Burgess; and (2) DotMusic made a lengthy telephonic presentation to the BGC on September 17, 2016, and gave the BGC ample opportunity to seek additional information or clarifications from DotMusic during the presentation.

Likewise, we understand that: (1) on September 17, 2016, the Board directed “the President and CEO, or his designee(s) to undertake an independent review of the process by which ICANN staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE provider” (“Independent Review”); and (2) on October 18, 2016, the BGC requested “from the CPE provider the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports” (“Request for Information from the CPE Provider”). DotMusic has not received *any* communication from ICANN regarding the status of the Independent Review or Request for Information from the CPE Provider. The BGC cannot (and should not) rely on these processes to delay DotMusic's application.

Accordingly, we request an immediate update about the status of: (1) DotMusic's Reconsideration Request 16-5 and the BGC's best estimate of the time it requires to make a final recommendation on DotMusic's Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider.

We look forward to receiving a response from you.

DotMusic reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali

# **Exhibit 27**

A hand holding a magnifying glass over a network diagram. The diagram consists of a central node connected to several other nodes, which are further connected to more nodes, forming a web-like structure. Several people in business attire are standing on the nodes. The background is a blurred image of a hand holding a magnifying glass.

**APPLICATIONS  
TO ICANN FOR  
COMMUNITY-BASED  
NEW GENERIC TOP  
LEVEL DOMAINS  
(gTLDs):**

**Opportunities  
and challenges  
from a human rights  
perspective**

Council of Europe report  
DGI(2016)17

Report by **Eve Salomon  
& Kinanya Pijl**

# **Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective**

by<sup>1</sup>

Eve Salomon  
Lawyer and International Media consultant

and

Kinanya Pijl  
PhD researcher in law  
European University Institute  
Florence, Italy

---

<sup>1</sup> The opinions expressed in this document are personal and do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of member states, the Council of Europe's statutory organs or the European Court of Human Rights.





## Foreword

This report aims to contribute to ICANN's discussions. Top-level domain names enable people across borders to communicate and access information and ideas in new ways. Domain names make an important contribution to the enjoyment of freedom of expression and freedom of assembly and association, and the prohibition of discrimination which is especially important for minorities and vulnerable groups. Ensuring that public policy for the Internet respects the core values of human rights, the rule of law, and democracy, is the key objective of the Council of Europe's Internet Governance Strategy 2016-2019<sup>2</sup>.

The ICANN Board's commitment to a new bylaw on human rights recognises that the Internet's infrastructure and functioning is important for pluralism and diversity in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the public interest.

As a follow-up to the Declarations' of the Committee of Ministers of 20103 and 20154, the Steering Committee on Media and Information Society (CDMSI) commissioned this report to serve as an input into the work of the Governmental Advisory Committee (GAC) including its working group on human rights and international law.

The report focuses on ICANN's policies and procedures concerning community-based applications for top level domains. It considers the human rights at stake and takes account of the original vision of communities as put forward by the Generic Name Supporting Organisation (GNSO). In this context, particular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.

I would like to thank the authors, Eve Salomon and Kinanya Pijl, for preparing this report which is intended to prompt constructive dialogue and reflection in ICANN. The Council of Europe will remain actively involved in ICANN's work.

Jan Kleijssen  
Director of Information Society and Action against Crime

---

<sup>2</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c1b60](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c1b60)

<sup>3</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cee51](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cee51)

<sup>4</sup> [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true)



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## Executive summary

This report provides an in-depth analysis of ICANN's policies and procedures with regard to community-based applications from a human rights perspective. In 2012 ICANN embarked on a wide-ranging opening of the New generic Top Level Domains (gTLDs) name space. The governing rules, developed in a multistakeholder process, included provision for special priority to be given to qualifying community applications. This was a commendable endeavour, but one which we recommend be treated as a "first attempt". As we will show, much can be learned from this initial round to improve on processes applicable to such community applications and assist ICANN's development as a multistakeholder body working in the public interest.

This report grounds its examination from a human rights angle, with particular regard to the rights to freedom of expression, freedom of association, non-discrimination and due process. These rights are all interrelated, interdependent and indivisible. Any failure to follow a decision-making process which is fair, reasonable, transparent and proportionate endangers freedom of expression and association, and risks being discriminatory. We have therefore paid particular attention to the key processes affecting community based applications, e.g. the community objection and community priority evaluation (CPE) processes, to assess whether they are fair and reasonable. We conclude that there are well-founded concerns that weaknesses in those processes may affect the human rights of community applicants.

### *Chapter 2: Human rights*

Chapter 2 provides an overview of which universal human rights apply to communities and ICANN gTLDs and how ICANN should have regard to human rights when assessing applications. Human rights law does not as a general matter directly govern the activities or responsibilities of private business. ICANN is a private corporation under Californian law and as such not the direct subject of human rights law. However, ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN functions as a global governance body that develops Internet policy and has the capacity to impact on human rights such as the right to freedom of expression, the right to freedom of association, the right not to be discriminated against and due process.

A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression as well as freedom of association and assembly.

### *Chapter 3 and 4: The notion of 'community' and the public interest*

Chapter 3 provides an analysis of the definition of "community" as set out in the different ICANN policy documents that form the basis for assessing whether a community deserves priority over standard applicants. Chapter 4 goes deeper into the concept of priority for community-based applicants and explores the concept of public interest. We found that there

is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook (AGB) and the Community Priority Evaluation (CPE) Guidelines. In addition, many constituents of the ICANN community consider that the Economist Intelligence Unit (EIU) – which is in charge of evaluating whether communities deserve priority in the CPE procedure – set an even more narrow interpretation of such a narrowed definition without due regard for context and circumstances.

There is consensus that community-based applications ought to serve the public interest, but without agreement about what “public interest” might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection. Before any new gTLD round, we recommend ICANN to reconsider the definition of “community” and provide clarity on the public interest values community TLDs are intended to serve.

## **Recommendations:**

### *The definition of ‘community’*

- Define a clear and consistent definition of “community”.
- Re-assess the criteria and guidance as formulated in the AGB and CPE Guidelines in the light of the spirit of the GNSO Policy Recommendations.
- Instruct and train delegated decision-makers, such as the experts and panels deciding on Community Objections and CPE, to interpret the cases before them in light of the purpose for which community-based applications were enacted.

### *The concepts of priority and public interest*

- Provide clarity on the public interest values community TLDs are intended to serve.

### *Chapter 5: Community Objections*

Chapter 5 provides an evaluation of the process of Community Objections, particularly based on input provided by community-based applicants. The process of Community Objection refers to an objection by a community representative because of substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted. We found apparent inconsistency in the determinations of whether entities had standing to object. The International Center of Expertise of the International Chamber of Commerce administers disputes brought pursuant to Community Objections. Maximum predictability of the behaviour of these delegated decision-makers need to be guaranteed by ICANN. Moreover, the first round of applications and Community Objections suggests that these experts and panels have applied implicit standards when making their decisions. Such implicit standards ought to be made explicit to guarantee the community-based application with all its procedures and processes is aligned with the intended goal of the programme. Additionally, there are no appeal mechanisms in place with respect to the Community Objection procedure. There ought to be availability of an appeal on the substance of the argument and on the representativeness and eligibility of the objectors.

## **Recommendations:**

- Assess whether it is desirable and feasible to open up the possibility to collectively file a Community Objection.
- Assess whether it is feasible and desirable for certain organisations within ICANN, such as ALAC and GAC, to be able to file Community Objections.
- Provide clarity on the expected costs for Community Objection.
- Lower the costs for Community Objection.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability.
- Expose implicit standards that have influenced the delegated decision-makers in their decision-making and assess to what extent these standards correspond to the goal of community-based applications.
- Incorporate a proper appeal mechanism that has the capacity to re-evaluate the entire case, including the fairness of the process as well as the substance of the argument.
- Reconsider the standards on disclosure in the light of due process for both ICANN as well as delegated decision-makers.
- Guarantee that both delegated decision-makers and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board.
- Guarantee that adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.
- Reconsider the mandate of delegated decision-makers in the light of the UN Guiding Principles on Business and Human Rights and its requirements concerning the provision of an effective remedy.
- Provide clarity about the required community-specific expertise of panel members of delegated decision-makers.
- Provide the fullest disclosure when it comes to the qualifications and background of Panel members of delegated decision-makers as well as into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN in the light of due process.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability and ensure consistency of decisions taken along the whole process: from objection to evaluation.

### *Chapter 6: Community Priority Evaluation*

Chapter 6 considers the range of complaints that have been levied at the Community Priority Evaluation process – which is the process established to determine whether an application would have community priority status – and assesses them in the light of human rights. During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination. According to ICANN's own published review of the new gTLD round, only ICANN staff reviewed the CPE results for consistency without any evidence of any external quality control on the EIU's procedures (despite this being a term of

the contract between the EIU and ICANN). Furthermore, there is no appeal of substance or on merits available of the EIU's evaluation. These shortcomings should all be rectified for any future gTLD round.

### **Recommendations:**

- Consider reducing the costs for CBAs for future gTLD rounds. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.
- Establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and any appeal mechanisms for future gTLD rounds in order to further due process, manage expectations and enable a degree of accountability. These deadlines can be framed in bands, to take account of variances in the number of applications received.
- Take care to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.
- Consider whether ICANN should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms' length from ICANN, then there should be staff support for community applicants.
- Take greater care to keep CBAs informed about anything which affects the progress of their application. To facilitate due process, they should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.
- Have a clear set of definitions and/or guidance that works across different but related ICANN processes to reduce apparent inconsistency. Furthermore, the application of a comprehensive quality control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.
- In any future new gTLD rounds ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.
- Either re-evaluate the scoring system and points to lower the bar or develop a new process altogether for assessing community applicants.
- Full registry conditions, including key elements of the application and any additional Public Interest Commitments, should be published to enable on-going monitoring by stakeholders to ensure compliance by the applicant to the community to which it is accountable.

### *Chapter 7: Accountability mechanisms*

Chapter 7 looks briefly at the so-called accountability mechanisms that community-based applicants and their competitors can resort to throughout their application process. These



include reconsideration requests, the Independent Review Process, the ICANN Ombudsman, and recourse to the court.

We have found that ICANN's accountability mechanisms have been of very limited value to community applicants. In particular in the case of CPE decisions ICANN has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN's own accountability mechanisms are unable to hold ICANN (or the EIU) to account. Ultimately, greater responsibility than delegation to an external third party is called for, as is endorsed by the majority decision in the recent Independent Review Panel dated 29 July 2016.

#### **Recommendations:**

- Institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeal mechanism could effectively replace the other existing ICANN accountability mechanisms.

#### *Chapter 8: Concepts for the next gTLD application rounds*

Chapter 8 provides a series of specific suggestions for improving or changing the application process for community-based applicants in any future gTLD expansion in order to tackle the shortcomings mentioned above.

In particular, we believe ICANN should explore a revised system of fair, reasonable and non-discriminatory restrictions/incentives on community TLDs to seriously deter potential “gaming” and thus facilitate a *de facto* assumption that any CBA is, in fact, working to serve a community rather than a purely commercial interest. In effect, this could make the practical application of GNSO Guideline IG H – one of the implementation guidelines as set out in the Generic Names Supporting Organization's (GNSO) policy recommendations on which the implementation of the New gTLD Program is based – much simpler: claims that an application is in support of a community would be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application”.

For instance, a tighter set of restrictions could be envisaged on how a community string can be used and on the use of profits, or on the existence of transparent internal processes to resolve conflicts. This would mean that ordinary commercial applicants would have no interest in pretending to be communities. ICANN already sets more stringent registry conditions for strings delegated to community-based applicants, so there is a precedent for treating community applicants differently. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community.

#### **Recommendations:**

- Consider community applications first. ICANN staff who have been involved with the current new gTLD round have suggested that in any new round, community applications should be considered first. If, after evaluation, an applicant is deemed to be “community” (in ICANN terms), then no other applications for the applied-for string should be considered.
- Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs. In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).
- Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs. In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).
- Have applications in staggered batches. ICANN could invite “expressions of interest” in applying, asking potential applicants to submit an interest in a string of their choice. ICANN could then advertise the strings in batches, requiring all competing applications to be submitted simultaneously. At the same time, they could ask for any community objections. This would help ICANN manage the workload and make keeping to deadlines feasible. Publishing a timetable for future string batches would also help potential applicants manage their application workload and business expectations. This would also comply neatly with GNSO Principle 9: “There must be a clear and pre-published application process using objective and measurable criteria. “
- Beauty parade for all applications. Rather than having a high bar for priority, ICANN could consider all applications for a particular string together. Retaining the principle of preference for bona fide communities, all applications from self-declared CBAs should be looked at together to determine which one best meets the selection criteria. The criteria would be similar to those in the AGB for CPE.

Given that many ICANN stakeholders seem troubled with the notion of a “beauty parade” involving subjective judgement, it is important that any competitive assessment be based on transparent and clear criteria and that the assessment Panel be truly accountable (unlike the EIU Panel). It may be appropriate to construct a Panel consisting of members appointed by the ICANN multi-stakeholder community.

- Have a different community track. Most countries around the world have systems in place for the licensing and regulation of community media.<sup>5</sup> Useful precedents can be borrowed from these existing regimes. For example, in the UK the telecoms and broadcasting regulator Ofcom requires community media, “Not be provided in order to make a financial profit, and uses any profit produced wholly and exclusively to secure or improve the future provision of the service or for the delivery of social gain to members of the public or the target community.”<sup>6</sup> Furthermore, community media must be accountable to the target community.

ICANN already sets more stringent registry conditions for strings delegated to CBAs, so there is a precedent for treating community applicants differently. Setting tougher criteria which would effectively deter any commercial applicant from ‘gaming’ by pretending to be a CBA would make it much easier to assume that a self-declared CBA actually is one. In effect, it could make the practical application of GNSO Guideline IG H much simpler: claims that an application is in support of a community will be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application”<sup>7</sup>

A tighter set of restrictions on how a community string can be used and on the use of profits would mean that generic commercial applicants would have no interest in pretending to be communities. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community. Certain mandatory registry requirements could be set in advance, such as having an effective appeals mechanism.

At the moment, accountability to the community is merely a background factor only taken into account by the EIU when considering Enforceability under Criterion 3, Guidelines: “The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.” It is not a determining factor in itself, whereas it could be a major determinant in identifying bona fide CBAs.

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles<sup>8</sup> refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the

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<sup>5</sup>In the US, the FCC licenses non-profit stations but these are meant to be exclusively granted to “educational organizations”, so not of particular relevance to ICANN. In fact, most are licenced to either NPR or religious organisations.

<sup>6</sup>See Para 2.2 at <http://licensing.ofcom.org.uk/binaries/radio/community/thirdround/notesofguidance.pdf>

<sup>7</sup> GNSO 2007 Principles and Recommendations

<sup>8</sup> GNSO Principles E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN’s Registry agreement.” Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.” Principle 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to could lead to contract termination. “

CBA applicant and its community – and ensuring they can be enforced going forward – will strengthen compliance with the GNSO principles.

### *Chapter 9: Conclusion*

This report concludes in chapter 9, with an overview of findings intended to catalyse multistakeholder discussion on community-based applications and human rights and to contribute to the on-going GNSO Policy Development Process (PDP) addressing this issue.

## 1. Introduction

This study is conducted by two independent experts with expertise in the field of Internet governance, human rights, corporate social responsibility and better regulation. The findings of the study stem from in-depth analysis of ICANN's policies and procedures, international human rights law and interviews with community-based applicants, ICANN staff and other relevant actors within the ICANN community. This report is commissioned by the Council of Europe. The Council of Europe is an observer in the ICANN Governmental Advisory Committee (GAC), and is there to assist its member states, inter alia in the framework of its mandate as set out in the Declaration of the Committee of Ministers on ICANN, Human Rights and Rule of Law, adopted on 3 June 2015. This report builds upon the Council of Europe Report on 'ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values, prepared by Dr Monika Zalnieriute & Thomas Schneider (2014) and the Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with regard to New Generic Top Level Domains, as prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, and Mr Nico van Eijk (2012).

ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. By means of its multistakeholder, private sector led, bottom-up policy development model for Domain Name System (DNS) technical coordination the ICANN community agreed to a major expansion of new generic top level domains (gTLDs). The New gTLD Program is a program to add an unlimited number of new gTLDs to the root zone. The program's goal is to foster diversity, encourage competition, and enhance the utility of the DNS.<sup>9</sup> The first application round started in January 2012 and ended in April 2012, during which time applicants applied to run the registry for the TLD that they choose. The ICANN community agreed that there should be "community TLDs", for communities that are interested in operating their own TLD registry. Such communities are given precedence for TLDs in contention. Hence, if there are multiple applicants for a given string, and one of the applicants passes the Community Priority Evaluation (CPE), then that applicant is automatically given precedence to the TLD.

1,268 applicants applied for the first round of the ICANN New gTLD Program. In total there were 1,930 applications of which 84 were [community applications](#) (4.4%). 46 of these community applications remained uncontested. These uncontested community applications concerned brand names, Internationalized Domain Names (IDNs, these permit the global community to use a domain name in their native language or script), and geographic names. 22 out of 84 community applications were in contention. These community applications in contention concern generic, brand, IDN and geographic names. At least 27 community-based applicants went into Community Priority Evaluation of which at least for six gTLDs there were two different community-based applicants. Until this point (July 2016), only five community applicants prevailed in the CPE.<sup>10</sup> This low success rate warrants in-depth analysis of the policies and procedures relating to community-based applications (CBAs).

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<sup>9</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

<sup>10</sup> These are: .OSAKA; .RADIO; .HOTEL; .ECO; AND .SPA.

The definition of community, the concept of priority for community-based applicants, the process for awarding such priority and the criteria and scoring threshold to determine priority have been severely criticised over the last few years. It was estimated that 75% of the community-based applications failed and CBAs perceive a bias in the system against them.<sup>11</sup> These applicants indicate that the process as well as other practical and procedural barriers has become an insurmountable hurdle to pass the Community Priority Evaluation. These communities argue that the intended prioritisation of CBAs has had completely the opposite effect and become a barrier to be awarded a gTLD.

This study pays particular attention to the definition of community, the concept of priority for community-based applicants, the process for awarding such priority and the criteria and scoring threshold to determine priority. This report reviews the range of problems encountered by community applicants and identifies how such problems might be avoided in future gTLD application rounds. In particular, we have found that the intended goal of the concept of prioritising communities is insufficiently developed. It is insufficiently clear which public interest values are served by CBAs and which types of individuals or groups should be regarded as communities to fulfil this goal. This has led to the development of a process which has not delivered on the GNSO's original policy intentions. Instead, we have found that priority is given to some groups and not to others, with no coherent definition of "community" applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN's own accountability mechanisms are unable to hold ICANN (or the EIU) to account.

This work is structured as follows. Chapter 2 provides an overview of which universal human rights apply to communities and ICANN gTLDs. Chapter 3 provides an analysis of the definition of "community" as set out in different policy documents that function as the basis for assessing whether a community deserves priority over standard applicants. Chapter 4 goes deeper into the concept of priority for community-based applicants and explores the concept of public interest. Thereafter this report will go further into the process for awarding such priority and the criteria and scoring threshold to determine priority. Chapter 5 therefore provides an evaluation of the process of Community Objections, particularly based on input provided by community-based applicants. Chapter 6 considers the range of complaints that have been levied at the Community Priority Evaluation process and assesses them in light of human rights. Chapter 7 looks briefly at the so-called accountability mechanisms that (alleged) communities can resort to throughout their application process. Chapter 8 provides some ideas for improving or changing the application process for community-based applicants in any future gTLD round. This study concludes, in chapter 9, by an overview of findings and recommendations intended to catalyse discussion on community-based applications and human rights and to contribute to the GNSO Policy Development Process (PDP) on this issue.

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<sup>11</sup> This estimation is based on the overview of gTLD application results as provided by ICANN. See: <https://gtdresult.icann.org/>.

## 2. A human rights perspective on community-based applications for gTLDs

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.<sup>12</sup>

Human rights law does not as a general matter directly govern the activities or responsibilities of private business.<sup>13</sup> ICANN is a private corporation under Californian law and as such not the direct subject of human rights law. However, ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN functions as a global governance body that develops Internet policy and has the capacity to impact on human rights such as the right to freedom of expression, freedom of association, and non-discrimination. For this reason, ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.<sup>14</sup> ICANN's human rights policy will be further developed through a framework of interpretation that will set out how human rights should be interpreted in the ICANN context. Moreover, when states participate in specialised bodies with a primarily technical mandate such as GAC does in ICANN – states do not divest themselves of their human rights obligations.<sup>15</sup>

The Universal Declaration of Human Rights (UDHR) was developed after the Second World War to end barbarous acts and to help create a world in which human beings enjoy freedom of speech and belief and freedom from fear and want. The UDHR is the primary source of the global consensus on human rights. Human rights treaties place an obligation on public

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<sup>12</sup> OHCHR, 'What are human rights?' <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> (accessed 13 July 2016).

<sup>13</sup> See: Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', A/HRC/32/38, 11 May 2016.

<sup>14</sup> ICANN sets out in its Bylaws under "Core Values" that in performing its mission its decisions and actions should respect internationally recognized human rights as required by applicable law and within the scope of its Mission and other Core Values. The phrase "as required by applicable law" makes the commitment to some extent ambiguous, since human rights law does not as a general matter directly govern the activities or responsibilities of private business. Nevertheless, the Bylaws set out that this specific Core Value will have force when a framework of interpretation for human rights is approved (Bylaws, section 27.2), which demonstrates that ICANN is taking its commitment to human rights seriously.

<sup>15</sup> See: Council of Europe Report on 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014)

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048f14f>; Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association With Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

authorities to act at all times in a way that is compatible with these rights. Since 1948, when the UDHR was formulated, much has changed. Due to privatisation and economic globalisation the public role of private actors has increased tremendously. Technology changes fast and key information and communication resources are owned and managed by private actors. The capacity of these private actors to impact on the human rights of people around the world has led to global acceptance that corporate actors need to respect human rights.<sup>16</sup> Despite the fact that human rights treaties have not been designed to address private actors directly and have also not been formulated with an eye on the digital age, the norms and values enshrined in these treaties are nevertheless considered as what ought to be protected at all times. Rights that people have offline must also be protected online.<sup>17</sup> Today, the challenge is therefore to collectively distil the meaning of human rights law and its concrete implications in digital environments and with regard to private actors, such as ICANN.<sup>18</sup>

Below, we will set out which universal human rights apply to communities and ICANN gTLDs. First, we will set out these human rights in the abstract and how and whether these have already been interpreted with regard to private actors and/or with regard to the digital environment and domain names in particular. Thereafter, we will apply this human rights perspective to the following aspects of community-based applications in the gTLD Program:

- The definition of community;
- The concept of priority for community-based applicants; and
- The process for awarding such priority and the criteria and scoring threshold to determine priority.

### *Freedom of expression*

Article 19 of the UDHR states that: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This freedom is not absolute; it can only be subject to restrictions made necessary by the respect of rights of others.<sup>19</sup> As Article 10 of the European Convention on Human Rights (ECHR) states: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Any interference with the exercise of these rights and freedoms must (1) be prescribed by law, (2) be pursued for one of the legitimate aims

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<sup>16</sup> The Human Rights Council endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (see [A/HRC/17/4](#) and [A/HRC/17/31](#)).

<sup>17</sup> See: NETmundial, ‘NETmundial Multistakeholder Statement’ (24 April 2014), <<http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>> (accessed 17 August 2016).

<sup>18</sup> See: Human Rights Council, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’, A/HRC/32/38, 11 May 2016.

<sup>19</sup> See: Article 29(2) UDHR; Article 19 ICCPR; Article 10 ECHR.



listed in an exhaustive way in the ECHR and (3) be necessary in a democratic society (proportional to the aims pursued).

In determining whether a member state's action or failure to act is compatible with the conditions laid down in the ECHR, the European Court of Human Rights (ECtHR) acknowledges that national authorities have a certain degree of discretion to assess whether there is a pressing social need which makes a restriction on fundamental rights and freedoms necessary according to conditions laid down in the ECHR. In the ECtHR's jurisprudence this is known as the margin of appreciation doctrine. The degree of discretion allowed to member states varies according to the circumstances, the subject matter and other factors.<sup>20</sup> There is no international agreed framework on how to balance and interpret these legitimate aims for restricting the right to freedom of expression; different approaches prevail in different domestic legal orders. Local cultural values determine the scope of national security, public order and moral.

How does this right to freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas through any media and regardless of frontiers relate to communities and ICANN gTLDs? A key feature of the Internet is transmission of content. For Internet users at large, domain names represent an important way to find and access information on the Internet. Domain names have both an addressing function and an expressive dimension and play an important role in the transmission of an individual's ideas. They are key elements for Internet information indexing and selection systems especially those enabled by search engines.<sup>21</sup> As set out in the Council of Europe Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (2011), "The addressing function of domain names and name strings and the forms of expressions that they comprise, as well as the content that they relate to, are inextricably intertwined. More specifically, individuals or operators of websites may choose to use a particular domain name or name string to identify and describe content hosted in their websites, to disseminate a particular point of view or to create spaces for communication, interaction, assembly and association for various societal groups or communities."

A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.<sup>22</sup> Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.

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<sup>20</sup> Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

<sup>21</sup> Ibid.

<sup>22</sup> See: ICANNwiki, 'Community TLD' <[https://icannwiki.com/Community\\_TLD](https://icannwiki.com/Community_TLD)> (accessed 20 July 2016).

At the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded. Those that are excluded might have a legitimate interest to be part of the community to express and seek opinions and ideas, while falling outside the scope of the community. As such, the community TLD has the capacity to be a barrier to freedom of opinion and expression. This can be a legitimate restriction to serve, for example, the right of community members to not be discriminated against. If such clashes of rights of those that are included and those that are excluded from the community can be foreseen, ICANN could require gTLD applicants to specify in their rules and policies how they intend to balance these rights.

Those who manage Community TLDs have editorial-like responsibilities. Their choices and policies may result in decisions on the availability of information on the Internet, similar to editorial judgments made by media routinely in respect of what content is relevant for purposes of the public interest and what content to project in the public domain. Editorial activities may entail special guarantees and responsibilities in the light of freedom of expression and access to information, including serving the public interest in accessing diverse information.<sup>23</sup>

To illustrate this balancing act, let us set out the freedom of expression consideration with regard to the community-based application for .MUSIC. DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal, licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community.

While these arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime, others have argued that this .MUSIC application ends up undermining free expression and restricting numerous lawful and legitimate uses of domain names. Robin Gross argues that: "ICANN's "community" designation has been used in practice principally by applicants seeking to assert exclusive rights over discussion subjects and means of expression that appeal to a broader public, to whom the so-called "community" applicant would effectively deny or artificially limit access to expression".<sup>24</sup> Whilst the rights of the community need to be balanced with the rights of third

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<sup>23</sup> Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

<sup>24</sup>Robin Gross, Letter to Dr. Steve Crocker, Chairman of the ICANN Board and Fadi Chehadé, ICANN President and CEO concerning Opposition to .MUSIC "Community" Application Based on Freedom of Expression and

parties that are affected by their potential exclusion from the community TLD, in balancing those rights ICANN has a margin of appreciation analogous to the European Court of Human Rights. In so doing, ICANN must have regard to other means of expression that are available to third parties who may be excluded from a community TLD as against the rights to safe association and assembly for the community members.

### *Freedom of association and assembly*

Freedom of association and assembly is also considered one of the classic fundamental rights laid down in many constitutions and international treaties, including Article 20 UDHR, Article 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 ECHR. Article 11 ECHR provides: “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

The European Court of Human Rights reiterates that the protection of personal opinions, secured by Article 10 ECHR is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 ECHR.<sup>25</sup> Freedom of thought and opinion and freedom of expression would be of very limited scope if they were not accompanied by a guarantee of being able to share one’s beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.<sup>26</sup>

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, indicated that the right of peaceful assembly covers not only the right to hold and to participate in a peaceful assembly but also the right to be protected from undue interference.<sup>27</sup> He concludes that the rights to freedom of peaceful assembly and of association play a decisive role in the emergence and existence of effective democratic systems as they are a channel allowing for dialogue, pluralism, tolerance and broadmindedness, where minority or dissenting views or beliefs are respected. Restrictions

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Innovation Policy Concerns (12 August 2015) <<https://www.icann.org/en/system/files/correspondence/gross-to-crocker-chahad%C3%A9-12aug15-en.pdf>> (accessed 20 July 2016).

<sup>25</sup> See: Schwabe and M.G. v Germany, Judgment of the European Court of Human Rights (Fifth Section) of 1 December 2011, § 98; Ezelin v. France, Judgment of the European Court of Human Rights (Chamber) of 26 April 1991, App. No 11800/85, § 37; Djavit An v. Turkey, Judgment of the European Court of Human Rights (Third Section) of 20 February 2003, App. No 20652/92, § 39; Barraco v. France, Judgment of the European Court of Human Rights (Fifth Section) of 5 March 2009, App. no. 31684/05, § 27; Palomo Sánchez and Others v. Spain, Judgment of the European Court of Human Rights (Grand Chamber) of 12 September 2011, App. nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 52.

<sup>26</sup> Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014), p. 22.

<sup>27</sup> UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27.

on this right ought to be prescribed by law, necessary in a democratic society, and proportionate to the aim pursued, and ought not to harm the principles of pluralism, tolerance and broadmindedness.<sup>28</sup> The right to freedom of association and assembly is closely connected to the right to freedom of expression as well as the right to freedom of thought, conscience and religion.<sup>29</sup>

The rights to freedom of peaceful assembly and of association can be exercised through new technologies, including through the Internet.<sup>30</sup> As the Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (2011) states: “Individuals or operators of websites may choose to use a particular domain name or name string to identify and describe content hosted in their websites, to disseminate a particular point of view or to create spaces for communication, interaction, assembly and association for various societal groups or communities”.<sup>31</sup> In pursuing its commitment to act in the general public interest, ICANN should ensure that, when defining access to the use of TLDs, an appropriate balance is struck between economic interests and other objectives of common interest, such as pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.<sup>32</sup>

A community-based gTLD application may raise specific issues concerning freedom of association and assembly. *Community-based TLDs could take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They could also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.*<sup>33</sup> Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests.<sup>34</sup> As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.

As with the right to freedom of expression, community TLDs have an impact on the rights of third parties. Those that are left out of the community could perceive their human rights to be negatively impacted by the community. For that reason, the rights of the community need to

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<sup>28</sup> Ibid.

<sup>29</sup> Article 18 UDHR, Article 18 ICCPR and Article 9 of the ECHR.

<sup>30</sup> UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27.

<sup>31</sup> See: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805b1059](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805b1059) (accessed 26 July 2016).

<sup>32</sup> Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true) (accessed 26 July 2016).

<sup>33</sup> See: Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnierute and Thomas Schneider (2014).

<sup>34</sup> UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27; UN GA, ‘Report of the Special Representative of the Secretary-General on human rights defenders’ (1 October 2004), A/59/401, para. 46.

be balanced against the rights of the third parties. Restrictions on the right to freedom of association and assembly of the community by means of a community TLD shall be subject to limitations if these are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. As part of this balancing act, it can be relevant whether alternative means of expression – another gTLD or something other than a gTLD – were available to the concerned party.<sup>35</sup>

### *Due process*

The concept of due process refers to the idea that no one should be deprived of his rights without due process of law. It has been common in the international debate to discuss due process in terms of a set of procedural rights, including (1) the right to notice; (2) the right to a hearing; (3) the right to a reasoned decision; (4) the right of appeal to an independent tribunal; (5) the right of public access to information; and (6) the right to a judicial remedy.<sup>36</sup> The most traditional and popularly known context of due process is criminal trials, but due process requirements concern civil cases as well. Usually due process is seen as a set of criteria that protect a private person in relation to the State and authorities. Due process requirements are considered to be a part of constitutional protection of an individual.<sup>37</sup> Due process rights are recognised by most legal systems, but this does not make its principles “universal” nor do they take the same shape in every legal system.<sup>38</sup>

Due process rights are traditionally known among human right experts to centre on the right to a fair trial and the right to an effective remedy. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within Article 14(1) of the ICCPR and is applicable to both criminal and non-criminal proceedings.<sup>39</sup> The various elements of the right to a fair trial codified in the ICCPR are also to be found in Article 10 UDHR, Article 6 ECHR and customary international law norms.<sup>40</sup>

The right to an effective remedy is set out in many human rights treaties, declarations, resolutions and other non-treaty texts. Article 8 of the UDHR states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental

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<sup>35</sup> See the case law of the ECHR: *Appleby and others v. the United Kingdom* (no. 44306/98), 06.05.2003, para.48; *Wabl v. Austria*, (no. 24773/94), 21.03.2000, para. 44; *Rekvényi v. Hungary* (25390/94) 20.05.1999, para. 49. Via: W. Benedek, Joy Liddicoat and Nico van Eijk, ‘Comments relating to freedom of expression and freedom of association with regard to new generic top level domains’, Council of Europe DG-I (2012) 4, 12 October 2012, para 62-66.

<sup>36</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>37</sup> Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010).

<sup>38</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016); Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010).

<sup>39</sup> See also: Article 13 and 15 ICCPR.

<sup>40</sup> The UN Human Rights Committee’s General Comment 32 on the right to a fair trial stands as an authoritative interpretation of the meaning and application of article 14 of the ICCPR.

rights granted by the constitution or by law”.<sup>41</sup> Except for Article 25 of the American Convention on Human Rights, which guarantees a right to recourse to “courts and tribunals”, other human rights conventions do not require that the remedy be “judicial”.

The UN Guiding Principles on Business and Human Rights, unanimously adopted by the United Nations Human Rights Council in June 2011, provide an authoritative global standard on the respective roles of businesses and governments in helping ensure that companies respect human rights in their own operations and through their business relationships. These guiding principles prescribe the duty on governments to provide for greater access by victims to effective remedy, both judicial and non-judicial as well as a responsibility on corporate actors to provide for effective remedy if they have caused or contributed to adverse impacts. The Guiding Principles prescribe that non-judicial grievance mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.<sup>42</sup>

The procedural due process standards set out above have been developed to protect the individual against state authorities and to enhance the legitimacy of the state’s decision-making.<sup>43</sup> Due to economic globalisation and privatisation the public role of private actors in the transnational arena increased. Consequently, it is increasingly recognized that private actors that fulfil a public role ought to base their decision-making on similar procedural due process standards.<sup>44</sup>

Several approaches have been developed as to how to develop appropriate procedural due process standards for non-state actors such as ICANN, arbitration tribunals or the United Nations.<sup>45</sup> On the one hand, international lawyers have drawn due process standards binding on states based on international and regional human rights sources and customary international law and applied these to private actors that fulfill a public role. An important movement in this respect is the Global Administrative Law movement. These scholars put emphasis on the enhancement of the transparency and accountability of diffuse transnational regulatory regimes and focus their attention on the improvement of the reasonableness and procedural fairness of decisions made under transnational regulatory frameworks.<sup>46</sup> Although there are various interpretations of Global Administrative Law, in general it can be understood to encompass “the legal mechanisms, principles and practices,

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<sup>41</sup> Article 2 (3) ICCPR; Article 13, 5 (4) and Article 2 Protocol No. 7 ECHR; Article 7, 21, 26 of the African Charter on Human and Peoples’ Rights and Article 27 of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples’ Rights; and Article 25 of the American Convention on Human Rights.

<sup>42</sup> OHCHR, Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework (2011), [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed 26 July 2016).

<sup>43</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, American Journal of International Law, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>44</sup> See also: Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

<sup>45</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, American Journal of International Law, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>46</sup> Ming-Sung Kuo, ‘Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism’ (2011) 44 New York University Journal of International Law and Politics 55, 58.

along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make”.<sup>47</sup>

In contrast with this state-oriented approach, contextual approaches can be distinguished. Within these approaches due process is regarded to be contextual: “different legal contexts legitimately require different procedural standards and operate according to different principles and values”.<sup>48</sup> As such, due process principles can be developed based on the values of the community that is affected by the decisions of the organisation. Hovell states: “Safeguards associated with due process aim collectively to open up a structured dialogue between decision-making authority and those affected by decisions. Broadly, the aim of this dialogue is to enhance legitimacy”.<sup>49</sup> She continues: “The concept of legitimacy envisages a connection between decision-making authority and community values sufficient to ground acceptance of that authority in the relevant community. Due process acts in the service of legitimacy by shoring up the connection that acts as legitimacy’s source, providing legal standards that serve to establish a dialogue between decision-makers and the community affected by decisions to ensure decision-making takes place in accordance with relevant community values”.<sup>50</sup>

ICANN’s gTLD program, including community-based applications, needs to be based on procedural due process. The exclusive nature of ICANN’s gTLD application process results in a need and justification for certain minimum procedural standards.<sup>51</sup> ICANN’s mission and mandate to manage the DNS in the public interest warrants it to take into account due process standards. Furthermore, all new gTLD applicants effectively waived the right to sue ICANN over the new gTLD program when they applied for a new gTLD as per the “*Top-Level Domain Application – Terms and Conditions*” as set out in the Applicant Guidebook. Thus, the agreement one signs when one applies for a gTLD with ICANN in principle prevents a party from bringing a procedure in a general court. Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus access to justice, which is generally considered a human right or at least a right at the constitutional level. The ECtHR has decided that right of access to court and a public trial in a court of law can be waived in favour of arbitration via an agreement.<sup>52</sup> However, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6 ECHR on fair trial; a distinction may have to be made between different rights guaranteed by Article 6

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<sup>47</sup> Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17-1 *European Journal of International Law* 1.

<sup>48</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>49</sup> *Ibid.*, p. 5/6.

<sup>50</sup> *Ibid.*

<sup>51</sup> See also: Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

<sup>52</sup> EComHR, 5 March 1962, *X. – Germany* (appl. no. 1197/61, as published in *Yearbook of the ECHR* vol. 5 (1962), pp. 94-96); ECHR, 23 February 1999, *Suovaniemi a.o. - Finland* (appl. no. 31737/96).

ECHR.<sup>53</sup> As arbitration is a kind of surrogate for normal court procedure, some procedural standards need to be upheld to compensate for loss of access to court.<sup>54</sup> This logic equally applies to ICANN's policies and procedures with regard to the gTLD application process.

### *Discrimination*

The general principle of equality and non-discrimination is a fundamental element of international human rights law.<sup>55</sup> Article 14 of the ECHR, similarly to the UDHR and ICCPR, provides: "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>56</sup> The Court has established in its case law that discrimination means "treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations."<sup>57</sup> However, Article 14 ECHR does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them. In certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14 ECHR.<sup>58</sup>

When it comes to communities and ICANN top-level domains the general principle of equality and non-discrimination is highly relevant. Although the exact reasons are unclear, ICANN positively discriminates in favour of community-based applicants, by giving them priority for a gTLD if they fulfil certain criteria. The objective and reasonable justification to do so are unclear, but community priority has been discussed extensively by the ICANN community and was decided upon by the community as a whole. However, ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority: out of 27 string applications in CPE only 5 passed through but none with the maximum score of 16 points, 2 passed with 15 points (93%) and 3 with 14 points (87.5%). The criteria and scoring threshold to determine priority as set out in the Applicant Guidebook as well as the restrictive interpretation by the EIU of the concept of "community" have particularly been put forward to obstruct a fair, equal and non-discriminatory procedure.

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<sup>53</sup> ECHR, 23 February 1999, *Suovaniemi a.o. - Finland* (appl. no. 31737/96).

<sup>54</sup> Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

<sup>55</sup> The right to equality and non-discrimination is recognized in Article 14 ECHR, as well as in Article 2 and 7 UDHR and is a cross-cutting issue of concern in different UN human rights instruments, such as Articles 2 and 26 ICCPR, Article 2(2) ICESCR, Article 2 CRC, Article 7 CMW and Article 5 CRPD.

<sup>56</sup> Council of Europe Report on 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnierute and Thomas Schneider (2014).

<sup>57</sup> See: *D.H. and Others v. the Czech Republic* [GC], App no. 57325/00, § 175, ECHR 2007, and *Burden v. the United Kingdom*, App no. 13378/05 § 60, EHRR 2008.

<sup>58</sup> See *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, § 10; *Thlimmenos v Greece*, (2000) 31 EHRR 411, § 44). *Horváth and Kiss v. Hungary*, Judgment of the European Court of Human Rights (Second Section) of 29 January 2013, App. no. 11146/11, § 101.



Moreover, in most cases where multiple applicants apply for a single new gTLD it is expected that contention will be resolved by the CPE, or through voluntary agreement among the involved applicants. If that is not the case, auctions will take place to determine the winner of each contention set.<sup>59</sup> The mechanism of last resort to determine who wins string contention has been extensively discussed within ICANN. In principle, CPE is there to determine whether there is a community-based applicant that ought to have priority and if that is not the case, all applicants can go to auction. An auction is likely to award the gTLD to the financially richer entity. As such, its discriminatory nature can be criticised from a human rights perspective. This mechanism in theory does not discriminate against communities, since they have had the opportunity to prove their community status in CPE. However, in practical terms the auction procedure is discriminatory against communities if the process that ought to determine their community status – CPE – is unfair and discriminatory and does not live up to due process standards.

In the following, this report examines ICANN's policy on community-based applications, and the implementation of that policy, with particular regard to the rights to freedom of expression, freedom of association, non-discrimination and due process. Any failure to follow a decision-making process which is fair, reasonable, transparent and proportionate endangers freedom of expression and association, and risks being discriminatory. We have therefore paid particular attention in this report to ICANN's Community Objection and Community Priority Evaluation processes to assess whether they are fair and reasonable, and are concerned that weaknesses in those processes may affect the human rights of community applicants.

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<sup>59</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-13.

### 3. The definition of community

No clear definition of “community” for the purpose of community-based applications has been formulated by ICANN. Instead, scoring criteria were formulated that set requirements that the alleged community needs to fulfil to be considered a community in order to satisfy the Community Objection and the Community Priority Evaluation. It was decided to not formulate a clear-cut definition, because many different types of communities should be eligible. It was also decided not to explicitly preclude particular groups or scenarios, because the definition should not pre-judge applications without consideration of the circumstances.<sup>60</sup> Throughout these discussions on communities and community priority, the discussants mostly had natural communities in mind, such as First Nation or Native American tribal communities.<sup>61</sup>

Within ICANN there is frequent reference to the “ICANN community”, which is a complex matrix of intersecting organisations.<sup>62</sup> This “community” should not be confused with the notion of community in community-based applications, Community Objection and Community Priority Evaluation. The concept of community-based applications stems from the Generic Names Supporting Organization’s (GNSO) policy recommendations on which the implementation of the New gTLD Program is based. The Applicant Guidebook was formulated from the GNSO policy recommendations and the CPE Guidelines are an accompanying document to the AGB meant to provide additional clarity around the process and scoring principles outlined in the AGB.

#### *The GNSO policy recommendations*

With regard to Community Objections, the GNSO policy recommendations conceptualise “communities”. Principle 20 determines that an application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted. **It continues:** “Community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community”.<sup>63</sup> The standard for “community” is entirely subjective and was based on the personal beliefs of the objector.<sup>64</sup>

#### *The Applicant Guidebook*

The Applicant Guidebook was formulated based on the GNSO policy recommendations. It sets out in more detail the criteria a community applicant needs to fulfil. The AGB prescribes

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<sup>60</sup> ICANN, New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf> (accessed 26 July 2016)

<sup>61</sup> Based on an interview with Avri Doria (who participated in these discussions) at ICANN56, Helsinki.

<sup>62</sup> See: <http://www.icann.org/structure/>.

<sup>63</sup> ICANN Generic Names Supporting Organisation, ‘Final Report Introduction of New Generic Top-Level Domains’ (8 August 2007) <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm> (accessed 21 July 2016).

<sup>64</sup> ICANN Generic Names Supporting Organisation, ‘Final Report Introduction of New Generic Top-Level Domains’ (8 August 2007) <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm> (accessed 21 July 2016).

that all applicants are required to designate whether their application is community-based or not. Designation or non-designation of an application as community-based is entirely at the discretion of the applicant. An application that has not been designated as community-based has been referred to as a standard application. A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
4. Have their applications endorsed in writing by one or more established institutions representing the community it has named.<sup>65</sup>

With regard to Community Objection, the AGB provides that the objector must prove that the community expressing opposition can be regarded as “a clearly delineated community”. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

When it comes to the String Contention Procedures, the AGB provides that community implies “more of cohesion than a mere commonality of interest”. Criteria that ought to be fulfilled to be considered a community are:

- an awareness and recognition of a community among its members;
- some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and
- extended tenure or longevity—non-transience—into the future.<sup>66</sup>

The community priority criteria of which an applicant needs to score 14 out of 16 to be considered a community do not define community, but the criteria indicate what requirements a community needs to fulfil. Criterion 1 (Community Establishment) indicates that a community ought to score high on delineation and extension. It ought to be a clearly

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<sup>65</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

<sup>66</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-11.

delineated, organized, and pre-existing community of considerable size and longevity. The AGB guidelines on this criterion emphasize that “a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.”<sup>67</sup>

### *CPE Guidelines*

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB.<sup>68</sup> This document is prepared by the EIU. These guidelines do not provide a definition of “community”, but sets out the questions based on which the evaluators score the application based on the criteria set out in the AGB. When it comes to “delineation” of the community, the EIU Guidelines provide that: “Delineation relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low. Delineation also refers to the extent to which a community has the requisite awareness and recognition from its members. The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certification aligned with community goals, etc.”<sup>69</sup> When it comes to the aspect of “extension”, the EIU Guidelines state that the following questions must be scored when evaluating the application: “Is the community of considerable size? Does the community demonstrate longevity? Is the designated community large in terms of membership and/or geographic dispersion?” With regard to the latter question it makes clear that communities may count millions of members in a limited location or spread over the globe, but also some hundred members spread over the globe.<sup>70</sup>

### *Conclusion*

The original GNSO intention appears to be that “community” is self-defining (a community is whatever the group claiming to be a community says it is). However, to be eligible for either priority consideration for a contended string, or to lodge a Community Objection, “communities” have to demonstrate certain characteristics. The fact that the characteristics of eligible communities vary within the body of ICANN’s own processes and guidance leads to confusion and a perceived lack of coherence.

To further develop the concept of CBA and community priority it could be useful to formulate a definition of community that is central to CBA, Community Objection and CPE. Based on the concept of association as used by the ECtHR and the United Nations, we believe “community” refers to: “Any groups of individuals or any legal entities brought together in

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<sup>67</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-12.

<sup>68</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.2.

<sup>69</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.4.

<sup>70</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.5.

order to collectively act, express, promote, pursue or defend a field of common interests”.<sup>71</sup> Any form of voluntary grouping for a common goal should be able to fulfil the standard of “community” for CBA.<sup>72</sup> A certain degree of institutional organisation ought to be required, but this does not mean that a community must have legal entity status in order to be eligible for a community TLD. The community has to be distinguishable from a mere gathering of individuals for the sake of socializing and therefore some degree of continuity and institutional elements must be in place.<sup>73</sup>

The broad definition of community as formulated by the GNSO has been severely restricted in the AGB and in the CPE Guidelines. The AGB narrows the concept of community down to a “clearly delineated, organized, and pre-existing community of considerable size and longevity” and the CPE guidelines require clear and straight-forward membership. It is not that the EIU would not at all accept a more unclear, dispersed or unbound definition of community, but the high threshold of a score of 14 out of 16 of the CPE criteria ensures that communities are indirectly forced in a straitjacket of strict membership. Based on the CPE Guidelines, the Panel awards a higher score to communities that are based on fees, skill and/or accreditation requirements, privileges or benefits entitled to members, and certification aligned with community goals. These are criteria that may fit economic communities, but not religious or social communities.

The criteria and questions formulated in the AGB and CPE Guidelines to determine whether the applicant can be regarded as a community do not correspond to the spirit of the intended goal that the GNSO had in mind when establishing the concept of community priority. In addition, many constituents of the ICANN community make clear that the EIU provides an even more narrow interpretation of the already narrowly formulated AGB and CPE Guidelines. Based on the desk research and interviews with members of the ICANN community we have conducted we believe that the methods used for interpretation by the EIU has led to rigidity that reduced the scope for success for community applicants to obtain a gTLD. As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate.

However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN's mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in. Community

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<sup>71</sup> This definition is based on the definition of “association” as formulated in: UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27; UN GA, ‘Report of the Special Representative of the Secretary-General on human rights defenders’ (1 October 2004), A/59/401, para 46.

<sup>72</sup> Based on the concept of “association” as defined by the European Court of Human. See: Young, James, Webster v. the United Kingdom, Judgment of the European Court of Human Rights (Plenary) of 13 August 1981, App. nos. 7601/76; 7806/77.

<sup>73</sup> Based on the concept of “association” as defined by the European Court of Human. See: McFeeley v. The United Kingdom, Judgment of the European Commission of Human Rights (Plenary) of 15 May 1980, App. no. 8317/78.

priority was a new concept that was decided to be best developed as the process went on. The Panel should have interpreted the cases before it in light of the purpose for which it was enacted. In legal contexts, this approach is called the contextual, purposive or teleological approach. How to interpret (legal) texts has presented problems from the earliest times to the present day. Plato urged that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. Montesquieu viewed the judge as simply the mechanical spokesman of the law.<sup>74</sup> Due to the fact that the concepts of community and community priority have been intentionally left underdeveloped, one cannot regard the EIU Panel as a mechanical spokesperson of the AGB and CPE Guidelines. The EIU Panel ought to have helped develop the concept, which is not possible by means of a literal interpretation without due regard for context and circumstances.

In brief, we recommend ICANN to:

- Bearing in mind that community TLDs may be tools for citizens to enjoy their human rights to freedom of expression and freedom of association, define a clear and consistent definition of “community”, taking account of the fact that different groups of communities (geographic, religious, economic, social, cultural, gender-based and ethnic) may have different modes of functioning; a rigid set of evaluation criteria has the potential to be unduly restrictive for the wide variety of communities that ought to be eligible for a community gTLD.
- Re-assess the criteria and guidance as formulated in the AGB and CPE Guidelines in the light of the spirit of the GNSO Policy Recommendations.
- Instruct and train delegated decision-makers, such as the experts and panels deciding on Community Objections and CPE, to interpret the cases before them in light of the purpose for which community-based applications were enacted.

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<sup>74</sup> Report of Mr. Justice John L. Murray, President of the Supreme Court and Chief Justice of Ireland, ‘Methods of Interpretation – Comparative Law Method’, [http://curia.europa.eu/common/dpi/col\\_murray.pdf](http://curia.europa.eu/common/dpi/col_murray.pdf) (accessed 25 July 2016).

## 4. The concepts of priority and public interest

For the EIU Panel to be able to interpret the cases it evaluates in the light of the purpose of community priority, it needs to be perfectly clear why the ICANN community decided to establish priority for those applicants that can prove they deserve a “community” label. What was the GNSO’s intended goal and how was it intended to serve the public interest?

The concept of community priority stems from the GNSO’s policy recommendations on which the implementation of the New gTLD Program is based. It was expected that community-based TLDs would add value to the namespace in serving the needs of diverse user groups.<sup>75</sup> The benefits of a community-TLD put forward by ICANN are that it creates a rallying point for supporters of your cause, community or culture<sup>76</sup>; it will help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members; it enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community’s standards and values; it will boost the trust and confidence of its members; the community may be recognized globally; members will be able to register a relevant, shorter and easy to remember domain name; and it will generate income from registration and annual renewal fees of domain names.<sup>77</sup> However, nowhere is it stated what the values are that community-based TLDs and community priority aim to protect. There is no doubt that the concept of community priority was supported by the ICANN community when the new gTLD program was initiated and developed. However, it is not clear what the goal is that is meant to be served by community-based applications, what sort of persons or organisations should benefit from the use of a community-based gTLDs to serve this goal and how these communities would actually benefit from having their own TLD. Before there are subsequent rounds of applications it is necessary to determine the public interest values that CBAs aim to protect. Below, we provide some input to serve these deliberations within the ICANN community.

There appears to be consensus on the idea that community TLDs ought to serve the public interest. As Olga Cavalli puts it: “Business communities should not be eligible for community applications if there is no public interest reason to differentiate them from generic applicants”.<sup>78</sup> However, ICANN has no definite definition of “the public interest”. ICANN’s Chairman Dr. Steve Crocker clarified that “historically at ICANN, there has been no explicit definition of the term “global public interest” and that “future conversation and work on exploring the public interest within ICANN’s remit will require global, multistakeholder,

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<sup>75</sup> ICANN, New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf> (accessed 26 July 2016).

<sup>76</sup> ICANN, Benefits and Risks of Operating a New gTLD, <https://newgtlds.icann.org/en/about/benefits-risks> (accessed 27 July 2016).

<sup>77</sup> ICANNwiki, ‘Community TLD’ [https://icannwiki.com/Community\\_TLD](https://icannwiki.com/Community_TLD) (accessed 27 July 2016).

<sup>78</sup> Based on an interview conducted with Dr. Olga Cavalli at ICANN56, Helsinki. Dr. Cavalli is Argentina’s GAC representative at ICANN and was also the Nominating Committee’s appointee to the GNSO, where she represents the Latin American/Caribbean region.

bottom-up discussion.”<sup>79</sup> Whether a community TLD serves the global public interest needs to be determined on an ad hoc basis. However, ICANN should provide clarity on the public interest values community TLDs ought to protect. Based on our study, we believe this list of public interest values should at least include:

- The protection of vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.<sup>80</sup> Such vulnerable groups or minorities include groups of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, gender, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive).<sup>81</sup>
- Pluralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.<sup>82</sup> As the NETmundial Multistakeholder Statement determines **In line with the Council of Europe declaration by the Committee of Ministers on Internet governance principles**: “Internet governance must respect, protect and promote cultural and linguistic diversity in all its forms.”<sup>83</sup> Pluralism is an important factor determining the scope and impact of a number of fundamental rights, such as the right to freedom of expression, freedom of association and freedom of religion. For the concept of pluralism, ICANN can seek inspiration from the fundamental principles pronounced by the ECtHR concerning the importance of pluralism and diversity of information in a democratic society, as these have been elaborated in its case law on broadcasting licenses. The ECtHR decided that, in the context of granting

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<sup>79</sup> Dr. Steve Crocker, ICANN Chair, ICANN Board Response to GNSO Query on Public Interest, <https://www.icann.org/en/system/files/correspondence/crocker-to-bladel-12apr16-en.pdf> (accessed 27 July 2016).

<sup>80</sup> Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014).

<sup>81</sup> GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué - scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011, <https://archive.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf> (accessed 24 July 2016).

<sup>82</sup> See also: Office of the Ombudsman, Case 16-00177, In a matter of a Complaint by dotgay LLC, 27 July 2016, <http://www.lahatte.co.nz/> (accessed 29 July 2016).

<sup>83</sup> NETmundial, ‘NETmundial Multistakeholder Statement’ (24 April 2014), <<http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>> (accessed 17 August 2016); **The Council of Europe declaration by the Committee of Ministers on Internet governance principles determines in Principle 10**: “Preserving cultural and linguistic diversity and fostering the development of local content, regardless of language or script, should be key objectives of Internet-related policy and international co-operation, as well as in the development of new technologies”, see [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2f6](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2f6) (accessed 11 October 2016).



broadcasting licenses, states have to be guided by the importance of pluralism.<sup>84</sup> The Court also expressed the view that the exercise of power by mighty financial groupings may form a threat to media pluralism<sup>85</sup> as well as far-reaching monopolisation in the press and media sector.<sup>86</sup> By using the concept of pluralism, ICANN can serve the protection of individual and associational fundamental rights.

- Consumer or internet user protection. It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to national regulation (such as .BANK, .PHARMACY,) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse.<sup>87</sup> Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted.

To award a community TLD to a community can – as such – serve the public interest. It can, for example, provide a space for a vulnerable group that helps strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members. Alternatively, a community TLD can be awarded to an entity that cannot be regarded a community, but that does serve the public interest by the way it administers the TLD. This entity could even be a commercial applicant, which serves the internet community for example by protecting the intellectual property rights of musicians or making sure that all doctors that offer their services via the TLD are trustworthy.

The most important element of a CBA that should be evaluated is whether the applicant is expected to serve the global public interest by means of the community TLD. Such a judgement appears to be best conducted through ICANNs multistakeholder model, in which the entire internet community is represented in a multitude of constituencies. The internet community as a whole, represented by representatives from these constituencies, appear to be better positioned than expert Panels to determine what is in the best interest of the global internet community. The expert Panels, such as the International Center of Expertise of the International Chamber of Commerce (ICC) for Community Objections and the EIU for CPE

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<sup>84</sup> Demuth v. Switzerland, Judgment of the European Court of Human Rights (Second Section) of 5 November 2002, App. no. 38743/97. See for more information: Council of Europe, Thematic factsheet on freedom of expression and the broadcasting media' (April 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631e3c> (accessed 11 October 2016); Council of Europe, **Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society** (31 January 2007), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d6bc5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d6bc5) (accessed 11 October 2016).

<sup>85</sup> VgT Verein gegen Tierfabriken v. Switzerland, Judgment of the European Court of Human Rights (Second Section) of 28 June 2001, App. no. 24699/94.

<sup>86</sup> De Geillustreerde Pers N.V. v. The Netherlands, Judgment of the European Commission of Human Rights of 6 July 1976, App. no. 5178/71.

<sup>87</sup> GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué - scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011, <https://archive.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf> (accessed 24 July 2016).

would still be of importance to decide upon all other eligibility criteria that a community applicant must fulfil.

In brief, we recommend ICANN to:

- Provide clarity on the public interest values community TLDs are intended to serve. This provides the necessary clarity as to the goal of community-based applications which in turn allows for clarity as to the criteria an applicant needs to fulfil to be regarded a legitimate community-based applicant. These public interest values should include: the protection of vulnerable groups or minorities; pluralism, diversity and inclusion; and consumer or internet user protection.

## 5. Community Objections

There are two types of mechanisms that may affect an application. First, the ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. The second mechanism that may affect an application is the dispute resolution procedure triggered by a formal objection to an application by a third party. A formal objection can be filed only on four enumerated grounds: (1) String Confusion Objection: The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications; (2) Legal Rights Objection: The applied-for gTLD string infringes the existing legal rights of the objector; (3) Limited Public Interest Objection: The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law; and (4) Community Objection.<sup>88</sup>

The process of Community Objection refers to an objection by a Community representative because of substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.<sup>89</sup> Established institutions associated with clearly delineated communities are eligible to file a community objection. But the problem arises especially because there was no reference to any reference system existing in the real world for communities. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. For such an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

These different types of objection procedures are administered by different Dispute Resolution Service Providers. Community Objections are administered by the International Centre for Expertise of the International Chamber of Commerce.<sup>90</sup> Applicants whose applications are the subject of an objection can reach a settlement with the objector, file a response to the objection and enter the dispute resolution process, or withdraw.

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<sup>88</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 3.

<sup>89</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Attachment to Module 3: New gTLD Dispute Resolution Procedure.

<sup>90</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04., Attachment to Module 3 - New gTLD Dispute Resolution Procedure.

Several issues have come up with regard to Community Objections, particularly in the interviews with community-based applicants. The following issues need to be taken into account and sorted before subsequent rounds of applications.

### *The objector's standing*

Established institutions associated within a clearly defined community have standing to file a Community Objection. Community organisations could not object collectively as a community, but could only object independently. In other words, community organisations could not jointly object together as one. Community objections are designed for situations in which there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string is targeted. The elements of “substantial opposition” and “significant portion of the community” is thus something that does not have to be proven by the community (since they cannot collectively file a community objection), but by the organisation representing the community. It appears to make more sense if the community as a whole is able to prove “substantial opposition” by a “significant portion of the community”. Under the current rules the community objector needs to live up to a high burden of proof: it needs to prove that its followers can be considered a clearly delineated community of which a significant portion of this group substantially opposes the application.

Furthermore, before subsequent rounds of applications ICANN might need to reconsider to what extent it is desirable for certain organisations within ICANN to be able to object. The Independent Objector can lodge objections in cases where no other objection has been filed. The Independent Objector has filed several Community Objections, but the amount of successful objections is limited.<sup>91</sup> Based on the first round of applications, ICANN should re-assess the role of the Independent Objector. Other ICANN organisations, such as the ICANN At-large Advisory Committee (ALAC) or GAC are not likely to have standing in Community Objections, because they most likely do not have the required “ongoing relationship with a clearly delineated community.”<sup>92</sup> ALAC did not have standing in two Community Objections it filed.<sup>93</sup> The GAC is also expected not to have standing in Community Objections, but does have the possibility to provide GAC Advice on New gTLDs to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. The potential role for the ALAC and/or GAC could be taken into consideration in evaluating the role of the independent objector.

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<sup>91</sup> Independent Objector, The Objections Filed by the Independent Objector, <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/> (accessed 27 July 2016).

<sup>92</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-8.

<sup>93</sup> The International Centre for Expertise of the International Chamber of Commerce, Case No. EXP/504/ICANN/121, ICANN AT-LARGE ADVISORY COMMITTEE (ALAC) (USA) vs. DOTHEALTH, LLC (USA) (Consolidated with case No. EXP/505/ICANN/122, ALAC vs. GOOSE FEST, LLC, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1684-6394-en.pdf> (accessed 27 July 2016);  
; The International Centre for Expertise of the International Chamber of Commerce, Case No. EXP/505/ICANN/122, ICANN AT-LARGE ADVISORY COMMITTEE (ALAC) (USA) vs. GOOSE FEST, LLC (USA) (Consolidated with case No. EXP/504/ICANN/121, ALAC vs. DOTHEALTH, LLC, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1489-82287-en.pdf> (accessed 27 July 2016).

## Costs

The AGB did not disclose the approximate costs of Community Objections. The Community Objectors indicate that these costs came out to hundreds of thousands of dollars for a single objection. This amount was even higher if the objector selected a 3-person panel, because of panellist fees and legal fees. Due to these excessive costs, communities were often not able to select a 3-person panel. Generally, communities lack the financial means to do so. In other words, non-profits were severely limited in filing objections due to the excessive costs. Furthermore, since organisations could only object one at a time, rather than collectively, the costs would have been in the millions for each case if many community organisations objected independently. It is expected that this prevented communities from objecting one by one. Providing a possibility to collectively object in conjunction with lowering the costs for Community Objections would help solve these issues.

## Inconsistent decisions

Several actors within different ICANN constituencies have expressed unease about the variations in (Community) Objection determinations.<sup>94</sup> There appears to be inconsistency when it comes to the entities that did or did not have standing. Objectors prevailed and had standing for .ARCHITECT (The International Union of Architects), .BANK (International Banking Federation), .INSURANCE (The Financial Services Roundtable), .MOBILE (CTIA - The Wireless Association), .POLO (United States Polo Association), .RUGBY (International Rugby Board), .SKI (Fédération Internationale de Ski), and .SPORTS (SPORTACCORD).<sup>95</sup> However, objectors for .BASKETBALL (Fédération Internationale de Basketball), .GAME (Entertainment Software Association), .GAY (The International Lesbian Gay Bisexual Trans and Intersex Association), .GOLD (World Gold Council), .INSURE (American Insurance Association), .KOSHER (Union of Orthodox Jewish Congregations of Americas), .LGBT (The International Lesbian Gay Bisexual Trans and Intersex Association), .MAIL (Universal Postal Union), .MUSIC (American Association of Independent Music or International Federation of Art Councils and Council Agencies) and .HOTELS (HOTREC, Hotels, Restaurants & Cafés in Europe) did not qualify<sup>96</sup>, while there appears to be little difference with those that did qualify when it comes to fulfilling the requirement of being an “established institution associated with a clearly delineated community”.

Another example is the decision in the case of the Republican National Committee against .REPUBLICAN.<sup>97</sup> The expert argues it is insufficiently clear whether the community involved in the objection is the Republican Community or the US Republican Party. The expert concludes that the objector does not have standing to object to the Applicant’s registration of

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<sup>94</sup> Based on interviews with people active within different ICANN constituencies during ICANN56, Helsinki.

<sup>95</sup> See: ICANN, ‘Objection Determinations’ <https://newgtlds.icann.org/en/program-status/odr/determination> (accessed 27 July 2016).

<sup>96</sup> Although HOTREC was considered to be an organisation representing the entirety to the hotel community in the .HOTEL CPE report. See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

<sup>97</sup> The International Centre for Expertise of the International Chamber of Commerce, Case No. Exp/485/ICANN/102, Republican National Committee (USA) vs. United Tld Holdco Ltd. (Cayman Islands), <https://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-1255-42012-en.pdf> (accessed 27 July 2016).

the new gTLD .REPUBLICAN, in the name of the so-called Republican Community, as it cannot be considered as a clearly delineated community, contrary to the US Republican Party. The Expert therefore analyses the merits on the assumption that the Objector is objecting to the new gTLD .REPUBLICAN in the name of the US Republican Party. The flexible approach of the expert in assessing the objection as if it stems from the Republican Community or the US Republican Party is highly appreciated in the light of due process in the context of a dynamic organisation like ICANN. However, the expert concludes that there is neither a substantial opposition to the Application from a significant portion of the community to which the string may be explicitly or implicitly targeted, *as the Republican Party only relates to US politics*, nor a likelihood of detriment to the Republican Party, if the new gTLD is granted to the Applicant, United TDL. Hence, the fact that the objection only relates to the USA automatically implies there is no substantial opposition to the Application from a significant portion of the community to which the string may be explicitly or implicitly targeted. Requiring such an implicit global reach is potentially unduly restrictive. Such implicit standards ought to be made explicit and should be evaluated in light of the intended goal of the programme before there are subsequent rounds of applications.

It appears that ICANN expected some level of inconsistency in Community Objection decisions.<sup>98</sup> Due process requires ICANN to guarantee a certain level of legal certainty, to protect applicants and objectors against arbitrary use of power and to be able for them to regulate their conduct, applications and objections. Maximum predictability of the Expert and Panel's behaviour needs to be guaranteed by ICANN. This allows applicants and objectors to organise their affairs in such a way that does not conflict with ICANN policies and procedures. This notion of "certainty" is strongly linked to that of individual autonomy. It is not clear whether ICANN indeed incorporated a quality control program in the Community Objections to guarantee maximum predictability. Quality control ought to include the assessment of a number of similar Community Objections against one another in light of consistency.

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<sup>98</sup> "[I]t would be surprising if among the corpus of reasoned objections [determinations] to have been issued thus far that a somewhat diverse marketplace of ideas had not developed; some variation is to be expected." See: ICANN's Brief Concerning the Final Declaration Issued in The Donuts, Inc. V. ICANN IRP Proceeding (19 May 2016), <https://www.icann.org/en/system/files/files/irp-corn-lake-icann-concerning-final-declaration-issued-19may16-en.pdf> (accessed 27 July 2016).

## *Appeal mechanisms*

There are no appeal mechanisms in place with respect to the Community Objection procedure. In practice, applicants that were competing for the same string and were dissatisfied with the outcomes of these procedures have sought justice or a win through existing mechanisms originally conceived to ensure ICANN's board accountability. These mechanisms include the Reconsideration Request, Cooperative Engagement Process (CEP), Independent Review Process Panel (IRP) and filing a complaint to the Ombudsman. These mechanisms have not been designed to function as a way of appeal in case of Community Objection or string contention, but have been used as such due to dissatisfaction with the outcome of evaluations in earlier stages of the application procedure. These mechanisms do not provide an appeal on the substance of the argument. Appeals function as a process of error correction as well as a process of clarifying and interpreting the applicable rules, such as those set out in the AGB. Particularly with regard to the fact that 3-person Panels have been too expensive to be affordable by community objectors, due process requires that another entity is able to provide a full evaluation that goes beyond assessing procedural fairness of the objection. Such an appeal mechanism should be able to also re-assess the facts of the case.

## *Independent, transparent and accountable decision-making*

It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest. There have been allegations of conflict of interest with regard to panellists deciding on objections against gTLD applications. In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that Sir Robin Jacob (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist.<sup>99</sup> Moreover, in the Final Declaration of the Independent Review Panel of the International Centre for Dispute Resolution in decision of Donuts, Inc vs. ICANN on the objections concerning .SPORTS and .RUGBY, there was a dissenting opinion by one of the panel members because of a conflict of interest of one of the other panellists.<sup>100</sup> The dissenting opinion contends that the decision-maker (panellist) was the lawyer for undisclosed clients directly benefited by his ruling. With the dissenting panel member, we believe this is a failure of the promise of independent, transparent, accountable decision-making.

It is necessary to avoid the appearance of impropriety, which dictates the fullest disclosure. The decision-makers in both Community Objections and CPE have decision-making power similar to a judge or arbiter. Disclosure is a fundamental aspect of due process to guarantee the integrity of the International Center of Expertise of the International Chamber of

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<sup>99</sup> Joe Patrice, 'Conflicts of Interest Are Just Classier with English Accents' (1 March 2013) <http://abovethelaw.com/2013/03/conflicts-of-interest-are-just-classier-with-english-accents/> (accessed 27 July 2016).

<sup>100</sup> International Centre for Dispute Resolution, Independent Review Panel, Donuts, Inc vs. ICANN, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel, Dissenting Opinion of Philip W. Boesch, Jr, Panel Member (5 May 2016), <https://www.icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf> (accessed 27 July 2016).

Commerce as well as the integrity of ICANN's model that is depending on it. It should be the ICC experts' disclosures and not the party's private investigation into the expert's background, upon which the integrity of the ICC expertise system depends. The relevant principles of international law as set out earlier in this report, including due process with its requirements for independent, transparent and accountable decision-making as well as local (California) law apply. The promise of independent judgment, transparency and accountability as to decision-making regarding matters of public interest, should not be set aside by resort to technical rules.

There ought to be a remedy for impermissible non-disclosures. As a remedy of the lack of independence of the Panel member in the IRP of *Donuts, Inc vs. ICANN* concerning .SPORTS and .RUGBY, the majority of the Panel argues that it would not be inconsistent with ICANN's values and principles to provide for a rehearing of that objection, by a different expert (or three experts). This seems to be an advisory opinion that Donuts can and perhaps should petition for a rehearing. The Panel appears to not have the mandate to order a rehearing based on the appearance that fundamental due process standards have been violated. This is at odds with fundamental principles of due process, independence of the decision-maker, transparency and accountability. The mandate of dispute resolution panels should be re-assessed before there are subsequent rounds of applications.

Lastly, several actors within different ICANN constituencies have made clear that the lines of responsibility are unclear when it comes to the delegated decision-makers, such as the International Center of Expertise of the International Chamber of Commerce when it concerns Community Objections and the EIU when it concerns CPE. The AGB is straightforward when it comes to who is responsible: "The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process."<sup>101</sup> ICANN community members express concern that the ICANN Board does not go into the merits of the decisions by the ICC or EIU and provides a mere 'rubber-stamping'. They do this with the best intentions; these Panels ought to have the expertise and have invested adequate time in their evaluations and thus is the ICANN Board by no means positioned to provide a better decision. However, members of the ICANN community indicate this leads to both the delegated decision-maker and ICANN avoiding responsibility; the delegated decision-maker argues ICANN is responsible, while the ICANN Board avoids responsibility by stating it cannot be held responsible, since the delegated decision-maker is best positioned to take the decision.

As in the IRP of *Donuts Inc vs. ICANN* concerning .SPORTS and .RUGBY mentioned above, the applicant had every right to expect independent, transparent and accountable decision-making, in accordance with fair and reasonable processes. That is the responsibility of the ICANN Board in conjunction with the responsibility of the delegated decision-makers. The experts are appointed by or under authority of the Board and as such – whether they are agents of the Board, staff members reporting to the Board, a Board member or an independent contractors of the board – are with the Board responsible for ensuring that their decisions comply with due process standards.<sup>102</sup> ICANN should make sure that both the

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<sup>101</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-17.

<sup>102</sup> See: International Centre for Dispute Resolution, Independent Review Panel, *Donuts, Inc vs. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel, Dissenting Opinion of Philip W. Boesch, Jr, Panel



delegated decision-maker and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board. ICANN needs to guarantee adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.

### *Qualifications of delegated decision-makers*

The competence and qualifications of panel members have been disputed both with regard to the International Center of Expertise of the International Chamber of Commerce when it concerns Community Objections and the EIU when it concerns CPE. It appears to be unclear to what extent panel members are required to have in-depth knowledge of the field to which the application or objection relates. Does the ICC Panel or EIU Panel for example need qualifications when it comes community-related decisions, and/or knowledge when it comes to the substance of the application, such as knowledge concerning the context and background of the music community when considering .MUSIC, rugby community when considering .RUGBY or knowledge about the relevant actors and sub-scenes when deciding on the application or objections for the .GAY or .LGBT gTLD?

The Expert Appointment Process in New gTLD Dispute Resolution Procedures administered by the ICC makes clear that the following aspects matter for appointing panel members: “nationality, training, qualifications, languages spoken, prior experience and knowledge of specific areas of law”.<sup>103</sup> The EIU was selected as a Panel Firm for the gTLD evaluation process based on a number of criteria, including: “The Panel will be an internationally recognized firm or organisation with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role”.<sup>104</sup> In other words, the panel must have significant and demonstrated expertise in evaluating community applications in which the defined community (such as the gay community, music community, rugby community or sports community) plays an important role. This information provides insufficient insight into the extent to which panel members are expected to have community-specific expertise.

The suitability and qualifications of Panel members have been disputed and more clarity on what is required would prevent ambiguity. ICANN should provide clarity about the required community-specific expertise of panel members. Besides that, it is important that ICANN makes sure there is no appearance of impropriety. For that reason, due process requires a fully transparent process, including information about the Panel members and insight into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN.

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Member (5 May 2016), <https://www.icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf> (accessed 27 July 2016).

<sup>103</sup> International Centre for Expertise of the International Chamber of Commerce, The Expert Appointment Process in New gTLD Dispute Resolution Procedures Administered by ICC makes clear that the following aspects matter for appointing panel members, <https://newgtlds.icann.org/en/program-status/odr/icc-expert-appointment-process-25sep14-en.pdf> (accessed 27 July 2016).

<sup>104</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.22.

In brief, we recommend ICANN to:

- Assess whether it is desirable and feasible to open up the possibility to collectively file a Community Objection.
- Assess whether it is feasible and desirable for certain organisations within ICANN, such as ALAC and GAC, to be able to file Community Objections.
- Provide clarity on the expected costs for Community Objection.
- Lower the costs for Community Objection.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability and ensure consistency of decisions taken along the whole process: from objection to evaluation.
- Expose implicit standards that have influenced the delegated decision-makers in their decision-making and assess to what extent these standards correspond to the goal of community-based applications.
- Incorporate a proper appeal mechanism that has the capacity to re-evaluate the entire case, including the fairness of the process as well as the substance of the argument.
- Reconsider the standards on disclosure in the light of due process for both ICANN as well as delegated decision-makers.
- Guarantee that both delegated decision-makers and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board.
- Guarantee that adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.
- Reconsider the mandate of delegated decision-makers in the light of the UN Guiding Principles on Business and Human Rights and its requirements concerning the provision of an effective remedy.
- Provide clarity about the required community-specific expertise of panel members of delegated decision-makers.
- Provide the fullest disclosure when it comes to the qualifications and background of Panel members of delegated decision-makers as well as into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN in the light of due process.

## 6. Community Priority Evaluation

String contention occurs when two or more applicants for an identical or similar gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes. In case of similar gTLD strings, the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated. Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. If no settlement or agreement is reached, the applications will proceed to contention resolution through either Community Priority Evaluation, in certain cases, or through an auction.<sup>105</sup>

CPE is a method to resolve string contention. It will only occur if a community application is both in contention and elects to pursue CPE. The evaluation itself is an independent analysis conducted by a panel from the Economist Intelligence Unit. The EIU was selected for this role because it offers premier business intelligence services, providing political, economic, and public policy analysis to businesses, governments, and organizations across the globe. As part of its process, the EIU reviews and scores a community applicant that has elected CPE against the following four criteria:

- Community Establishment;
- Nexus between Proposed String and Community;
- Registration Policies; and
- Community Endorsement.

An application must score at least 14 out of 16 points to prevail in a CPE. This bar was set high deliberately because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants.<sup>106</sup> If a single community-based application is found to meet these community priority criteria, that applicant will be declared to prevail in the CPE and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as set out in the AGB.<sup>107</sup> If none of the community-based applications are found to meet the criteria, then all of the parties in contention (both standard and community-based applicants) will proceed to an auction.

This section examines the process for CPE and assesses the CPE criteria and scoring threshold in the light of international human rights law with a particular focus on due process standards. It is our contention that as the CPE assessment determines whether or not a CBA applicant gets priority over non-community applicants, which therefore presumes a successful delegation of the applied for string, the CPE is effectively a determination of rights.

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<sup>105</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 4.

<sup>106</sup> ICANN, 'Community Priority Evaluation (CPE)', <<https://newgtlds.icann.org/en/applicants/cpe>> (accessed 13 July 2016).

<sup>107</sup> See: ICANN, gTLD Applicant Guidebook, Version 2012-06-04, section 4-8.

We were told by senior ICANN staff that although the high level policy on community applications was agreed by the GNSO, implementation of the policy was delegated in full to ICANN staff. Although the staff who wrote the AGB consulted widely on it, final decisions were taken by staff without additional recourse to any other elements of the ICANN community. Furthermore, as the AGB was written prior to the identification of any presumptive community applications, a number of community applicants pointed out that they had not been able to contribute to the consultation process. They felt that this meant that the implementation was decided by ICANN staff who had primarily consulted with potential generic applicants who would ultimately be in competition with community-based applicants and were particularly concerned to prevent “gaming” of the system.<sup>108</sup> They considered that it was for this reason that the scoring bar was ultimately set as high as it was.

It should be noted that more recently the GNSO has established a role for itself in both policy making and policy implementation although they were not involved in any aspects of implementation of the CPE or community application process in the gTLD round under consideration.

### Costs

A regular complaint from CBAs was the cost of seeing through an application, particularly when the applicant was involved in objection and/or accountability mechanisms. The cost of applying for the CPE process had been \$22,000<sup>109</sup>, although they had been originally estimated in the AGB to cost \$10,000<sup>110</sup>. It was unclear why the cost had more than doubled. The EBU which had been successful in CPE for their application for the .RADIO string, estimates that the total amount they paid for ICANN processes during their entire application process was in the region of \$250k, (plus substantial legal, consultancy and communication costs). Some applicants we spoke to claim to have already spent a total well over \$1m for applications that to date have not prevailed. There were widespread claims of well-funded commercial competitors prolonging the contention process in order to wage a “war of attrition”, with claims that 60-70% of all objection procedures were undertaken by the “Big Four” registry companies. We were also told stories of competitors trying to negotiate with CBAs to pay them to drop their contention.

We recommend that for any future gTLD rounds consideration is given to reducing the costs for CBAs for all processes. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.

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<sup>108</sup> We made widespread enquiries about perceived actual ‘gaming’ by CBAs. The only concrete example given to us was that it was arguable that the applicant for dot.osaka ‘gamed’ the system by applying as both a generic and community based applicant. Moreover, Judge Charles N. Brower argued in the IRP decision concerning Dot Registry LLC, that Dot Registry gamed the system by means of its CBAs for .INC, .LLC and .LLP. See: the Dissenting Opinion by Judge Charles N. Brower, page 15, para 35 of the IRP, Final Declaration 29 July 2016 between Dot Registry LLC and ICANN, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>109</sup> See CPE FAQs available at <https://newgtlds.icann.org/en/applicants/cpe/faqs-13aug14-en.pdf>

<sup>110</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-46.

## *Time*

GNSO Principle A states that “New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.”<sup>111</sup> Unfortunately, the sheer and unexpected number of new applications resulted in a delay of ICANN’s own processes by about 7 months. Those applications still in contention have been open for some 4 years now, with no sign of imminent resolution of many of them. CBAs told us that it was their perception that ICANN had no internal deadlines for dealing with clarification issues, CPE, or replies to answers. But senior ICANN staff tell us that they did – but their targets were based on an estimated 500 applications, not the 2000 actuals. In fact, they say, their performance was proportionate. Going forward, ICANN staff say they would be prepared to have published deadlines if the number of applications were limited. They think it would also be helpful for there to be deadlines for the accountability mechanisms.

In order to manage expectations and enable a degree of accountability, ICANN staff should establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and appeal mechanisms for future gTLD rounds. These deadlines can be framed in bands, to take account of variances in the number of applications received.

## *Conflicts of interest*

It was pointed out to us that Eric Schmidt became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google’s former CEO). Google is in contention with CBAs for a number of strings, which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of Vint Cerf who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN’s reputation for taking decisions on a fair and non-discriminatory basis. This appearance of conflict can be particularly acute when ICANN is trying to introduce new community players into its sphere; as ICANN is by its history closely associated with the existing internet industry, it is easy to suspect that the odds will be stacked against new aspiring market entrants.

On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN’s stated policy on community priority and the potential revenues that can be earned through the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.

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<sup>111</sup> see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

## Assistance and dialogue

Under ICANN's published procedures, once a contention set is identified and an applicant is eligible for CPE, ICANN staff are available to advise on timing and to work with applicants to help them understand the process. However, the applicants we spoke to said that ICANN staff were never involved and did not help or assist. The result of this was the impression given to CBAs that the process was somehow divorced from ICANN's involvement altogether and merely handed over to the EIU to deal with. This was compounded by the fact that other than passing over any clarifying questions from the EIU (and many Evaluation Panels asked no questions), there was hardly any dialogue whatsoever with the EIU (or ICANN) during the CPE process. Indeed some applicants, such as the EBU, were notified by ICANN not to approach the EIU directly for clarification of issues because this was forbidden within the existing procedure.

Furthermore, objections, complaints to the Ombudsman or entry by contenders into the IRP process were not routinely communicated to CBAs. ICANN staff told us that these matters are published on the ICANN website, but confirmed that there is no specific procedure to inform affected applicants separately.

Another lack of dialogue involved the exclusion of applicants when contenders made objections, complaints or applications for accountability mechanisms; CBAs were given no opportunity to comment on contenders' claims, even where they considered the claims to be misleading.

ICANN should consider whether it should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms' length from ICANN, then there should be staff support for community applicants.

In addition, greater care could be taken to keep CBAs informed about anything which affects the progress of their application. They should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.

## Consistency

In February 2016, an IRP Panel issued its Final Declaration in the IRPs relating to .HOTEL and .ECO.<sup>112</sup> The Panel suggested that a system be put in place to ensure that CPE evaluations are conducted "on a consistent and predictable basis by different individual evaluators," and to ensure that ICANN's core values "flow through...to entities such as the EIU."

In response, the ICANN Board "notes that it will ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations. The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of

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<sup>112</sup> Available at <https://www.icann.org/en/system/files/bm/briefing-materials-2-redacted-10mar16-en.pdf>

ICANN's Articles of Incorporation. The Board also encourages ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when determining that requested documents will not be disclosed.<sup>113</sup>

A number of different areas of alleged inconsistency were put to us. First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. This is considered in more detail below.

The Guidebook says utmost care has been taken to avoid any “double-counting” – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria.

However, the EIU appears to double count “awareness and recognition of the community amongst its members” twice: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.

As an example, the .MUSIC CPE evaluation says:

*1A: However, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).*

*1B: However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.*

Although both 1A and 1B are part of the same criterion, the EIU has deducted points twice for the same reason.

It is also interesting to note that the EIU Panel has not considered this question of “cohesion” at all in the CPE for .RADIO, where the term does not appear.

Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others.

The EIU appears to have been inconsistent in its interpretation of “Nexus” Under Criterion 2 of the CPE process.

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<sup>113</sup> <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>

The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.

There is no evidence provided of the relative small and “more than small” segments of the identified communities which justified giving a score of 0 to one applicant and 2 to another.



The EIU has demonstrated inconsistency in the way it interprets “Support” under Criterion 4 of the CPE process.

Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from *a majority* of the community:

.HOTEL: “These groups constitute the recognized institutions to represent the community, and represent a majority of the overall community as defined by the applicant.”<sup>114</sup>

.RADIO: “the applicant possesses documented support from institutions/organizations representing a majority of the community addressed”.<sup>115</sup>

By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organisation exists either, but the EIU did not appear to be demanding one: “Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”<sup>116</sup>

Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.

Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, but that this did not affect the process as described in the AGB.

Fourth, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. An example that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE

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<sup>114</sup> See: <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6.

<sup>115</sup> See: <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7.

<sup>116</sup> See: <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf> p.11 and <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf> p.8.

panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.

We found that although the Statement of Works (SOW) between ICANN and the EIU<sup>117</sup> refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done. Indeed, a number of CBAs complained about the lack of quality control. Proper quality control, as alluded to in the SOW, should entail an independent party looking at a number of CPE reports to ensure consistency and quality control between them. A mere assessment of consistency and alignment with the AGB and CPE Guidelines does not suffice.<sup>118</sup> Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law).

Having a clear set of definitions and/or guidance that works across different but related ICANN processes would reduce apparent inconsistency. Furthermore, the application of a comprehensive Quality Control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.

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<sup>117</sup> See Section 8 of EIU Contract and SOW Information, at <https://newgtlds.icann.org/en/applicants/cpe>

<sup>118</sup> ICANN, 'Program Implementation Review' (29 January 2016), p. 122, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> (accessed 20 August 2016).

## Transparency

GNSO Policy Recommendation 1 states: “The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.”<sup>119</sup>

A number of complaints were raised on the grounds of lack of transparency. Applicants told us they are not given sight of the additional materials which the Panels consider as the basis of their decisions (such as EIU research, and opposition to applications). As a result, applicants are unable to counter any claims made in material submitted in opposition to their applications.

Nor are they given details of the individual panel members who undertake the evaluations. The anonymity of panel members has been defended on the grounds that the Panels are advisory only.

This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report <sup>120</sup>, the EIU state, “We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.” However, in all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.

When we researched this point, it became clear that although ICANN staff routinely checked the EIU Panel reports for clarity and comprehensiveness, they neither questioned nor rejected the Panel’s conclusions. In terms of ICANN’s own processes, CPE is a staff, not a Board decision and ICANN has in effect fully delegated the process to the EIU. This means that there is no means of appeal (as it is only a staff decision) and any review through the Independent Review Process is limited to a review by the Board Governance Committee of whether there has been any contravention of established policy or procedure by ICANN staff. As there is no transparency of the process followed by the EIU Panels when conducting CPEs, the hurdles for proving such a contravention are arguably unsurmountable.

As the CPE process – if successful – provides the CBA with the right to string priority, the lack of transparency of the evaluation process as well as the lack of an appeals process arguably fails to meet the principles of Article 6 of the ECHR.

It is therefore crucial that a full review of all processes should be undertaken with a view to introducing as much transparency and sharing of information as possible. The decision on CPE is a determination of the rights of the applicant and should therefore be subject to a full appeal process, regardless of where the initial decision is taken. But it is not a lower level

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<sup>119</sup> ICANN GNSO, ‘Introduction of New Generic Top-Level Domains - Final Report’ (8 August 2007), <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> accessed 24 August 2016.

<sup>120</sup> Case 15-00110 In a matter of an Own Motion Investigation by the ICANN Ombudsman, Report dated 13th October 2015.

decision which should be treated as inviolate by the ICANN Board; ultimately, greater responsibility than delegation to an external third party is called for.

### *EIU Guidance: timing and content*

It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available pre-submission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).

Care must be taken in any future new gTLD rounds to ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.

### *Scoring bar*

“An application must score at least 14 points to prevail in CPE. There was considerable debate about what the proper threshold should be for a prevailing score. The implications of a prevailing score are that the community-based application receives priority over all other applications in the contention set, so care needed to be taken to ensure that the threshold was set adequately high to prevent illegitimate use of the mechanism, while also allowing communities that met the definitions as established in the AGB to have a legitimate opportunity to pass the evaluation.”<sup>121</sup>

“It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application”<sup>122</sup>

Regardless of the reasoning, the relatively low number of applicants who have successfully got through CPE leaves room for question. Applicants, observers, and members of the ICANN community we spoke to believe that the hurdle of scoring 14 out of a maximum 16 points (i.e. 88%) is too high.

It is recommended that either the scoring system and points bar should be re-evaluated or a new process should be developed for assessing community applicants. Some suggestions are discussed below in chapter 8.

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<sup>121</sup> Final Issue Report on New gTLD Subsequent Procedures, 4 December 2015

<sup>122</sup> AGB 4.2

## Criteria

There are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. The application contains a set of questions specifically for CBAs and it is the answers to these questions which are assessed against the criteria should the applicant be eligible for and choose to enter CPE. The AGB describes the criteria and the EIU guidance adds subsequent elucidation on how the criteria will be interpreted.

Criterion 1 concerns “Community Establishment” and is divided between:

- 1A: Delineation (clearly delineated, organized, and pre-existing community) which carries a maximum score of 2 points, and
- 1B: Extension (considerable size and longevity), also with a maximum score of 2 points.

### **Contrast between the AGB, Application Form and EIU Guidelines (Community Establishment)**

AGB: "Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.

Application form: How is the community delineated from Internet users generally? Such descriptions may include, but are not limited to, the following: membership, registration, or licensing processes, operation in a particular industry, use of a language.

EIU: “Delineation” also refers to the extent to which a community has the requisite awareness and recognition from its members. The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certifications aligned with community goals, etc.

Criterion 2 considers the “Nexus” between the proposed string and community.

- 2A: Nexus (the string matches or identifies the community). This carries a maximum 3 points and it is not possible to score 1 under 2A; just 3, 2 or 0.
- 2B: Uniqueness (the string has no other significant meaning beyond identifying the community described in the application). This carries a score of 1 point.

Only two CBAs have scored the maximum on Nexus: Osaka and Spa. This is the hardest criterion to score full points on.

We consider the criterion of nexus to lack justification in the case of community TLDs; why should a string connected to a community bear such a close connection as to effectively disbar any other interpretation or meaning, as long as there is a clear connection between the string and the community?

### **Contrast between the AGB, Application Form and EIU Guidelines (Nexus)**

AGB: “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community... If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.

Application Form: Explain the relationship between the applied for gTLD string and the community. Explanations should clearly state:

- relationship to the established name, if any, of the community.
- relationship to the identification of community members.
- any connotations the string may have beyond the community.

EIU: “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.

Criterion 3 covers “Registration Policies” (each scoring a maximum of 1).

- 3A: Eligibility (eligibility restricted to community members).
- 3B: Name Selection (Name selection rules are consistent with the articulated community-based purpose of the applied for TLD).
- 3C: Content and Use (Rules of content and use are consistent with the articulated community-based purposes of the applied for TLD).
- 3D: Enforcement (policies include specific enforcement measures with appropriate appeal mechanisms).

### **Contrast between the AGB, Application Form and EIU Guidelines (Registration Policies)**

AGB: Accountability: The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Application Form: (b) Explain the applicant’s relationship to the community.

Explanations should clearly state:

- Relations to any community organizations.
- Relations to the community and its constituent parts/groups.
- Accountability mechanisms of the applicant to the community.

EIU: Do enforcement measures ensure continued accountability to the named community?

It should be noted that there is no monitoring by ICANN of enforcement of registry conditions once a string has been delegated. For all generic applicants, registration policies are left to the registry to determine with the only requirement being that the registries publish their policies. *ICANN introduced an important addition to the basic registration requirements with the Public Interest Commitment (PIC) Specification, which allowed applicants the opportunity to make specific public interest commitments based on statements made in their applications*

and/or additional public interest commitments which were not included in their applications but to which they intend to commit.<sup>123</sup> These commitments then become part of the applicant's new gTLD registry agreement. *Community applicants have not been required to submit a PIC Specification to incorporate the community restrictions proposed in their applications as binding commitments. However, any community applicant that does not submit a PIC Specification will still be expected to enter into a registry agreement incorporating the community registration restrictions proposed in the application. Especially when it comes to community-based applicants, PIC Specifications or community registration restrictions as proposed in the application should be binding commitments that are published. In this way, an element of self-regulation would operate through the ability of the relevant community and wider stakeholder group to monitor compliance with the applicant's obligations and to hold the applicant to account.*

Criterion 4 covers "Community Endorsement".

- 4A: Support (documented support from recognised community institutions/authority to represent the community). This carries a maximum of two points.
- 4B: Opposition (no opposition of relevance). This also carries two points.

It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: "Recognized" means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community." If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as "recognised" organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not "recognised". This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.

#### **Contrast between AGB, Application Form and EIU Guidelines (Opposition)**

AGB: Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

EIU: No guidance issued on any of "clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction".

- There is a real danger that opposition to an application can count against an applicant twice; first prior to CPE during a community objection process (and any subsequent reconsideration request) as well as under Criterion 4B. The AGB states: "When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context." Furthermore, The identification of whether an opposition is relevant or not, is something that needs to be carefully assessed to prevent opportunistic objections by competitors.

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<sup>123</sup> See: <https://newgtlds.icann.org/en/announcements-and-media/announcement-06mar13-en>; <https://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.

This group of criteria does not necessarily create a cohesive whole, as the questions which are being asked are basically: “Is the applicant representing a bona fide community, and does it have the support of that community?” “Is there a clear link between the community and the string which is being applied for?” and “Are the registration policies consistent with the community’s purpose?” These points need unpicking.

It seems to us that the core questions for ICANN to be assured of when giving priority to a CBA are the first ones: “Is the applicant representing a bona fide community, and does it have the support of that community?” We would add a third question here: “Is the applicant properly accountable to the community it represents?” If the answers to those questions are “yes”, then that should be the basis for awarding priority. The question of nexus is one which can be settled during the community objection process: if the applied for string does not have a clear connection to the alleged community, then the CBA will lose the community objection.

Arrangements for registration policies should, we believe, either be left to the registries or be mandatory requirements. Questions of how the string is used and who is eligible to use it should be matters for the community itself and the accountability mechanisms in place for the applicant. We believe there should be mandatory obligations for enforcement measures and in particular every community applicant should be required to have an appeal mechanism in place as a tool to assign 2<sup>nd</sup> level domains.

In brief, we recommend ICANN to:

- Consider reducing the costs for CBAs for future gTLD rounds. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.
- Establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and any appeal mechanisms for future gTLD rounds in order to further due process, manage expectations and enable a degree of accountability. These deadlines can be framed in bands, to take account of variances in the number of applications received.
- Take care to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.
- Consider whether ICANN should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms’ length from ICANN, then there should be staff support for community applicants.
- Take greater care to keep CBAs informed about anything which affects the progress of their application. To facilitate due process, they should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.
- Have a clear set of definitions and/or guidance that works across different but related ICANN processes to reduce apparent inconsistency. Furthermore, the application of a comprehensive quality control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.



- In any future new gTLD rounds ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.
- Either re-evaluate the scoring system and points to lower the bar or develop a new process altogether for assessing community applicants. The newly arrived CBA admitted within ICANN could contribute with their direct experience to this process to improve previous too restrictive rules.
- Full registry conditions, including key elements of the application and PICs, should be published to enable on-going monitoring by stakeholders to ensure compliance by the applicant to the community to which it is accountable.

## 7. Accountability mechanisms

There are no appeal mechanisms in place neither with respect to the Community Objection Procedure nor with regard to the CPE. In practice, applicants that were competing for the same string and were unsatisfied with the outcomes of these two procedures have sought justice or a win through existing mechanisms originally conceived to ensure ICANN's board accountability. These mechanisms include the Reconsideration Request, the Cooperative Engagement Process (CEP), the Independent Review Process (IRP) and filing a complaint to the Ombudsman. These mechanisms have not been designed to resolve string contention, but have been used as such due to dissatisfaction with the outcome of evaluations in earlier stages of the application procedure and the lack of alternative ways to appeal. This chapter looks at each of these mechanisms in turn and concludes that a simple appeal mechanism would better serve due process concerns, and be likely to be faster and cheaper than utilising the accountability mechanisms which were not designed for either the Community Objection Procedure or the CPE.

### *Reconsideration requests*

A Reconsideration Request can be filed by any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information.

Reconsideration requests have very limited scope in relation to CPEs. This is, as discussed above, because CPE is treated as a staff process that has been fully delegated from staff to the EIU. Even though ICANN is ultimately responsible for decisions arising from the CPE, ICANN staff confirmed to us that they have never challenged or disagreed with the recommendations made by EIU Panels. The decisions are taken by the Panel alone; ICANN staff verify the Panels' reports for completeness and ensure they are comprehensible for the ICANN community, they do not interfere with the scoring or the results.

The Board has designated the Board Governance Committee (BGC) to review and consider any such Reconsideration Requests.<sup>124</sup> A reconsideration request has for example been filed by Dotgay LLC. The request asked the BGC to reconsider the outcome of their CPE, which resulted in Dotgay LLC's .GAY application not achieving community priority. The BGC argued that it is only authorized to determine if any policies or processes were violated during CPE and that the BGC has no authority to evaluate whether the CPE results are correct. BGC decided in February 2016 that the CPE process for Dotgay LLC's .GAY application did not violate any ICANN policies or procedures.<sup>125</sup>

Under existing rules, reconsiderations are only permitted on the grounds that the published process has not been followed, either through error or malice. CBAs have pointed out that as applicants have no sight of what the EIU or the Panels have done, they are not in a good position to identify whether or not the published process has been followed. In the future, however, reconsiderations will also be permitted on the grounds that the decision has gone against ICANN's mission. This provides greater accountability and may allow more scope for successful reconsiderations of CPE outcomes.

In cases where a third party requests a reconsideration of a CPE which has evaluated in favour of a CBA, community applicants have indicated that they are not included at all in the process. Under ICANN rules, reconsiderations are bilateral between the claimant and ICANN with no involvement of third parties. Given that erstwhile priority CBAs could potentially have their rights fundamentally affected by the outcome of such a reconsideration, it seems counter to fair process for them not to be consulted or given an opportunity to comment on matters which directly affect them.

The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) “failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).”<sup>126</sup> The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws. The procedural flaws addressed by this Independent Review Panel must be corrected before any next rounds of gTLD applications take place.

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<sup>124</sup> ICANN, Bylaws, Article IV: Accountability And Review, Section 2: Reconsideration, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV>> (accessed 13 July 2016).

<sup>125</sup> ICANN, ‘BGC’s Comments on Recent Reconsideration Request, <<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>> (accessed 13 July 2016).

<sup>126</sup> See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

## *Independent Review Process (IRP)*

Another accountability mechanism that has been used to obtain some sort of review of decisions made with regard to CBAs is the independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws.<sup>127</sup> The Panel compares contested actions of the Board to the Articles of Incorporation and Bylaws, and declares whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must focus on issues of conflict of interest, due diligence/care and whether the Board members exercise independent judgment.<sup>128</sup> The Panel is not asked to, nor allowed to, substitute its judgment for that of the Board.<sup>129</sup> The Panel does not have the mandate to review the actions or inactions of ICANN staff or third parties, such as objection experts or the CPE Panel, who provide services to ICANN.<sup>130</sup> The only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN Articles or Bylaws in acting or failing to act with respect to that conduct.<sup>131</sup> The IRP is considered the last resort and is decided upon by the International Centre for Dispute Resolution.

Prior to initiating an independent review process, 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.<sup>132</sup> Cooperative engagement is expected to be among ICANN and the requesting party, without reference to outside counsel.<sup>133</sup> Again, if the cooperative engagement involves a contender for a string which has been subject to a successful CPE process, the CBA is not permitted to participate or make written submissions. This lack of transparency has caused some IRP cases to take as long as 2 years (including the Cooperative Engagement Process) to resolve, where the intention of the complainant was apparently to delay the gTLD launch of potential competitors. This “gaming” of the rules by some of the stronger actors in the market, has been also noted by the Ombudsman in its own motion report on CBA.<sup>134</sup>

Under the current system, the applicant chooses one IRP panel member, ICANN chooses one, and they jointly appoint a third. The process is costly for the applicant. Under the new

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<sup>127</sup> [ICANN, Bylaws, Article IV, Section 3.](#)

<sup>128</sup> ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

<sup>129</sup> See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

<sup>130</sup> ICANN, Approved Board Resolutions - Regular Meeting of the ICANN Board (25 June 2016), Consideration of Independent Review Panel's Final Declaration in the Donuts Inc. v. ICANN IRP, <<https://www.icann.org/resources/board-material/resolutions-2016-06-25-en#2.d>> (accessed 14 July 2016).

<sup>131</sup> See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

<sup>132</sup> ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

<sup>133</sup> ICANN, Cooperative Engagement Process – Requests for Independent Review 11 April 2013, <<https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>> (accessed 13 July 2016).

<sup>134</sup> <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>

Bylaws, this is proposed to change to create a cheaper mechanism for the applicant: ICANN will select seven individuals to be standing members of the IRP and the applicant will select individuals to sit on any specific review.

The ICANN Board adopted New Bylaws on 27 May 2016. These New ICANN Bylaws will be deemed effective upon the expiration the IANA Functions Contract between ICANN and NTIA. Under the new process the scope of IRP will broaden. The new Bylaws prescribe that ICANN needs to act in compliance with its Articles of Incorporation and Bylaws as well as its Mission. The actions that are covered by IRP is extended and includes the actions and inactions of ICANN staff members more explicitly as well as action or inaction that resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws. Under the new Bylaws, each IRP Panel shall conduct an objective, de novo examination of the Dispute, which will lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction. Under the new process and 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.<sup>135</sup>

This new process is a major improvement in term of human rights and due process in particular. However, in principle, and similar to the Reconsideration Request, the Panel does not have the mandate to affirm, reverse or vacate the decision. The Panel can only assess whether ICANN acts in accordance with its mission, Bylaws and Articles of Incorporation. This means that there is no adequate mechanism of checks and balances in place, which is a foundational aspect of accountability. Under the new Bylaws, the IRP Panel conducts de novo review, thus, the Panel acts if it were considering the question for the first time. The extent to which this 'de novo' review includes the capacity to do its own fact finding is not clear. As it stands, the outcomes of a Reconsideration Request and of an IRP are solely recommendations to the Board as to whether the mission, Bylaws and Articles of Incorporation have been respected. As such, the Board has the capacity to judge on the merits of the case. There is no reason to believe that the Board is better positioned than an Independent Review Panel that relies for its verdict solely on ICANN's mission, Bylaws and Articles of Incorporation to judge upon the substance of the case.

### *Ombudsman*

In addition to these accountability mechanisms ICANN has its own independent and impartial Ombudsman. The Ombudsman's function is to act as an Alternative Dispute Resolution office for the ICANN community who may wish to lodge a complaint about an ICANN staff, board or supporting organization decision, action or inaction. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly.<sup>136</sup> The Ombudsman has been asked to look at decisions of the ICANN Board in Reconsideration Requests and received many complaints concerning the CPE process. Both Chris LaHatte and Herb Waye (Ombudsmen) indicate their role is not to conduct a first

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<sup>135</sup> ICANN, Bylaws adopted by ICANN Board on 27 May 2016, section 4.3,

<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> accessed 25 August 2016.

<sup>136</sup> ICANN, What the Ombudsman Can Do for You, <<https://www.icann.org/resources/pages/contact-2012-02-25-en>> (accessed 13 July 2016).

level review; their role is to provide recommendations (not binding) concerning the fairness of the process.<sup>137</sup> The Ombudsman perceives informality to be the strength of the ICANN Ombudsman, the Ombudsman does not prescribe to change policy, but helps to solve problems by talking to the parties.<sup>138</sup>

Although lodging a complaint with the ICANN Ombudsman is not strictly an accountability mechanism, it operates in a similar way insofar as it works to block the progress of an application. Complaints arise about how long an application can be blocked by the Ombudsman's own process and the lack of transparency. Moreover, when a third party makes a complaint to the Ombudsman the other parties in contention, including CBAs, are not specifically informed, even though the complaint blocks the furthering of the process. There is no communication between the Ombudsman and these other parties in contention, including CBAs, on grounds of 'confidentiality'.

The somewhat informal manner in which the ICANN Ombudsman operates does not seem to fulfil a clear purpose when extremely valuable gTLDs are in contention. It seems highly unlikely that a disgruntled applicant will accept a view from the Ombudsman that ICANN did act fairly without resorting to more formal accountability mechanisms. As such, complaining to the Ombudsman is too easily used as just another obstructing mechanism.

Based on a number of different complaints about the CPE process, the Ombudsman undertook his "own motion investigation" into the issues raised in these complaints as well as the overall CPE process.<sup>139</sup> The Ombudsman criticised an element of the CPE process, such as anonymity of the EIU Panel members, but has not found issues sufficiently serious to recommend any action other than recommendations about changes for the next round.

### *Legal process*

The contracts that applicants sign with ICANN on submitting their application commits them against bringing legal action against ICANN.<sup>140</sup> However, the US District Court in Central California rejected the validity of that prohibition when it issued an injunction against ICANN in favour of one of the applicants for the .AFRICA string. On 12 April 2016 the same court granted a preliminary injunction to prevent ICANN delegating the string to another applicant who, in ICANN's view, had successfully gone through the evaluation process for a geographic name. The Court held that the circumstances of the case raised serious questions about the enforceability of the Release against bringing litigation on the grounds of it being contrary to California Civil Code § 1668 which says that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud,

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<sup>137</sup> Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki.

<sup>138</sup> Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki. See also: Office of the Ombudsman, Case 16-00177, In a matter of a Complaint by dotgay LLC, 27 July 2016, <http://www.lahatte.co.nz/> (accessed 29 July 2016).

<sup>139</sup> Office of the ICANN Ombudsman, Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman (13 October 2015).

<sup>140</sup> See Module 6, AGB, para. 6 "Applicant agrees not to challenge, in court or in 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 for a on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application."

or wilful injury to the person or property or another, or violation of law, whether wilful or negligent, are against the policy of the law.”

It is particularly interesting that this case was brought by the applicant on First Amendment (freedom of speech) grounds and successfully persuaded the Court that once the string was delegated, the applicant’s rights would be abrogated. Furthermore, the Court considered the public interest in granting an injunction: “Here, the public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today’s society. A full hearing on the merits of the case has not been set, but it does set a precedent to suggest that applicants who have gone through ICANN’s own accountability processes may still have recourse to a court of law.

### *Appeals*

ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN.<sup>141</sup> This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a “decision” which it will not question.

Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.

The GAC has expressed its concerns about the consistency of the CPE process and asked the ICANN Board to consider implementing an appeal mechanism in the current round of the new gTLD Program. In a letter from the ICANN Board to the GAC Chair<sup>142</sup>, the Board declined to do so for the current round. The New gTLD Programme Committee (“NGPC”), “determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. The NGPC recommended that the development of rules and processes for future rounds of the New gTLD Program should explore whether there is a need for a formal review process with respect to Expert Determinations more broadly, including CPE determinations.”

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<sup>141</sup> *Ibid (emphasis added)* “Applicant acknowledges and accepts that applicant’s nonentitlement to pursue any rights, remedies, or legal claims against ICANN or the ICANN affiliated parties in court or any other judicial fora with respect to the application shall mean that applicant will forego any recovery of any application fees, monies invested in business infrastructure or other startup costs and any and all profits that applicant may expect to realize from the operation of a registry for the TLD; **provided, that applicant may utilize any accountability mechanism set forth in iCANN’s bylaws for purposes of challenging any final decision made by ICANN with respect to the application.**”

<sup>142</sup> Dated 28 April 2015

ICANN should institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeals mechanism could effectively replace the other existing ICANN accountability mechanisms.

In brief, we recommend ICANN to:

- Institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeal mechanism could effectively replace the other existing ICANN accountability mechanisms.

## 8. Concepts for the next gTLD application rounds

The following are some ideas that arose through our research and discussions which we propose for further consideration by the ICANN community. It may be that a combination of proposals would create a fair and transparent process which meets both GNSO and human rights principles.

### *Consider community applications first*

ICANN staff who have been involved with the current new gTLD round have suggested that in any new round, community applications should be considered first. If, after evaluation, an applicant is deemed to be “community” (in ICANN terms), then no other applications for the applied-for string should be considered.

### *Consider whether the model applied for geo-names TLDs could offer possibilities for CBA*

In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).

### *Have applications in staggered batches*

ICANN could invite “expressions of interest” in applying, asking potential applicants to submit an interest in a string of their choice. ICANN could then advertise the strings in batches, requiring all competing applications to be submitted simultaneously. At the same time, they could ask for any community objections. This would help ICANN manage the workload and make keeping to deadlines feasible. Publishing a timetable for future string batches would also help potential applicants manage their application workload and business expectations. This would also comply neatly with GNSO Principle 9: “There must be a clear and pre-published application process using objective and measurable criteria. “

### *‘Beauty parade’ for all applications*

Rather than having a high bar for priority, ICANN could consider all applications for a particular string together. Retaining the principle of preference for bona fide communities, all applications from self-declared CBAs should be looked at together to determine which one best meets the selection criteria. The criteria would be similar to those in the AGB for CPE.

Given that many ICANN stakeholders seem troubled with the notion of a “beauty parade” involving subjective judgement, it is important that any competitive assessment be based on transparent and clear criteria and that the assessment Panel be truly accountable (unlike the EIU Panel). It may be appropriate to construct a Panel consisting of members appointed by the ICANN multi-stakeholder community.



### *Have a different community track*

Most countries around the world have systems in place for the licensing and regulation of community media.<sup>143</sup> Useful precedents can be borrowed from these existing regimes. For example, in the UK the telecoms and broadcasting regulator Ofcom requires community media, “Not be provided in order to make a financial profit, and uses any profit produced wholly and exclusively to secure or improve the future provision of the service or for the delivery of social gain to members of the public or the target community.”<sup>144</sup> Furthermore, community media must be accountable to the target community.

ICANN already sets more stringent registry conditions for strings delegated to CBAs, so there is a precedent for treating community applicants differently. Setting tougher criteria which would effectively deter any commercial applicant from “gaming” as a CBA would make it much easier to assume that a self-declared CBA actually is one. In effect, it could make the practical application of GNSO Guideline IG H much simpler: claims that an application is in support of a community will be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application.”<sup>145</sup>

A tighter set of restrictions on how a community string can be used and on the use of profits would mean that generic commercial applicants would have no interest in pretending to be communities. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community. Certain mandatory registry requirements could be set in advance, such as having an effective appeals mechanism.

At the moment, accountability to the community is merely a background factor only taken into account by the EIU when considering Enforceability under Criterion 3, CPE Guidelines: “The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.” It is not a determining factor in itself, whereas it could be a major determinant in identifying bona fide CBAs.

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles<sup>146</sup> refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the CBA applicant and

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<sup>143</sup>In the US, the FCC licenses non-profit stations but these are meant to be exclusively granted to “educational organizations”, so not of particular relevance to ICANN. In fact, most are licenced to either NPR or religious organisations.

<sup>144</sup>See Para 2.2 at <http://licensing.ofcom.org.uk/binaries/radio/community/thirdround/notesofguidance.pdf>

<sup>145</sup> GNSO 2007 Principles and Recommendations

<sup>146</sup> GNSO Principles E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN’s Registry agreement.” Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.” Principle 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to could lead to contract termination. “

its community – and ensuring they can be enforced going forward – will strengthen compliance with the GNSO principles.

## 8. Conclusion

ICANN's remit is to look after the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN's function as a global governance body that develops Internet policy has the capacity to impact on human rights such as the rights to freedom of expression, freedom of association, due process and non-discrimination. This report has reviewed the range of problems encountered by community applicants and sought to identify how such problems could be avoided in future gTLD application rounds. This study aims to catalyse discussion on CBAs and human rights and to contribute to the GNSO Policy Development Process (PDP) on this issue. The findings of the study stem from in-depth analysis of ICANN's policies and procedures, international human rights law and interviews with community-based applicants, ICANN staff and other relevant actors within the ICANN community. This report intends to assist ICANN in implementing its commitment to the global public interest and international human rights law.

The ICANN community went to considerable lengths to prepare the new gTLD program and the Applicant Guidebook as the user manual for the process. It is inevitable that there would be problems with the process as a whole and community-based applications; the process was brand new and it was expected that situations would arise that could not have been anticipated. The first round of applications provides the ICANN community with a wealth of information based on which ICANN's policies and procedures can be re-evaluated to improve ICANN's policies and procedures for the subsequent round of gTLD applications.

Our study reveals that the intended goal of the concept of prioritising communities is insufficiently developed. It is insufficiently clear which public interest values are served by CBAs and which types of individuals or groups should be regarded as communities to fulfil this goal. The ICANN community should invest time in fundamentally re-assessing the purpose of CBA to be able to provide a clear insight into the values it is meant to serve. This will provide the necessary guidance on the definition of communities to provide delegated decision-makers, such as the ICC and EIU, with the contextual background required for them to decide on objections and CPE in the light of the public interest purpose of community priority. The current assessment by delegated decision-makers based on strict metrics alone as set out in the AGB and CPE Guidelines is insufficient to live up to due process standards.

In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.<sup>147</sup> Here, he took to task the fact that the BGC has “a very narrow view of its own jurisdiction in considering reconsideration requests.” He points out that “it has always been open to ICANN to reject an EIU recommendation, especially when public interest considerations are involved.” As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it “has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency”. We endorse his view and hope that our report will strengthen the argument

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<sup>147</sup> Available at <http://www.lahatte.co.nz/>.

behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.

In delegating global top level domains, ICANN is allocating scarce and valuable resources in a competitive market, much the way governments and regulators allocate spectrum. Just as spectrum is allocated through a combination of: auctions (typically for telecommunications use where only light touch obligations are placed on the use of spectrum), specific allocation for government and defence need, and special licensing (for broadcasting with particular obligations on use), ICANN delegates domain names for generic purposes, specific geographic country use, and special community use. The process for special delegations is still in its infancy and, as demonstrated in this report, is in need of considerable re-evaluation and development. The opportunities for ICANN as an exemplar for global governance are enormous as it builds on its multi-stakeholder model to become a truly international and inter-state body. But just as regulators have learned to be “principles-based”, ICANN must learn to take decisions that are not simply binary ones developed from “box ticking” assessments. ICANN must develop confidence in taking judgements based on its core values and principles.

## List of interviewees

- Mark Carvell, member GAC, UK
- Dr Olga Cavalli, member GAC, Argentina
- Avri Doria, member GNSO, Community TLD Applicant Group
- Christine Willett, ICANN staff
- Chris LaHatte, ICANN Ombudsman
- Herb Waye, ICANN Ombudsman
- Representative from CORE Registry: Werner Straub
- Representatives from Decherts LLP: Erica Franzetti, Harsh Sancheti and Erin Yates.
- Representative from dotgay LLC/.Gay application: Jamie Baxter
- Representatives from DotMusic/.MUSIC application: Constantine Roussos, Tina Dam, Paul Zamek, Jason Schaffer
- Representatives from EBU/.RADIO application: Alain Artero and Giacomo Mazzone

**[www.coe.int](http://www.coe.int)**

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

# **Exhibit 28**

[GET STARTED \(/GET-STARTED\)](#)[NEWS & MEDIA \(/NEWS\)](#)[POLICY \(/POLICY\)](#)[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)[RESOURCES \(/RESOURCES\)](#)[COMMUNITY \(/COMMUNITY\)](#)[IANA STEWARDSHIP  
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

## Minutes | Board Governance Committee (BGC) Meeting

01 Aug 2017

BGC Attendees: Cherine Chalaby, Chris Disspain (Chair), Markus Kummer, Ram Mohan, and Mike Silber

BGC Member Apologies: Rinalia Abdul Rahim and Asha Hemrajani

Other Board Member Attendees: Becky Burr, Steve Crocker, and Ron da Silva

ICANN (Internet Corporation for Assigned Names and Numbers) Organization  
Attendees: Michelle Bright (Board Content Senior Manager), John Jeffrey (General Counsel and Secretary), Vinciane Koenigsfeld (Board Training & Content Senior Manager), Elizabeth Le (Associate General Counsel), Wendy Profit (Manager, Board Operations), and Amy Stathos (Deputy General Counsel)

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The following is a summary of discussions, actions taken, and actions identified:

- **Update on Community Priority Evaluation Process Review (Review)** - The BGC received a briefing on the status of the CPE process review. The second track of the Review, which focuses on gathering information and materials from the CPE provider, is still ongoing. This is in large part because, despite repeated requests from ICANN (Internet Corporation for Assigned Names and Numbers) beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced. FTI is in the process of reviewing the documents that have been produced. The BGC



discussed the importance of bring the work on the second track to a closure within a definitive time period so that the FTI can conclude their work.

- Action:
  - ICANN (Internet Corporation for Assigned Names and Numbers) organization to follow up with FTI on what documents are outstanding from the CPE provider in response to FTI's document request.
  - ICANN (Internet Corporation for Assigned Names and Numbers) organization to continue providing the BGC with updates on the status of the review, and publish update(s) as appropriate.
- **Board Committee and Leadership Selection Procedures** - The BGC reviewed and discussed proposed revisions to the Board Committee and Leadership Selection Procedures (Procedures). The BGC agreed that Committee members should review revisions and provide further edits, if any, by the next BGC meeting, whereupon the Committee will revisit the issue.
  - Action:
    - BGC members to provide comments and further edits to the Procedures via email by the next BGC meeting.
- **Discussion of Board Committees and Working Groups Slate** – The BGC discussed the Board Committees and Working Group slates based upon the preferences indicated by the Board members. The BGC also discussed standardizing the Committee charters to specify a minimum and maximum number of Committee members but allow flexibility for the composition of Committee within that range.
  - Action:
    - ICANN (Internet Corporation for Assigned Names and Numbers) organization to revise the Committee charters in accordance with the discussion regarding composition of the Committees for consideration by the BGC at its next meeting.
- **Any Other Business**
  - Nominating Committee (NomCom) 2018 Chair and Chair-Elect Leadership – The BGC noted that it is anticipated that the interview process for the NomCom 2018 Chair and Chair-Elect Leadership will be completed by the next BGC meeting and that the BGC will discuss its recommendations at the meeting.

Published on 24 August 2017.

Initiative  
(/resources/pages/universal-acceptance-2012-02-25-en)

▶ Policy  
(/resources/pages/policy-01-2012-02-25-en)

▶ Public Comment  
(/public-comments)

Root Zone (Root Zone) KSK Rollover  
(/resources/pages/ksk-rollover-2016-05-06-en)

▶ Technical Functions  
(/resources/pages/technical-functions-2015-10-15-en)

▶ Contact (/contact)

▶ Help  
(/resources/pages/help-2012-02-03-en)



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[Newsletters](https://www.icann.org/resources/pac-newsletter-2018)

(<http://www.youtube.com/icann-us>) (<https://www.twitter.com/icann-us>) (<https://www.linkedin.com/company/icann>) (<http://www.flickr.com/photos/icann/>) (<https://www.facebook.com/icann-us>) (<https://www.icann.org/resources/pac-newsletter-2018>)



[Community Wiki](https://community.icann.org)



[ICANN Blog \(/news/blog\)](/news/blog)

(<https://community.icann.org>)

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<a href="/en/about/learning">Learning</a> (/en/about/learning)	<a href="/resources/pages/customer-support-2015-06-22-en">Global Support</a> (/resources/pages/customer-support-2015-06-22-en)	<a href="/en/news/in-focus/accountability/mechanisms">Mechanisms</a> (/en/news/in-focus/accountability/mechanisms)	<a href="/en/about/agreements">Agreements</a> (/en/about/agreements)	<a href="#">Domain Name Dispute Resolution</a> (/en/help/dndr)	<a href="#">Privacy Policy</a> (https://www.icann.org/privacy)
<a href="/en/about/participate">Participate</a> (/en/about/participate)	<a href="#">Report Security Issues</a> (/resources/pages/report-security-issues-2018-05-24-en)	<a href="/resources/pages/irp-2012-02-25-en">Independent Review Process</a> (/resources/pages/irp-2012-02-25-en)	<a href="/resources/reviews/aoc">Specific Reviews</a> (/resources/reviews/aoc)	<a href="#">Name Collision</a> (/en/help/name-collision)	<a href="#">Terms of Service</a> (https://www.icann.org/privacy)
<a href="https://www.icann.org/resources/pages/groups-2012-02-06-en">Groups</a> (https://www.icann.org/resources/pages/groups-2012-02-06-en)	<a href="#">PGP Keys</a> (/en/contact/pgp-keys)	<a href="/groups/board/governance/about/financials">Request for Reconsideration</a> (/groups/board/governance/about/financials)	<a href="/about/annual-report">Annual Report</a> (/about/annual-report)	<a href="#">Registrar Problems</a> (/en/news/announcements/announcement-06mar07-en.htm)	<a href="#">Cookies Policy</a> (https://www.icann.org/privacy)
<a href="/resources/pages/board-of-directors-2014-03-19-en">Board</a> (/resources/pages/board-of-directors-2014-03-19-en)	<a href="#">Certificate Authority</a> (/contact/certificate-authority)	<a href="/help/ombudsman">Ombudsman</a> (/help/ombudsman)	<a href="/en/about/transparency">Financials</a> (/en/about/transparency)	<a href="#">WHOIS</a> (https://whois.icann.org/en)	
<a href="/presidents-corner">President's Corner</a> (/presidents-corner)	<a href="#">Registry Liaison</a> (/resources/pages/contact-f2-2012-02-25-en)	<a href="#">Empowered Community (/ec)</a>	<a href="/en/about/planning">Planning</a> (/en/about/planning)		
<a href="/organization">Staff</a> (/organization)			<a href="#">KPI Dashboard</a> (/progress)		
<a href="https://www.icann.org/careers">Careers</a> (https://www.icann.org/careers)			<a href="/en/news/rfps">RFPs</a> (/en/news/rfps)		
<a href="/en/news/newsletter">Newsletter</a> (/en/news/newsletter)	<a href="https://forms.icann.org/en/about/aoc-review/contact">Specific Reviews</a> (https://forms.icann.org/en/about/aoc-review/contact)		<a href="/en/news/litigation">Litigation</a> (/en/news/litigation)		
<a href="https://www.icann.org/dp">Public Responsibility</a> (https://www.icann.org/dp)	<a href="#">Organizational Reviews</a> (http://forms.icann.org/en/groups/reviews/contact)		<a href="/en/news/correspondence">Correspondence</a> (/en/news/correspondence)		
	<a href="https://www.icann.org/complaints-office">Complaints Office</a> (https://www.icann.org/complaints-office)				
	<a href="http://forms.icann.org/en/contact/speakers">Request a Speaker</a> (http://forms.icann.org/en/contact/speakers)				
	<a href="/en/news/press">For Journalists</a> (/en/news/press)				

# **Exhibit 29**

## Document information

**Publication**

Competing for the Internet - ICANN Gate - An Analysis and Plea for Judicial Review through Arbitration

**Bibliographic reference**

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## Chapter 2: The Regulatory Framework

### A ICANN AND ITS ROLE

#### 1 Introduction

ICANN is the abbreviation for 'Internet Corporation for Assigned Names and Numbers', a not-for-profit public-benefit corporation formed in September 1998. (4) ICANN's primary mission is to coordinate, at the highest level, the Internet's systems of unique identifiers globally, (5) and in particular to ensure the stable and secure operation of the Internet's unique identifier systems, the Domain Name System or 'DNS'. (6)

The DNS is a hierarchical structure that permits the use of a stable and orderly system of unique identifiers, allowing computers to communicate over the Internet. The Internet is a network of computer networks. Every computer on this network has a unique identifying Internet Protocol address or 'IP address'. Each IP address can be substituted with an easy to remember set of characters or letters which becomes the domain name. Domain names have become part of website addresses, email addresses and File Transfer Protocol (FTP) servers. The DNS helps make the Internet more accessible by allowing users to type in a domain name instead of an IP address, for example typing 'www.wolterskluwer.com' rather than typing '85.17.2.5'. Even in a world where applications can be a substitute for more traditional webpages, and where the majority of traffic is generated via search engines and not via direct navigation, domain names have retained much of their original appeal. A domain name can provide a source of recognition and serve as an anchor of trust. When visiting the website of a brand owner, the domain name in the browser's address bar may give assurance that the visitor is dealing with the true brand owner. The DNS also enables a single domain name to be linked to multiple servers, making it possible to offer a redundancy solution in case a server is down. The DNS also offers crucial support for the technological developments known as the 'Internet of things'. Developed in the 1980s, (7) the DNS remains a critical backbone supporting the Internet and the digital economy.

As the invention of the Internet and the DNS predates the existence of ICANN by many years, it is interesting to look at how ICANN became the custodian of this critical infrastructure.

#### 2 History of the Internet

##### a The Invention Of The Internet And The Dns

It is hard to imagine a world where computers are stand-alone devices unable to communicate with each other. In today's world, we are constantly connected to a vast network of computers and servers via our smartphones, personal computers and tablets. In modern households, refrigerators, home appliances and other electronic devices are also connected and monitored via the Internet. The Internet has fundamentally changed the way we live. However, it may come as a surprise to many that the origins of the Internet can be traced back as far as the 1960s.

Until the late-1960s, long-distance communications occurred over circuit-switched networks. In a circuit-switched network, a continuous physical connection is created between the sender and the receiver, which lasts for the duration of the communication. In a circuit-switched network, there can be only one communication session per circuit at any one time. The main advantage of a circuit-switched network is that it provides for a continuous stream of data or bits and that, for the duration of the connection, maximal use can be made of the available bandwidth. Once the connection has been established, there will be no delays caused by other users of the network.

But, its main advantage is also its biggest weakness: excess bandwidth in a circuit-switched network is unavailable to other connections on the same network, making the network inefficient for the communication of mass data among a broad user network. Already in the early to mid-1960s, researchers were developing a communication method using packets rather than circuits. The first paper on this so-called packet switching theory was published in 1961. (8) Via packet switching technology, the data is divided into smaller packets and these packets are sent through the network independently. (9) The packets are distributed over multiple communication sessions, allowing for a more efficient use of the network's capacity and the communication of bigger data, divided in small packets. When, in 1965, researchers managed to make the first long distance communication between a computer at the Massachusetts Institute of Technology (MIT) and a computer in California, they used a low speed dial-up telephone line. (10) The experiment showed that computers could work together over long distances, but reaffirmed the need for packet switching technology as the circuit switched telephone system proved to be inadequate for communicating computer data efficiently over long distances. (11) Researchers quickly understood that packet switching technology would be more efficient and would allow for the communication of data in excess

of the maximum capacity of single telephone lines.

The U.S. Department of Defense was quick to recognize the military potential of a computer communication network. Already back in 1951, the U.S. Air Force had commissioned MIT to design an early-warning network to guard against a Soviet nuclear bomber attack. The network was to include a network of computers capable of communicating data about airplane movements in 'real time'. (12) The technical developments in the mid-1960s created an ideal environment for the Department of Defense, through its Advanced Research Project Agency (ARPA) to invest in a research project to build a decentralized communication network, and it did not take long for researchers to obtain USD 1 million in funding. (13) In 1967, the first plan for this communication network, the ARPANET, was published. (14) The plan was later refined to include packet switching technology, and the design was put into practice in September 1969 when the first packet switch, called Interface Message Processor (IMP), and a host computer were connected at the University of California, Los Angeles (UCLA). One month later, a second host computer and IMP were connected at the Stanford Research Institute (SRI), and on 29 October 1969, the first successful host-to-host message was sent from UCLA to SRI using the ARPANET. (15) Other institutions soon joined, connecting universities, the military and industries. In December 1970, researchers finished the development of a communication protocol, called the Network Control Protocol (NCP), which was implemented on the ARPANET throughout 1971 and 1972 and allowed ARPANET users to develop applications. (16) In 1972, email was introduced and quickly became one of the most popular applications on the ARPANET, allowing researchers to communicate better over long distances. (17) Also in 1972, the File Transfer Protocol (FTP) was developed, allowing the efficient and reliable transfer of files between host computers at remote locations and creating the possibility to store and access files at remote locations. (18)

However, the ARPANET was not the Internet, nor did it evolve into the Internet. It was a research project that connected at most about 200 people in a twenty-one-node network, and it was not very user-friendly. (19) The ARPANET's biggest achievement is probably that it brought together the people who later played a role in the technical development of the Internet. (20)

By the mid-1970s, many other computer networks emerged. *E.g.*, NASA established a computer network, the U.S. Department of Energy set up two, and the U.S. National Science Foundation (NSF) provided a grant to the Computer Science community to set up yet another network. (21) The majority of these early networks was intended for use within closed communities. Each network had its own design and characteristics with many different communication protocols, which made them incompatible with one another. In the early 1970s, researchers working on the ARPANET had been looking for ways to integrate radio and satellite networks into the ARPANET computer network. (22) The networks were largely incompatible; they operated in a completely different environment, using completely different transmission speeds and infrastructure. The researchers realized that the best way to integrate these networks was by establishing a gateway between the networks that would operate as a sort of translator between them. The idea of a router was born. Both networks would need to comply with the – yet to be developed – standards of the router, and the router's sole job would be to translate ARPANET packets into radio/satellite packets and *vice versa*. (23) The use of routers and the adoption of a universal protocol made interconnection between a virtually infinite number of networks possible.

The first version of a universal inter-networking protocol, or 'Transmission Control Protocol/Internet Protocol' (TCP/IP) was developed from 1974 onwards (24) and was deployed for military networks in 1982–1983. (25) Other networks also started using the TCP/IP to connect with each other in an expanding network of networks, which became known as the Internet. (26) From its early stages, the scope of this emerging Internet was international; the network of networks included the ARPANET and several U.S. research centers and universities as well as European institutes, such as University College London, the French Cyclades network, the British Post Office, etc. (27)

The connection between computers on the network was established using a unique numbering system. Such a system was first proposed by Jon Postel, who wrote in 1972:

'I propose that there be a czar (me?) who hands out official socket numbers for use by standard protocols. This czar should also keep track of and publish a list of those socket numbers where host specific services can be obtained.' (28)

Jon Postel became the first 'czar' for handing out unique numbers to network computers on the emerging Internet, and he refined the numbering system throughout the 1970s and the beginning of the 1980s. (29) In 1981, the addresses had a fixed length of four octets or 32 bits. (30) This addressing system became known by the name Internet Protocol version 4 (IPv4), (31) and was the first version that was effectively implemented on the ARPANET. (32) IPv4 has been replaced by Internet Protocol version 6 (IPv6), which uses 128 bits, theoretically allowing 2<sup>128</sup> IP addresses, (33) which is far more than the soon to be exhausted 2<sup>32</sup> (approximately 4.29 billion) IP addresses available under IPv4. IPv4 however remains responsible for the majority of Internet traffic today, (34) and the transition to IPv6 creates technological challenges as demonstrated by the large number of publications dealing with transition mechanisms. (35)

Throughout the 1980s, the assignment of IP addresses remained in the hands of individuals;

P 10 first the 'czar', Jon Postel, (36) who handed over the assigning authority to fellow researcher Joyce Reynolds in 1983. (37) The first steps towards making the assigning authority more institutionalized came with the creation of IANA. IANA is mentioned for the first time in a publication of 1988. (38) Joyce Reynolds remained IANA's contact until the 1990s. (39)

Computers on the Internet were able – as they still are today – to communicate efficiently via the IP addresses. The numeric IP addresses are less easily recognizable for humans. Every IP address that was assigned to a network was also assigned to the name of the network. (40) In the early stages, with a fairly limited number of computers on the network, it was relatively easy to navigate through the directory of names and numbers and to identify the correct computer. But as the network expanded, the directory became difficult to manage; the master file of the directory required constant updating, and all computers on the network needed a copy of the master file, which resulted in errors and slowness caused by the continual need to download the master file. (41) A more structured approach, adapted to the growing size of the Internet was required. In 1981, the idea to create a hierarchical name-space and to partition the name-space into different domains was brought forward. (42) The idea was further developed, (43) and ultimately resulted in the crystallization of a hierarchical structure, which became known as the DNS. (44)

At the top of the DNS hierarchical structure is a single unique root. The unique root distinguishes the Internet from alternative networks. The root contains the root zone file and thirteen clusters of root name servers. (45) The root zone file is the list of Top Level Domains (TLDs), with references to the name servers for each TLD (the TLD name server). TLDs, such as .com, .org, .mil, .gov, .us, .eu, .fr, etc., appear at the right of the rightmost dot in an Internet address or domain name. The root name servers are specialized computers that provide connections between physical networks; (46) they operate as the place where the query for a unique IP address starts. The process is as follows: computers connect to the Internet, using a modem, Ethernet or other communication line. Connections are provided by Internet Service Providers (ISPs). When a computer wants to access a specific computer or server on the Internet (e.g., the server on which Google's search engine is available or the server of Wolters Kluwer's website), the ISP will initiate a query for the unique IP address. For example, when an Internet user wants to access Wolters Kluwer's website using *wolterskluwer.com*, the ISP's name server will start its query at one of the root name servers. The root name server will respond by giving the location of the TLD name server – the .com name server in our example – as it appears in the root zone file. The ISP's name server will then query the TLD name server. The TLD name server, in turn, maintains records of all Second Level Domains (SLDs) in a specific TLD. In our example, 'wolterskluwer' is the SLD within the .com TLD. The operator of the TLD, named the 'registry' or 'registry operator', is responsible for maintaining accurate records of all SLD name servers, and will provide the ISP's name server with the location of the SLD name server. The SLD name server is generally controlled by the domain name holder, who can use the domain name for e.g., the exchange of emails, file sharing or, since the invention of the World Wide Web (WWW) in 1989 and its implementation in 1990, (47) the publication of websites. The SLD name server can also operate as a second-level registry and refer to a sub-level domain.

The obvious benefit of the DNS hierarchical structure is that it is no longer necessary for each computer to have a full list of addresses for every other computer. Each computer needs only the address of an official root name server. (48) In practice, the root name servers will not be queried for every domain name request. The ISP's servers will cache the information and rarely revisit the root name servers.

Another advantage of the DNS is that multiple IP addresses can be linked to a single domain name, allowing for redundancy and better performance.

## b. Evolution of Governance Structure

### (1) The Rapid Expansion of the Internet

In the early stages of the Internet, one of the most important networks was the National Science Foundation NET (NSFNET), developed with the backing of the National Science Foundation (NSF). The NSF is a U.S. Government agency that has the statutory mission 'to promote the progress of science; to advance the national health, prosperity and welfare; to secure the national defence.' (49) Unlike most other early computer networks, the NSFNET was designed to be open to all academic users and not limited to mere handfuls of specialized contractors and researchers. (50) The NSFNET essentially provided the technical backbone to establish a fast growing network of networks. Between 1991 and 1992 the network almost doubled in size, going from connecting over 3,500 networks to over 6,000 networks. (51) The amount of data transferred increased from 1.3 trillion bytes per month in 1991 to 17.8 trillion bytes per month in 1994. (52) The popularity of the Internet was boosted by the invention of the WWW and the use of the Internet for commercial purposes.

Between 1991 and 1992, the NSF had assumed responsibility for coordinating and funding the management of the non-military part of the Internet infrastructure. (53) The NSF was granted statutory authority to allow commercial activity on the NSFNET in 1992, (54) and this created interest in the private sector. On 31 December 1992, the NSF entered into a cooperative agreement with Network Solutions, Inc. (NSI). (55) NSI took over responsibility for the coordination and maintenance of the DNS, and registered domain names in the generic gTLDs on a first come, first served basis. (56)

## (2) The Commercialization of the Internet and Its Challenges

On 13 September 1995, the NSF allowed NSI to charge user fees for the registration of domain names. (57) NSI was authorized to impose an annual fee of USD 50 per second level domain name in .gov, .edu, .com, .net and .org, 30% of which was to be deposited into a separate account for the preservation and enhancement of the intellectual infrastructure of the Internet. (58) Nevertheless, NSI's monopoly over domain name registrations gave rise to criticism: concern grew over the stability and regulation of the DNS, and the number of trademark disputes regarding the Internet's naming system rapidly increased. (59) It was not long before the U.S. Government took steps to address the growing dissatisfaction about the absence of competition, the commercialization of the Internet and the lack of a formal and accountable structure to manage the Internet's critical infrastructure and functions. (60) The cooperative agreement between the NSF and NSI was set to expire on 30 September 1998. (61) The growing criticism and the upcoming expiry date created a clear incentive for the U.S. Government to affirm its authority over the Internet and to have an alternative Internet Governance system installed before the expiration of the contract.

## (3) Privatizing Internet Governance

In response to the growing criticism concerning Internet Governance, and in anticipation of the expiry date of the cooperative agreement, the Clinton administration began privatization efforts in July 1997 in an attempt to increase competition and to promote international participation in the DNS. (62) The U.S. Department of Commerce (DoC) issued a request for comments to ascertain the views of the public regarding various DNS management proposals as well as the underlying policy issues. (63) The U.S. Government received 432 comments, (64) and it was clear from the start that the U.S. Government and the public recognized the global significance of the Internet, and that they were looking for an accountable and fair governance structure, aimed at increasing competition and relying on market mechanisms and self-governance by the private sector, with input from governments. (65) The tension between private sector-led self-governance and governmental input was apparent from the very start, and commentators asked for clarification about the role of governments and the limitation of their involvement. (66) To promote competition, there was immediate and considerable support for 'cautiously and judiciously' adding gTLDs once the new governance structure was in place. The public was concerned, however, about the stability of the system and the potential for a significant increase in domain name and trademark disputes, and it was wary of new governance mechanisms. (67) Almost twenty years later, these concerns are still very much alive.

### (a) Creating Policy: The Green Paper

On 30 January 1998, the DoC issued a proposal to improve the technical management of Internet names and addresses. (68) The proposal, which became known as the 'Green Paper', was published on 20 February 1998, (69) and a public comment period ran until 23 March 1998. (70) The Green Paper set out a plan whereby the U.S. Government would gradually transfer existing IANA functions, the root system and the appropriate databases to a new not-for-profit corporation. (71) The plan was for the U.S. Government to transfer operational responsibility to the new entity, but to maintain policy oversight 'to assure stability until the new corporation is established and stable, phasing out as soon as possible'. (72)

Many commentators from the international community criticized the Green Paper, emphasizing the international scope of the Internet and the importance for the U.S. Government to acknowledge the Internet's inherently global nature and to involve the global community. (73) The European Community (now, the European Union) called for a more international approach in Internet governance, and expressed their concern that, 'in the name of the globalization and privatization of the Internet' the U.S. would claim and consolidate 'permanent US jurisdiction over the Internet as a whole.' (74) The United Nations, in connection with its Asia-Pacific Development Information Programme (APDIP) called for increased transparency and for the further progress and administration of the Internet 'in partnership with an organization which unmistakably represents the international community of Internet regulators, providers and users.' (75) It also warned that '[t]he call to relinquish government control over this critical resource may be premature and counter-productive', as 'in the vast majority of countries, access to the Internet depends wholly on Government engagement, participation and support'. (76) The Japanese Telecommunications Bureau shared the call for internationalization of the Internet's management and emphasized the need for democratic decision-making and fairness. (77) Similar concerns were expressed by the Internet industry and civil society in Asia, Australia and New Zealand. (78) The International Trademark Association (INTA) also noted 'the importance of incorporating and being mindful of the international and commercial nature of the Internet.' (79) In the U.S. itself, academics, companies and associations voiced a similar plea to include the international community. (80)

A significant number of commentators expressed their support for a proposed plan to hand substantial authority over Internet policy to a Swiss not-for-profit organization called CORE (International Council of Registrars). (81) The plan, that came to be known as the 'Generic Top-Level Domain Memorandum of Understanding' or 'gTLD-MoU' received support from the International Telecommunications Union (ITU), a UN agency. However, in May 1997, the U.S. Government had already indicated that it would not support the gTLD-MoU. (82) Although the gTLD-MoU received broad international support, there was no consensus concerning CORE's proposal, and the U.S. Government did not change its mind about the gTLD-MoU. But the U.S.



Government responded to the call for internationalization by transferring important policy decisions to the private sector rather than the U.S. Government. (83)

#### (b) Finalizing Policy: The White Paper

The final plan for privatization was laid down in a statement of policy, which became known as the 'White Paper'. The White Paper acknowledged the concerns of the international community and the call for fairness and transparency in the decision-making. (84) This plan was a compromise – it proposed increased involvement of the international community and the private sector, while maintaining U.S. leadership – and it was positively received. (85) As a result, the U.S. Government was able to reaffirm its handling of the transition to private sector management. The U.S. Government believed – and rightfully so, in view of the lack of an elaborated international legal framework on Internet governance – that 'it would be irresponsible to withdraw from its existing management role without taking steps to ensure the stability of the Internet during its transition to private sector management.' (86) The U.S. Government insisted that the corporation responsible for DNS policy-making be located in the U.S., officially '[b]ecause of the significant U.S.-based DNS expertise and in order to preserve stability', (87) although according to some, this was mainly inspired to respond to Congressional concerns. (88) In any event, the concern for stability and sufficient DNS expertise seemed legitimate, and the U.S. Government argued that 'the mere fact that the new corporation would be incorporated in the United States would not remove it from the jurisdiction of other nations.' (89) Nevertheless, the U.S. Congress continued to insist until much later that there be U.S. oversight. On 16 November 2005, the U.S. House of Representatives unanimously adopted a resolution stating that 'the authoritative root zone server should remain physically located in the United States and the Secretary of Commerce should maintain oversight of ICANN.' (90) The U.S. Senate also asked that the President 'continue to oppose any effort to transfer control of the Internet to the United Nations or any other international entity.' (91) Some considered, maybe naively, that the physical location in the U.S. had mainly symbolic relevance. (92) More skeptical voices considered it a 'myth that U.S. oversight is completely neutral and intrinsically harmless'; they warned against the opportunities for misuse and denounced the non-transparency of the power wielded. (93)

The White Paper maintained the guiding principles of the Green Paper for management and oversight of the DNS, namely stability, competition, private bottom-up coordination and representation. (94) The entity that was going to take over the management of the DNS had to commit to these principles. With respect to ensuring stability, the White Paper stated:

'The introduction of a new management system should not disrupt current operations or create competing root systems. During the transition and thereafter, the stability of the Internet should be the first priority of any DNS management system. Security and reliability of the DNS are important aspects of stability, and as a new DNS management system is introduced, a comprehensive security strategy should be developed.' (95)

Recognizing the success of the Internet, which because of its decentralized nature encourages innovation and maximizes individual freedom, the U.S. Government wanted a clear commitment from the corporation that was to manage the DNS that it would rely on competition and free market mechanisms:

'Where possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction.' (96)

The White Paper further stressed the importance of bottom-up governance and the need for the DNS custodian to operate for the benefit of the Internet community as a whole, and to develop sound, fair and widely accepted policies for the management of the DNS. (97) This could only be achieved through transparent decision-making. In this respect, the U.S. Government required that the new corporation's processes be 'fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders.' (98) The U.S. Government clarified:

'Typically this means that decision-making processes should be sound and transparent; the basis for corporate decisions should be recorded and made publicly available. Super-majority or even consensus requirements may be useful to protect against capture by a self-interested faction.' (99)

#### (c) The Challenges for Implementing Policies

Of course, it was not sufficient for the U.S. Government simply to formulate policies asserting control over the DNS. The U.S. Government needed to make sure that it effectively controlled the Internet's unique identifiers and that the stability of the DNS was maintained during the transition of DNS management to an accountable and fair governance structure.

The IANA functions – these include administrative tasks such as the allocation and assignment of IP address blocks, the assignment of technical protocol parameter numbers and maintenance of assigned values, and oversight of the operation of the Internet root server system (100) – were still performed by the Information Sciences Institute (ISI) of the University of Southern California (USC), where IANA was created (101) as part of a research project. (102) The IANA functions would have to be transitioned to the future DNS custodian. And, as mentioned above, the operational aspects of the Internet root server system were performed by NSI according to an agreement which was about to expire. (103) It was to be anticipated

that the researchers at USC would continue to take care of IANA, and that they would be cooperative in the transition. But to guarantee the cooperation of NSI, a commercial entity, was a bigger challenge. On 7 October 1998, the U.S. Government managed to extend the cooperative agreement with NSI, and NSI accepted that the U.S. Government would transfer its DNS obligations under the cooperative agreement to a new corporation, as was foreseen in the White Paper. (104) With this extension, the U.S. Government and NSI agreed to an amendment in which the U.S. Government affirmed its authority over the Internet's root zone. (105) The amended cooperative agreement also laid down the basis for a more competitive environment among domain name registrars by requiring NSI to develop a Shared Registration System (SRS), allowing multiple registrars to provide registration services within the gTLDs for which NSI acted as a registry. (106) The introduction of an SRS, together with equal access for accredited registrars to NSI's registry services, was necessary in order to introduce appropriate competition in the sales of domain names. Before the SRS, NSI was the sole registrar for the existing open gTLDs. A transitioning of the technical IANA functions performed by NSI to a new corporation was not part of the deal. As a result, the U.S. Government and the new corporation would remain dependent on NSI for the performance of these critical functions.

#### (d) ICANN Becomes the Internet's Steward

In response to the White Paper, the U.S. Government received a proposal from the Internet Corporation for Assigned Names and Numbers (ICANN), a Californian non-profit organization that was created upon the instigation of Jon Postel. (107) Jon Postel's involvement was critical. His 'U.S.-based DNS expertise' was used to justify the U.S. Government's decision to keep DNS management within the U.S., and the U.S. Government expressed the belief 'that the private sector organizers will want Dr. Postel and other IANA staff to be involved in the creation of the new corporation' for the management of the DNS. (108) But rather than the private sector contacting Jon Postel, it was Jon Postel and his lawyer who laid the foundations of this new corporation, and who reached out to a geographically diverse group of individuals to serve on the first (interim) ICANN Board. (109) The first ICANN Board members had little expertise in relation to DNS matters, (110) but that may have been seen by Jon Postel more as an advantage than an inconvenience; Jon Postel would serve as ICANN's CTO, (111) and a Board with less expertise would undoubtedly make technical coordination easier. Jon Postel was reputedly seen as a trusted figure 'by almost everyone interested in DNS policy.' (112) The formation of ICANN was near completion, (113) and negotiations between the U.S. Government and ICANN were at an advanced stage, when Jon Postel died suddenly on 16 October 1998. (114)

Despite the fact that ICANN had lost the figurehead on which its legitimacy and trust was based, (115) the negotiations with the U.S. Government continued. On 20 October 1998, the National Telecommunications and Information Administration (NTIA) informed ICANN that the DoC 'regards the ICANN submission as a significant step towards privatizing management of the domain name system.' (116) However, the U.S. Government indicated that there were remaining concerns *inter alia*, 'in the area of accountability (representational and financial), transparent decision-making processes, conflict of interest.' (117) The U.S. Government recommended that ICANN consult with the Boston Working Group (BWG), the Open Root Server Confederation (ORSC) and others who commented critically on ICANN's proposal. (118)

On 25 October 1998, ICANN installed its first interim Board, Chairman, President and CEO. (119) Not long thereafter, the members of the newly installed ICANN Board discussed changes to the draft Bylaws and decided to hold a conference call with representatives of the BWG and the ORSC on 31 October 1998. (120) Following these discussions, the ICANN Board unanimously adopted its original Bylaws on 6 November 1998, (121) and informed the NTIA the same day. (122) On 14 November 1998, ICANN organized a public meeting to explain its operating principles to the Internet community, and allowed the public to express its concerns. On 19 November 1998, a representative of the U.S. Government had a conference call with ICANN, which resulted in ICANN amending its Articles of Incorporation and Bylaws on 21 November 1998. (123)

Four days later, the U.S. Department of Commerce and ICANN entered into a Memorandum of Understanding (MOU), which was intended to allow ICANN to give the U.S. Government the necessary assurances 'that the private sector has the capability and resources to assume the important responsibilities related to the technical management of the DNS.' (124) The MOU – which was later also referred to as the Joint Project Agreement (JPA) – set various milestones for ICANN: it emphasized the importance of accountability to and representation of the global and functional diversity of the Internet and its users, (125) and required ICANN's collaboration on a plan for the possible expansion of the number of gTLDs, which was to take into account *inter alia*, the recommendation by the World Intellectual Property Organization (WIPO) concerning the development of a uniform approach to resolving trademark/domain name disputes involving cyberspiracy. (126)

The USC, which had been operating IANA as a research project, agreed to transfer the IANA functions to ICANN, subject to the approval of the U.S. Government. (127) Probably the most important aspect of the agreement was that the USC and ICANN recognized the authority of the U.S. Government over the IANA functions (rather than that of the USC's ISI, where IANA had been created). The recognition in this agreement of U.S. Government authority is what allowed the U.S. Government to transfer control gradually to the private sector. On 8 February 1999, the U.S. Government authorized ICANN to perform the IANA functions. (128)

On 26 February 1999, the DoC officially recognized ICANN as the new corporation envisioned in

the White Paper, and authorized ICANN to take over the obligations of the U.S. Government under the cooperative agreement with NSI. (129) Thus, on that date, the U.S. Government effectively granted management authority over the DNS to ICANN.

#### (e) Keeping Control over the Internet's Governance Structure

The U.S. Government kept its oversight role until recently. Paradoxical as it may seem, the U.S. Government's oversight role was intended to avoid overregulation and interference by governments; the U.S. Government felt it had to assert authority over the Internet in order to avoid a situation where a more international governance structure would allow European or other countries to impose new and more invasive controls on the Internet. (130) It was intended that the U.S. oversight be limited in time. The very purpose of the MOU was to allow a coordinated transition to the private sector and enable ICANN to show that it was capable of carrying out the DNS management functions in accordance with the principles of stability, competition, private bottom-up coordination, and representation. (131) The original MOU was scheduled to come to an end on 30 September 2000. (132) It was expected that, by then, ICANN would have matured into a representative and accountable organization, able to promote competition in the DNS, while maintaining its stable operation. (133) However, the U.S. Government has not relinquished its oversight role until 30 September 2016. The MOU remained in place until 2009, (134) when it was replaced by an Affirmation of Commitments (AoC) between the DoC and ICANN. (135)

In essence, the Internet governance structure has not changed since February 1999. Since that time, ICANN has been in charge of the IANA functions, and therefore responsible for creating the policies that govern the root zone. ICANN also manages important aspects of the cooperative agreement between the DoC and NSI, later Verisign, Inc. (Verisign). Verisign acquired NSI in 2000. After the acquisition, NSI continued to perform its registrar activities, but Verisign took over the registry operator business and the operational control of the Internet's root zone. Verisign kept the registry business when it sold NSI in 2003 and also continued its operational control of the Internet's authoritative root zone. As a result, when ICANN approves a change to the Internet's authoritative root zone, the U.S. Government directs Verisign to implement the change in the root.

The U.S. authority over the root has been severely criticized and characterized as a 'provocation to other governments.' (136) Critics denounce the fact that contract negotiations between the U.S. Government, ICANN and Verisign are largely non-transparent, and they condemn ICANN for favoring U.S.-based economic interests (as evidenced by the redelegation of .org to the Internet Society (ISOC), of .net (and more recently .com) to Verisign). (137)

On 14 March 2014, the NTIA announced the U.S. Government's renewed intent to relinquish its oversight role and conclude the privatization that had begun in 1997. (138) The aim was to complete the transition by 30 September 2015, the expiry date of the then current contract concerning IANA functions. However, the IANA functions contract has been extended until 30 September 2016 to allow ICANN more time to prepare for the transition. Until the transition was completed on 30 September 2016, the joint project between the U.S. Government and ICANN continued.

### 3 Evolution of ICANN's Role

#### a. The Early Days of ICANN

During the first year of the joint project between the DoC and ICANN to privatize DNS management, ICANN was able to maintain stability and set up a structure within ICANN to allow for the representation of different stakeholders. Already in August 1999, ICANN adopted the Uniform Domain Name Dispute Resolution Policy (UDRP), which changed the domain name landscape forever and dramatically improved the protection of trademarks on the Internet. (139) The UDRP was developed by WIPO, and provided for the establishment of a 'mandatory administrative procedure concerning abusive registrations' to be adopted 'uniformly across open gTLDs.' (140) The procedure is mandatory in the sense that the registration agreement requires all domain name registrations in an open gTLD to be subject to the administrative procedure if there is a claim initiated against the registration by a third party. Although the UDRP does not exclude the jurisdiction of the courts, the exemplary case administration carried out by WIPO (and later also by other dispute resolution providers) has meant that only a small fraction of the cases have in fact been re-tried in court.

This progress stands in sharp contrast to the concerns regarding accountability and competition. On 15 June 1999, ICANN issued a first status report identifying the progress made so far and the main challenges going forward. (141) ICANN was clearly dismayed and very critical about the lack of NSI cooperation in transforming the DNS into a more competitive environment. ICANN complained that NSI had failed to comply with its deadlines for creating a Shared Registration System (SRS) interface for its .com, .net and .org TLDs, (142) which should have ensured that competitive registrars could use the registry on the same terms as NSI's registrar branch. (143) ICANN saw NSI's behavior as an impediment to competition, and it criticized both the fact that NSI had challenged ICANN's authority regarding policy, and also the manner in which it did so. In this respect, ICANN stated:

'Finally, as a general proposition, NSI has to date refused to accept the policy authority of ICANN, although it continues to "participate" in the creation of ICANN institutions and policies. It has funded and encouraged a variety of ICANN critics, including some whose only common

cause with NSI would appear to be unhappiness with ICANN. In short, NSI has generally been an impediment, not a help, in the transition from government controlled monopoly to a private competitive DNS.' (144)

Despite ICANN's complaints, NSI's deadline under the Cooperative Agreement to deploy the SRS was pushed back several times. (145) Nevertheless, when ICANN made its second status report in June 2000, ICANN considered that it had completed its task of ensuring competition in registration services for gTLDs. (146) ICANN reported that the share of net new domain name registrations attributable to the NSI registrar dropped from 100% to under 50%, and that the retail registration pricing dropped from USD 35 per year to USD 10. (147)

ICANN also looked to increase competition at a registry level, and posted a call for new gTLD applications on 15 August 2000, shortly before the initial expiration date of the MOU. This first round of new gTLD applications is discussed in more detail in Chapter 2.C.1 and Chapter 4.A.

### **b Extending The Timeframe For Privatization**

In spite of the progress made, the U.S. Government did not consider that the young ICANN was ready to take on the critical responsibility of managing the DNS without government oversight. On 11 September 2000, the MOU was extended until 11 September 2001 and amended to include specific tasks for ICANN, for example, to improve its accountability, enhance the root zone architecture and increase competition between TLD registries. (148) ICANN was asked to develop and test an independent review process to address claims by members of the Internet community who considered that they had been adversely affected by decisions in conflict with ICANN's bylaws or contractual obligations. (149) On 24 September 2001, the MOU was extended for yet another year. (150) And one year later, on 20 September 2002, the U.S. DoC reported that the terms of the MOU were to be extended again until 30 September 2003. This time, the U.S. Government and ICANN revised their commitments in detail. (151) The U.S. DoC expressed its concerns and disappointment about the progress made by ICANN:

'Clearly, ICANN's progress to date has been slower than expected and the organization still has much to accomplish before maturing into the stable and accountable entity necessary to complete transition of DNS management functions.


[...] The Department has frankly been disappointed that ICANN's progress on the MOU tasks has moved so slowly. In fairness, the accomplishment of many of these tasks requires more than ICANN's unilateral effort. Further, it is not surprising that the completion of certain tasks has proven difficult or that initial thoughts on processes and structure require rethinking based upon experience. Nevertheless, the variety of criticisms expressed by the Internet community is of concern to the Department - and should be instructive to ICANN.' (152)

This latest 2002 one-year term extension of the MOU was considered critical for ICANN 'to make substantial progress on the remaining transition tasks.' (153) Progress was lacking with respect to critical tasks. *E.g.*, ICANN had made only little progress in concluding agreements with the root server system operators (that would stabilize ICANN's relationship with them) and in enhancing the root server system's architecture and security. (154) With respect to its accountability, ICANN had not yet implemented an independent review process 'for decisions that purport to conflict with the corporation's bylaws', and ICANN's reconsideration process that was put in place had had 'limited success in resolving the type of disputes it was intended to address.' (155) ICANN also failed in opening up the market for generic TLDs. The U.S. DoC complained that ICANN had 'not yet defined the process, procedures, and standards for ensuring predictability and transparency in the gTLD selection process long-term (including the timeframe within which new gTLDs were to be made available).' (156)

One year later, and although ICANN had implemented an independent review process, the U.S. Government did not consider ICANN's progress sufficient to justify it relinquishing its oversight role. Much work was still needed if ICANN were to evolve into 'an independent, stable, and sustainable DNS management organization.' (157) New, specific aims were added to the express goals of previous MOUs. (158) Among these aims was the definition and implementation of 'a predictable strategy for selecting new TLDs using straightforward, transparent, and objective procedures that preserve the stability of the Internet.' (159) The strategy development was to be completed by 30 September 2004, and its implementation was to commence by 31 December 2004. (160) The U.S. Government also continued to stress the need for more transparency and accountability and a formalization of ICANN's relationship with the root server system operators. (161) Unlike previous years, where the U.S. Government had allowed for a one-year extension of the MOU, ICANN was now given a three-year extension to accomplish these goals. (162)

At the end of this three-year period, the U.S. Government and ICANN agreed to amend the MOU on 29 September 2006. ICANN's efforts in defining and implementing strategies for selecting new TLDs were still limited to specific categories of TLDs and had shown that ICANN's evaluation process needed adjustment and took much longer than expected (*infra*). In 2006, the U.S. Government and ICANN agreed to extend the MOU/JPA for another three-year period. A few days before the execution of the amendment, an almost unanimous ICANN Board approved an 'Affirmation of Responsibilities', in which ICANN confirmed its commitment 'to the private sector management of the Internet DNS, by promoting the security and stability of the global Internet, while maintaining and promoting competition through its multi-stakeholder model.' (163) ICANN also affirmed and agreed to be guided by responsibilities in relation to security and stability, transparency, accountability, etc., (164) and it agreed to the inclusion of the

Affirmation of Responsibilities in the MOU/JPA with the U.S. DoC. (165)

At the beginning of 2008, the U.S. Government conducted a review of the MOU/JPA and received numerous comments from the Internet community. (166) The U.S. DoC observed that 'there was general consensus on the need to preserve the security and stability of the DNS and the recognition that ICANN is the appropriate technical  coordinator of the Internet DNS.' (167) However, most commentators agreed that 'important work remain[ed] to increase institutional confidence through implementing effective processes that will enable: long term stability; accountability; responsiveness; continued private sector leadership, stakeholder participation; increased contract compliance; and enhanced competition.' (168)

### c Working Towards A Transition To The Private Sector: From A Joint Partnership To An Affirmation Of Commitments

During a public meeting in February 2006 concerning the U.S. Government's review of the MOU/JPA, ICANN announced its intention to prepare a plan for developing a transition framework. (169) The ICANN Board believed that ICANN was meeting its responsibilities under the MOU/JPA and that the conditions had been 'sufficiently met [to allow] that the [MOU/J]PA conclude during the months up to September 2009.' (170) After this meeting, ICANN publicly stated on several occasions – somewhat optimistically, and possibly with a view to boosting the development of a transition plan – that the MOU/JPA would conclude by 30 September 2009. (171) In anticipation of a possible transition, ICANN developed a so-called implementation plan for improving institutional confidence (172) and sought public input. Between June 2008 and May 2009, ICANN organized no fewer than three public comment periods. (173) The third public comment phase coincided with the request for public comments by the U.S. Government 'regarding the progress of the transition of the technical coordination and management of the Internet DNS to the private sector, as well as the model of private sector leadership and bottom-up policy development which ICANN represents.' (174)


Although strong support existed for a full transition to the private sector, (175) many agreed that there were insufficient guarantees for accountability, protection against capture, transparency, etc., to terminate the oversight by the U.S. DoC. (176) ICANN's first president and CEO, Michael M. Roberts, participated in the U.S. Government's inquiry, and encapsulated the situation quite well:

'One overarching problem – accountability – still dominates the relationship between ICANN and the U.S. Government, and between ICANN and its broader community, as documented in the comments that ICANN's own outreach has received. Accountability is the predominant and common factor in ICANN's Presidential Strategy Committee's public comment process. If a solution can be found to the accountability dilemma, many other issues will be more manageable.

In 1998, the White Paper described an early termination of U.S. involvement in the affairs of ICANN:

"the U.S. Government would continue to participate in policy oversight until such time as the new corporation was established and stable, phasing out as soon as possible, but in no event later than September 30, 2000."

But after ten years, this goal has not been realized and ICANN is still saddled with not one, but two contracts tying it to the Department of Commerce. It is clear that accountability and independence are intertwined, and a decision on independence is also a decision on accountability. In this context, accountability means clarity with respect to process and structure such that governments and private sector stakeholders are assured of fair and equitable treatment in ICANN decisions. It is possible that the delays and related stakeholder concerns in ending the MOU/JPA are more a reflection of unease over the accountability problem than they are a lack of accomplishment on the various tasks set forth in these documents.' (177)

So accountability concerns remained, and ICANN started focusing on the role of governments quite late in the development of its proposed implementation plan for improving institutional confidence. It was not until 26 June 2009 that the ICANN Board decided that a joint working group must be established between the ICANN Board and the Government Advisory Committee (GAC) to review the GAC's role within ICANN. (178)  This working group was also to engage with the broader ICANN community in a fully consultative process on the GAC's role within ICANN. (179)

The discussions on improving ICANN's accountability and on a possible full transition to the private sector came at a pivotal time for ICANN. After the ICANN Board had adopted the recommendations of ICANN's policy-making body, the Generic Names Supporting Organization (GNSO), for the introduction of new gTLDs in June 2008, (180) ICANN started detailed discussions on transforming these recommendations into a concrete process for opening up the Internet's name space. An enormous amount of energy was devoted to the development of this process, which became known as the new gTLD Program. Also in June 2008, ICANN's accountability mechanisms were put to the test, as ICANN was facing its first legal challenge for which the claimant used ICANN's Independent Review Process (IRP). (181) Both events – the development of the new gTLD Program and the IRP – together gave ICANN the opportunity to show that it was finally moving towards the opening up of the Internet's naming space in a predictable,

transparent and accountable manner. They provided ICANN with the chance to demonstrate that a transition could actually work.

The MOU/JPA between the U.S. DoC and ICANN was not renewed when it finally expired in September 2009. It was replaced by an Affirmation of Commitments (AoC), which was intended to be a longstanding agreement between the U.S. DoC and ICANN. (182) The AoC reaffirmed ICANN's commitments to *inter alia*: (i) ensure accountability, transparency and the interests of global Internet users, (ii) preserve security, stability and resiliency, and (iii) promote competition, consumer trust and consumer choice. (183) The AoC requires ICANN to perform regular compliance reviews and to improve its mechanisms so as to live up to its commitments on a continuing basis.

ICANN considered that the execution of the AoC completed the transition that had started in 1998. (184)

However, the AoC confirmed ICANN's relationship with the U.S. Government, and the U.S. Government did not relinquish its control over the IANA functions. ICANN continued to perform the IANA functions on behalf of the U.S. Government according to an agreement: the IANA functions contract with the NTIA. As a result, the AoC did not in fact complete the transition. Through the IANA functions contract, the U.S. Government maintained its control over changes in the authoritative Internet's root zone. The IANA functions contract has been up for renewal each year, providing the U.S. Government with remote, but real, oversight. Without control over the IANA functions, ICANN has no access to the Internet's root, and it would be impossible for ICANN to implement new policies affecting the root.

#### d Completion Of The Transition To The Private Sector

On 14 March 2014, in the aftermath of ICANN's most ambitious plan to date for introducing new gTLDs to the Internet's root, the NTIA announced its intent to transition out of its role as administrator of changes to the authoritative root zone file and as the historic steward of the DNS. (185) According to the NTIA, '[t]he timing [was] right to start the transition process.' (186) The NTIA invited ICANN to develop a transition plan and to propose it to the NTIA. The NTIA informed ICANN that the transition proposal 'must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services; and
- Maintain the openness of the Internet. (187)

The NTIA's role was to remain unchanged while ICANN and the Internet community prepared their proposal for a transition plan. At the time of the NTIA announcement, the IANA functions contract was set to expire on 30 September 2015, (188) and the Internet community started working towards this informal (189) deadline.

On 17 and 18 July 2014, a multistakeholder group met in London with the purpose of supporting and coordinating the development of a proposal on the IANA functions stewardship transition. (190) By the beginning of September 2014, the group, named the IANA Stewardship Transition Coordination Group (ICG) had adopted a charter (191) and issued a Request for Transition Proposals for each of the three primary IANA functions to be developed by the communities and parties most directly affected by each of the primary functions. (192) The ICG also adopted a timeline to work towards a transition by September 2015. (193) The ICG's aim was to have a proposal concerning the IANA functions transition ready for final community review by 19 June 2015. This would allow the proposal to be finalized by 31 July 2015 for submission to the NTIA.

But the Internet community was expecting more than a simple acknowledgment by ICANN of its role facilitating its technical functions; the Internet community was expecting ICANN to affirm its accountability. (194) When the U.S. Government finally relinquishes its oversight role, the general expectation is that ICANN should be more accountable, not less. Therefore, concurrent with the work of the ICG, a CCWG was established within ICANN with a view to improving ICANN's accountability in light of the anticipated transition. (195)

On 4 May 2015, the CCWG published its initial draft proposal for public comment. (196) Commentators criticized the proposed accountability framework for being too narrow and not powerful enough. (197) This initial proposal was very inward focused, and it was generally felt that ICANN should be accountable to all stakeholders, including those outside ICANN. Moreover, the enforceability of the accountability system needed to be assured unambiguously, (198) a topic which has been heavily debated in multiple disputes. (199)

At the end of the public comment phase, it was clear to the NTIA that the transition would not occur before the expiry of the IANA functions contract in view of the status of ICANN's proposal and the time necessary for the U.S. Government to evaluate the plan. (200) The NTIA informed ICANN that it could exercise an option to extend the IANA functions contract for two years until September 2017, but feared that this would send the wrong signal to the Internet community, and give the impression either that it was not working hard to finish the transition plan or that the U.S. Government was reducing its efforts to complete the transition. (201) The

NTIA subsequently negotiated a one-year extension with ICANN of the IANA functions contract. (202)

On 3 August 2015, the CCWG published a second draft proposal for public comments. And on 30 November 2015, a new public comment period was initiated on a third draft. The second and third drafts also remained inward-looking, focusing mostly on increasing accountability for existing stakeholder groups. (203) Insufficient account was taken of other parties, who, though not necessarily represented at ICANN, were nevertheless likely to be severely impacted by ICANN's decisions. Some stakeholders within the ICANN community asked for increased limitations on the rights of third parties not involved in ICANN's policy development processes. (204) Although imposing such limitations would impede, rather than improve, ICANN's accountability, interest groups within the Internet community are of course primarily concerned with the promotion and protection of their own interests, rather than with the common good. This is a major reason why efficient external control mechanisms are of paramount importance, even for communities in which a large number of critical voices can be heard.

For as long as the IANA functions contract remained in place, the U.S. Government retained its external control mechanism, and its ability to encourage ICANN to improve its internal and external accountability. The relinquishing of the U.S. stewardship role over the IANA functions was to be done with great care. If it turns out that the transition has not been carried out properly, the global Internet community may face a largely introspective and unaccountable ICANN and a situation where established groups could effectively block new entrants from entering the market.

In this respect, it is not necessarily to be applauded that the NTIA has been pushing for the ICANN community 'to conclude on a proposal that is as simple as possible but still meets our conditions and the community's needs'. (205) By insisting on simplicity, it seems that the NTIA was prepared to accept a baseline solution rather than the best solution. It is also worrying that the ICANN community had agreed to work in two different streams. The now completed Work stream 1 was dedicated to identifying those accountability mechanisms that must be in place or committed to before the IANA stewardship transition; work stream 2 is dedicated to improving ICANN's accountability mechanisms only after the IANA stewardship transition. (206) Since its creation, it has proven virtually impossible to persuade ICANN to enhance its accountability without external pressure. Moreover, as will be explained in Chapter 5 and Chapter 6, ICANN has sought to interpret changes that were made with the purpose of improving ICANN's accountability as the complete opposite: amendments to the accountability framework that weakened its accountability. Recent comments by ICANN's external legal advisors in response to the community's attempts to improve ICANN's accountability and ICANN's positions in IRPs are illustrative of ICANN's reluctance to offer effective redress mechanisms. (207) Such redress mechanisms are of particular importance when ICANN evaluates applications for new Internet extensions. As each TLD string is a unique identifier, TLDs have the potential to become a high-value asset which is difficult to substitute. The delegation of new TLDs is one of ICANN's most visible and economically relevant activities. TLD applicants are entitled to a fair, equitable, transparent and non-discriminatory process, and because of the high stakes involved in a TLD application, it is unsurprising that ICANN's accountability mechanisms are tested intensively with regard to these issues. Until now, parties relying on ICANN's accountability mechanisms have been confronted with the inadequacies of those mechanisms, rather than being provided with a meaningful redress in a streamlined manner. It is unfortunate that, despite three rounds of new gTLD applications (*infra*, Chapter 2.C), ICANN has been unable to install efficient redress mechanisms to guarantee legal certainty through the observance of fundamental rights. What is more, rather than enhancing its accountability mechanisms, ICANN has sought to do the opposite by attempting to introduce a statute of limitations retroactively, arguing that applicants were not entitled to due process, and attempting to evade all responsibility through its commissioning of third parties.

On 10 March 2016, the ICANN Board published ICANN's IANA Stewardship Transition Proposal. (208) ICANN's proposal received general support from U.S. businesses (209) and members of civil society. (210) The ICANN Board adopted amended Bylaws on 27 May 2016 (211) and prepared amended Articles of Incorporation. (212) The amended Bylaws and Articles of Incorporation entered into force when the U.S. Government relinquished its IANA stewardship role.

On 9 June 2016, the NTIA announced that ICANN's proposal met the criteria to complete privatization (213) and transmitted its assessment report on the proposal to U.S. Congress. (214) It has since defended its assessment report with U.S. Senators. (215)

In the meantime, ICANN had been testing the technical processes for managing the IANA functions without U.S. oversight. (216) On 12 August 2016, ICANN submitted an implementation status report on the IANA stewardship transition, confirming that all transition tasks are completed or will be completed in advance of 30 September 2016. (217) In response, the NTIA informed ICANN on 16 August 2016 that it intended to allow the IANA functions contract to expire as of 1 October 2016. (218) Everyone was thus getting ready for a transitioning of the IANA stewardship to ICANN, and a final attempt by some members of U.S. Congress to stop the transition failed. Four U.S. states tried to block the transition by filing a request for a restraining order at the eleventh hour. (219) Their request was turned down, and the transition moved forward. (220) Unless the court order gets reversed in appeal or proceedings on the




merits result in a different outcome, it is unlikely that the complete privatization of the Internet and ICANN's control over it will be reversed any time soon. Although we may expect that ICANN will exercise its stewardship over the Internet in a responsible manner, one should not underestimate the risks associated with the complete privatization. In Chapter 7, Chapter 8 and Chapter 9, we identify these risks.

## B GOVERNING PRINCIPLES

Unless stated otherwise, we refer to the governing principles as they existed before the transition of the IANA functions to ICANN. When mention is made of ICANN's Bylaws, we refer to the version of the Bylaws that was current before the transition on 1 October 2016. However, ICANN's newest Bylaws, which entered into force on 1 October 2016, did not change ICANN's essential obligations, but rather strengthened them.

### 1 Compliance with General Principles of International Law

ICANN is a non-profit public benefit corporation, incorporated under the laws of California. (221) ICANN's mission and the limits to its authority are defined in ICANN's Articles of Incorporation, Bylaws, and in agreements with competent authorities. Given ICANN's public benefit mission to 'operate for the Internet community as a whole' – *i.e.*, globally – ICANN is not bound by principles of the local laws in California only, but, first and foremost, ICANN must carry out 'its activities in conformity with relevant principles of international law and applicable international conventions.' (222)

 P 38  The requirement to comply with principles of international law was deliberate. The original draft of ICANN's Articles of Incorporation did not include any reference to  international law. (223) The fifth draft of ICANN's Articles of Incorporation – *i.e.*, the version of the Articles of Incorporation that ICANN submitted to the U.S. Government in response to the White Paper (224) – provided that ICANN should carry out its activities 'with due regard for applicable local and international law'. (225) This provision was added 'in response to various suggestions to recognize the special nature of [the] organization and the general principles under which it will operate.' (226) After negotiations with the U.S. Government and several Internet stakeholders, (227) ICANN augmented its obligations under international law on 21 November 1998. (228) From that date onwards, ICANN's Articles of Incorporation have provided that:

'The Corporation shall operate for the benefit of the Internet Community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.' (229)

The Articles of Incorporation do not require ICANN merely to have 'due regard' for 'international law'; ICANN must act 'in conformity with relevant principles of international law and applicable international conventions'. As accepted both by legal scholars (230) and case law, (231) ICANN's requirement to act in conformity with relevant principles on international law includes conformity with 'the general principles of law recognized as a source of international law'. General principles of international law can thus be said to serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted.

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### 2 Hierarchy of Legal Sources

In contrast with previous drafts of the Articles of Incorporation, ICANN's current version (232) puts principles of international law first, before applicable international conventions, local law and ICANN's Bylaws. ICANN reversed the order of the applicable rules in recognition of the international scope of its mission, and of the fundamental principle that international law prevails over domestic law. (233) As a result, any principles enshrined in Californian law, ICANN's Articles of Incorporation and/or ICANN's Bylaws will only apply to the extent that they are fully compatible with international law. ICANN's Articles of Incorporation and Bylaws must thus be interpreted in a way that is consistent with general principles of international law. If ICANN adopts secondary rules, such as policies and process, ICANN should warrant the compliance of these secondary rules with international law, national law, its Articles of Incorporation and its Bylaws; in that order.

In addition, we have always believed that ICANN's Articles of Incorporation and Bylaws should be interpreted in light of ICANN's AoC, which requires ICANN to comply with generally accepted good governance principles. Recent case law, (234) and, it seems, ICANN itself, (235) now accept this proposition. As a result, secondary rules, such as policies and process, must also be consistent with the AoC.

### 3 Applicable Norms

The applicable legal framework requires ICANN to act in good faith, to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition. These requirements can be found in applicable norms of international law, domestic law, ICANN's Articles of Incorporation and its Bylaws. They are reiterated at different places in the



Bylaws, and some requirements are taken up as core values that ‘should guide the decisions and actions of ICANN.’ (236) ICANN’s Bylaws provide:

P 40 ▲ 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.’ (237)

Although a balancing exercise may be appropriate in some circumstances, ICANN’s discretion in applying its core values is not unfettered. While some of ICANN’s core values, such as the promotion of competition, may be subject to restrictions (e.g., to ensure compliance with essential requirements that preserve the stability and security of the Internet), other core values reflect more fundamental norms from which derogation must not be permitted.

#### **a Act In Good Faith**

Many of the guiding substantive and procedural rules in ICANN’s Articles and Bylaws – including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the International Court of Justice (ICJ), the principle of good faith is ‘[o]ne of the basic principles governing the creation and performance of legal obligations.’ (238)

The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action and recognizing legitimate expectations. The principle is considered so fundamental that it need not be explicitly stated in order to apply and no derogation is permitted. Many of ICANN’s obligations which arise from the general principle of good faith are taken up explicitly in ICANN’s governing documents. These obligations are discussed below (*infra*, under b, c and e).

#### **b Apply Policies Neutrally, Fairly And Without Discrimination**

ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general principles of international law, it is also laid down repeatedly in ICANN’s governing documents. Article II(3) of ICANN’s current Bylaws is entitled ‘non-discriminatory treatment’ and provides that:▲▼

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

This prohibition on discrimination has been included in ICANN’s Bylaws since the corporation submitted its application in 1998 to operate as the DNS custodian. (239) In their original version ICANN’s Bylaws contained no example of a substantial and reasonable cause that could justify disparate treatment. (240) Following negotiations with U.S. Government officials and Internet stakeholders, ICANN added the promotion of effective competition as a possible justification for disparate treatment. (241) In 2002, ICANN changed the numbering of its Bylaws and added the title ‘non-discriminatory treatment.’ (242) Apart from these mainly cosmetic amendments, the article has never been changed, neither did it change with the entry into force of ICANN’s post-IANA transition Bylaws, adopted on 27 May 2016. The fact that the article on non-discrimination has remained unchanged ever since ICANN became the DNS custodian evinces the fundamental nature of the principle of non-discrimination as regards ICANN’s operations.

In addition, the prohibition on discrimination is not merely mentioned as a core value that ‘should guide’ ICANN’s actions and decisions; (243) ICANN dedicated a separate article in its Bylaws to non-discriminatory treatment, containing conclusive language that it ‘shall not’ act inequitably or single out a party for disparate treatment. It follows that the principle of non-discrimination is a cornerstone for ICANN’s actions and decisions.

#### **c Remain Transparent**

Another cornerstone for ICANN’s decision-making process is its obligation to operate in an open and transparent manner. ICANN’s commitment to transparency is contained in ICANN’s Articles of Incorporation, Bylaws and the AoC.

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ICANN’s transparency obligation was already included in Article 4 of the draft Articles of Incorporation it proposed in response to the U.S. Government’s White Paper. Article 4, which, after adoption, remained unchanged in this respect, provided that ICANN ‘shall operate for the benefit of the Internet community as a whole, carrying out its activities [...] to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent

processes that enable competition and open entry in Internet-related markets'. Similarly, Article III of ICANN's Bylaws has always stated that ICANN and its constituent bodies (244) 'shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness'.

These provisions have later been supplemented by the core values and commitments set out in ICANN's Bylaws, which specify that ICANN should employ '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.' (245) In addition, the AoC agreed between the U.S. DoC and ICANN also affirms ICANN's commitment to transparency, mentioning it as a key commitment. (246)

The emphasis ICANN has put on transparency is sensible. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting role that ICANN occupies. (247) The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. (248)

The coupling of the terms 'open' and 'transparent' in ICANN's governing documents, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision making. During ICANN's first public meeting, Esther Dyson, ICANN's first Chair, stated the following about ICANN's commitment to openness and transparency:

'But to me, being open isn't simply posting your minutes out. To be honest, when I read our minutes, I'm embarrassed. Like any legal minutes, they say almost nothing. And I think it is our duty and it's – frankly, we've got to do it or we won't win anybody's trust, not just to post our minutes, but to explain what we did, what ▲▼ was our reasoning. And sometimes that means we have to trust you, because we need to explain, well, we did this because, you know, there are these two points of view and we're trying to find a balance between them. And sometimes we need to make explicit things that our lawyers would prefer for us to keep implicit. But at some point, I'd rather say these things, I'd rather ask Frank[ (249) ] about his contract, I'd rather point out that there's tensions between the SO's and the rest of the community than simply try and hide it and pretend it's not there. So to me, transparency is not simply exposure, but explanation.' (250)

In 2009, when it executed the AoC, ICANN committed itself to providing a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN had relied. (251) ICANN committed itself to being transparent, so as to ensure that the outcomes of its decision-making would reflect the public interest; its decisions were to contain both a rationale and adequate explanation. (252) Since ICANN's inception (as has been confirmed in its governing documents), ICANN has been committed to maintaining and improving, at a continuing basis, robust mechanisms to support the most developed notion of transparency. (253)

#### **d Promote Competition And Innovation**

In performing its mission, ICANN is under an obligation to rely as far as possible on market mechanisms so as to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. The promotion and sustaining of a competitive environment was one of the primary reasons behind the U.S. Government's efforts to privatize the DNS management. (254) The focus on creating a more competitive environment has been present since the first MOU/JPA between the U.S. Government and ICANN, (255) and has been translated into ICANN's governing documents. Article 4 of ICANN's Articles of Incorporation calls for processes that 'enable competition and open entry in Internet-related markets'.

ICANN's Bylaws focus on promoting competition and innovation in three of ICANN's core values, namely: ▲▼

2. '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.

[...]

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.' (256)

In addition, the promotion of effective competition is the only acceptable justification for disparate treatment explicitly provided for in the ICANN Bylaws. (257) Finally, the AoC affirms the promotion of competition as a key commitment (258) and as a main goal during the expansion of the top-level domain space. (259)

#### **e Remain Accountable**


The fundamental principles which are considered in this Chapter 2.B.3 are not merely aspirational standards that ICANN may choose to adopt on a voluntary basis. They impose unambiguous commitments, and parties affected by ICANN's actions must be entitled to a meaningful review of ICANN's compliance with these fundamental obligations. ICANN has committed itself to ensuring accountability in the AoC, (260) and it has adopted both internal and external review mechanisms for accountability. Article IV(1) of ICANN's Bylaws sets forth that ICANN 'should be accountable to the community for operating in a manner that is consistent with the[...] Bylaws, and with due regard for the core values set forth in Article 1 of the[...] Bylaws.' One of ICANN's core values instructs ICANN to '[r]emain[...] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.' (261) As a result, ICANN has not merely committed itself to complying with its fundamental obligations; it has also committed itself to establishing mechanisms to redress any violation of those obligations.

## C ICANN'S LIBERALIZATION EFFORTS

<sup>P 45</sup> One of ICANN's missions and principal objectives is to promote competition and develop policy concerning the Internet's unique identifiers, in particular in the gTLD  name space. Before ICANN's formation, the gTLD name space consisted of five limited-use gTLDs (262) and three gTLDs which operated upon a first-come, first-served basis. (263)

The gTLD name space coexists with the ccTLD name space .ccTLDs or country code Top Level Domains are TLDs which consist of the two-letter country codes from ISO 3166. (264), (265) ccTLDs are organized by an administrator for the country to which the ccTLD relates. (266) The public character of ccTLDs has always been recognized. Designated managers (or administrators) of ccTLDs are regarded as trustees of the TLD for both the nation and the global Internet community; they perform a 'public service on behalf of the Internet community.' (267) In 1998, there were well over 200 ccTLDs in existence administered by their corresponding governments or by private entities with the appropriate national government's acquiescence. (268)

While gTLDs and ccTLDs coexist in the Internet's name space, they are nonetheless different. National governments had – and, in the White Paper, the U.S. Government recognized that they would continue to have – authority to manage or establish policy for 'their own' ccTLD. (269) As ccTLDs used to be far greater in number than gTLDs, and because of the policy authority of national governments, there is a much wider variety in structure and use for ccTLDs than for gTLDs. (270) Because of this, ccTLDs can be perceived as a distinct market. In this regard, German courts have held that third parties wishing to sell or market products on the Internet may not treat the '.de' TLD as interchangeable with other generic or country code TLDs. (271) Key to these decisions was the fact that purchasers located in Germany prefer to search for websites using the '.de' TLD.

<sup>P 46</sup> The original gTLD name space could also be seen as a collection of separate markets. In 1994, Jon Postel described the gTLD name space as follows: 

'Each of the generic TLDs was created for a general category of organizations. [...]

Of these generic domains, five are international in nature, and two are restricted to use by entities in the United States.

World Wide Generic Domains:

COM - This domain is intended for commercial entities, that is companies. [...]

EDU - This domain was originally intended for all educational institutions. Many Universities, colleges, schools, educational service organizations, and educational consortia have registered here. More recently a decision has been taken to limit further registrations to 4 year colleges and universities. Schools and 2-year colleges will be registered in the country domains [...].

NET - This domain is intended to hold only the computers of network providers, that is the NIC and NOC computers, the administrative computers, and the network node computers. The customers of the network provider would have domain names of their own (not in the NET TLD).

ORG - This domain is intended as the miscellaneous TLD for organizations that didn't fit anywhere else. Some non-government organizations may fit here.

INT - This domain is for organizations established by international treaties, or international databases.

United States Only Generic Domains:

GOV - This domain was originally intended for any kind of government office or agency. More recently a decision was taken to register only agencies of the US Federal government in this domain. State and local agencies are registered in the country domains [...].

MIL - This domain is used by the US military.' (272)

In 1994, the TLD landscape was able to serve the needs of the Internet community. Although the popularity and the growth pattern of the .com gTLD was already a source of concern, it was thought to be 'extremely unlikely that any other TLDs [would] be created.' (273) Instead, to solve the domain name scarcity in the .com TLD, the Internet community was considering subdividing the domain and allowing future commercial registrations only in the subdomains. (274)

However, these views rapidly changed. As explained above, NSI's monopoly over domain name registrations gave rise to criticism and there was a growing dissatisfaction concerning the absence of competition and the dominance of the .com domain. In May 1996, following discussions with fellow Internet engineers, Jon Postel wrote that 'the inherent perceived value of being registered under a single top level domain (.COM) is undesirable and should be changed', and he advocated open, free-market competition through the introduction of new gTLDs. (275) He considered that 'positive market forces dictate that this diversity, obtained through free competition, is the best means available to insure quality service to end-users and customers.' (276) He envisioned the creation of up to fifty new registries in 1996, each chartered to operate a maximum of three gTLDs for up to five years. (277) Although his plan for opening up the gTLD market did not deal with the issue of the (monopolistic) management of the then existing gTLDs, he did note that such gTLDs could come under the provisions of the plan when the existing sponsorship relationship came to an end (278) (and as mentioned above, the cooperative agreement between the NSF and NSI was set to expire on 30 September 1998). (279) In other words, Jon Postel and the members of the Internet community supporting his plan did not exclude the future introduction of a competitive process for the management of existing TLDs, and a re-evaluation every five years.

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Jon Postel slightly reworked his draft plan following criticism from the Internet technical community. (280) He acknowledged the concern that NSI was 'apparently unconstrained by effective regulation or competition.' (281) He was not convinced that sharing a single top-level domain among competing registries would be manageable, but believed that the introduction of successful new TLDs could very quickly have a significant impact on competition and that it would in any event be beneficial:

'While new single registry top-level domains may allow only a limited form of competition, it is a better situation than we have now, and it can be generalized in the future. Thus there is no 'competition' argument to prevent creating new top-level domains.' (282)

However, the Internet community failed to reach consensus on the proposal, and international plans for the evolution of DNS administration failed. By the end of the 1990s, various proposals existed, all aimed at injecting competition into the gTLD system. But there was no united view on how to install a more competitive gTLD environment. (283) Some questioned whether it was possible to create a truly competitive environment. (284) However, the U.S. Government made clear that the creation of a competitive environment was one of the key tasks for the new custodian of the DNS. The U.S. Government expressed its conviction that 'competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run. Moreover, the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically.' (285)

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In recognition of this goal and with a view to promoting competition in the gTLD name space, ICANN has expanded the number of available gTLDs three times since its inception: in 2000, 2004 and 2011. Each application round has had its own distinct policies and processes, designed to enable varying degrees of competition while preserving the stability and security of the Internet's unique identifier system.

Applying for a new gTLD is a very complex process and cannot be compared with the simple registering of a domain name. In a new gTLD application, the applicant seeks to create and operate a registry business to support the Internet's DNS, and this involves a number of significant responsibilities as a successful applicant will run a critical piece of Internet infrastructure.

## 1 The First Round of 2000

On 30 April 1999, the World Intellectual Property Organization (WIPO) submitted a report to ICANN, which concluded that, 'on condition that [WIPO's] proposed improved practices for domain name registrations, [WIPO's] proposed administrative dispute-resolution procedure and [WIPO's] proposed measures for the protection of famous and well-known marks and for the suppression of abusive registrations of domain names are all adopted, new gTLDs can be introduced, provided that they are introduced in a slow and controlled manner which takes account of the efficacy of the proposed new practices and procedures in reducing existing problems.' (286) Upon analysis of WIPO's report and the comments it received, the ICANN Board decided on 27 May 1999 to refer the matter of introducing new gTLDs to ICANN's policy-making body. (287) In mid-April 2000, ICANN's policy-making body (288) recommended that the ICANN Board adopt a policy for the introduction of new gTLDs in a measured and responsible manner. (289) It was suggested that only a limited number of new gTLDs be introduced as a 'proof of concept' for possible future introductions. (290)

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On 16 July 2000, the ICANN Board adopted the recommendation to organize a 'proof of concept' round for new gTLDs. (291) The plan was to issue a formal call for proposals for new gTLDs by 1 August 2000 and to allow applications until 1 October 2000. ICANN would then organize a fifteen-day public comment period, announce which applicants were selected to enter into negotiations for the operation of new gTLDs by 20 November 2000, and complete negotiations by 31 December 2000. (292)

On 15 August 2000, ICANN published application instructions (293) and criteria for assessing new gTLD proposals. (294) Interested applicants had to pay a non-refundable fee of USD 50,000

for the application to be considered, without any guarantee that their application would be selected for negotiation. (295)

ICANN's first priority was to preserve the stability of the Internet. Therefore, ICANN requested that applicants provide comprehensive strategies to assure the security and reliability of the DNS and well-thought-out plans to assure the Internet's continuing stability. (296) In evaluating proposals, ICANN staff intended 'to place significant emphasis on the completeness of the proposals and the extent to which they demonstrate that the applicant has a thorough understanding of what is involved, has carefully thought through all relevant issues, has realistically assessed the business, financial, technical, operational, and marketing requirements for implementing the proposal, has procured firm commitments for all necessary resources, and has formulated sound business and technical plans for executing the proposal'. (297) Other evaluation criteria included the potential of the proposed TLD operation: (i) to assist in the long-range management of the DNS, (ii) to enhance competition for registration services, (iii) to enhance the utility of the DNS, (iv) to meet previously unmet types of needs, (v) to enhance the diversity of the DNS, and (vi) to protect the rights of third parties appropriately. (298)

▲ P 50 The application window of this proof of concept round in fact ran from 5 September 2000 to 2 October 2000, (299) and ICANN received forty-seven applications for over 200 ▲▼ new gTLDs. (300) By 10 November 2000, the applications had been evaluated by ICANN staff and outside advisors, and on 16 November, the ICANN Board selected seven new gTLD proposals to enter into contract negotiations. (301) Eventually, ICANN entered into registry agreements concerning these seven new gTLDs, and allowed for the .biz, .name, .info, .pro, .aero, .coop, and .museum gTLDs to be added to the Internet's root zone.

## 2 The Second Round of 2004

One of the ideas behind the 2000 proof of concept round was that the future introduction of additional gTLDs should be done only after careful evaluation of the initial introduction. (302) Upon the conclusion of the proof of concept round, ICANN set up a task force to devise an evaluation process and planning. In July 2002, this task force recommended that the ICANN Board consider to what extent it could start working on new gTLD rounds in parallel with this evaluation process. (303) In response to the task force's report, the ICANN Board instructed ICANN's President to produce a plan for action. (304)

On 18 October 2002, the then President of ICANN issued a 'Plan for Action regarding New gTLDs', which called for 'proposals for up to three more sponsored TLDs as an extension of the "Proof of Concept".' (305) The author of the plan for action was of the opinion that small, specialized TLDs, which were sponsored by and operated in the interest of a particular, defined community could be introduced relatively easily, whereas major issues in relation to the 'Proof of Concept' 'mostly affected unsponsored TLDs. (306) The introduction of only a few sponsored TLDs might allow ICANN to 'learn a bit more about the nature of the "market" for these kinds of new TLDs.' (307) In December 2002, the ICANN Board instructed ICANN's President to develop a draft Request for Proposals (RFP) for a limited number of new sponsored gTLDs (or sTLDs). (308) Proposed selection criteria were posted for public comment in March ▲▼ 2003, (309) and a first draft RFP was published on 24 June 2003. (310) Meanwhile, ICANN had abandoned the proposed artificial limitation to three new sTLDs, (311) and had decided not to restrict the RFP for sTLDs to the applicants of the 2000 proof of concept round only. (312) The sTLD application process was to be open to both not-for-profits and other forms of entities that otherwise met the RFP criteria for a sponsoring organization, and was scheduled for completion in 2004. (313)

▲ P 51 The sTLD application process was officially launched on 15 December 2003, when ICANN posted the final version of the RFP for sTLDs. (314) The application window lasted until 16 March 2004. (315)

Consistent with ICANN's fundamental obligations, the RFP specified that the selection procedure was based on 'principles of objectivity, non-discrimination and transparency.' (316) Applicants had to pay a non-refundable application fee of USD 45,000, and meet the following criteria:

- Sponsorship information: The proposed sTLD 'must address the needs and interests of a clearly defined community'. The application had to demonstrate: (i) support from the sponsoring organization, (ii) the appropriateness of the sponsoring organization and the policy formulation environment, and (iii) broad-based support for the sTLD from the intended community;
- Business plan information: Applicants had to demonstrate their methodology for introducing a new sTLD and their ability to implement a robust and appropriately resourced organization and submit a financial model outlining the financial, technical and operational capabilities of the organization;
- Technical standards: Applicants had to demonstrate their ability: (i) to ensure stable registry operation, (ii) to conform with best practice technical standards for registry operations, (iii) to offer a full range of registry services, and (iv) to assure continuity of registry operation in the event of business failure;
- ▲ P 52 - Community value: Applicants had to demonstrate: (i) the added value of the proposed sTLD to the Internet name space, (ii) safeguards that protect the ▲▼ rights of others, (iii)

assurance of charter-compliant registrations and avoidance of abusive registration practices, (iv) assurance of adequate dispute-resolution mechanisms and (v) the provision of ICANN-compliant WHOIS services. (317)

ICANN received ten applications for nine sTLDs in response to the RFP. (318) A team of independent evaluators determined that two applications (319) satisfied all of the selection criteria. The other applicants were given an opportunity to provide additional clarifying information to the evaluators and the ICANN Board. (320) The sTLD application round ultimately resulted in ICANN's approval of the .post, .cat, .asia, .jobs, .mobi, .tel, .travel and .xxx gTLDs. (321)

### 3 The Third Round of 2011

Well before the launch of the second round of 2004, on 24 June 2003, the leadership of ICANN's policy body, now the GNSO Council, advised the ICANN Board that 'the namespace should be market driven and that organizations [should be] free to propose names that they believed would be of use to DNS users'. (322) On 31 October 2003, the ICANN Board accepted the GNSO's recommendation, and expressed ICANN's commitment to define and implement a predictable strategy for selecting new gTLDs using straightforward, transparent and objective procedures that preserve the stability of the Internet. The Board expressed the belief that ICANN should begin immediately with the development of a long-term policy for selecting new gTLDs, and requested that implementation commence before 31 December 2004. (323)

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It finally took the GNSO until October 2007 to complete its policy development work on new gTLDs, and to submit a set of principles and recommendations to ICANN's Board. (324) The GNSO gave the following reasons for introducing new gTLDs:

'The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.'

In developing its proposed policy, the GNSO collaborated with other ICANN policy development and advisory organizations; the GNSO consulted with the GAC, At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO), and Security and Stability Advisory Committee (SSAC). (325) The ICANN Board of Directors adopted the GNSO's proposed policy in June 2008. (326) The implementation plan needed further development and Board approval. (327)

Key to the implementation plan was the development of an applicant guidebook, which had to provide new gTLD applicants with a step-by-step procedure and to inform prospective applicants what to expect during the application and evaluation periods. (328) A first draft applicant guidebook was released for public comment on 24 October 2008. (329) It took almost three years, seven versions of the applicant guidebook, fifty-eight explanatory memoranda and nearly fifty new gTLD-related public comment sessions before the ICANN Board approved the new gTLD program. (330) The application window was planned to open on 12 January 2012 and to close on 12 April 2012. (331) In fact, the application window was extended until 30 May 2012, following technical issues with the only application portal. (332) The Board envisaged some changes to the applicant guidebook following discussions with the GAC. (333) After the Board's approval of the new gTLD program, ICANN changed the applicant guidebook twice, once before the application window to reflect the outcome of the discussions with the GAC, (334) and a second time after the close of the application window. (335)

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The applicant guidebook, named the gTLD Applicant Guidebook (AGB), sets out an application process, an evaluation process, and an objection and dispute resolution process. The AGB had to reflect the principles and recommendations of the GNSO's new gTLD policy. In particular, the AGB had to guarantee that new gTLDs would be introduced in 'an orderly, timely and predictable way.' (336) Consistent with ICANN's fundamental obligations, the GNSO recommended that evaluation and selection procedure for new gTLD registries respect the principles of fairness, transparency and non-discrimination. (337) Transparent and predictable criteria, which were objective and measurable had to be made available to the applicants prior to the initiation of the process, and, normally, no subsequent selection criteria were to be used in the selection process. (338) The GAC agreed with this recommendation and stated as a principle that 'the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.' (339) The GNSO's new gTLD policy required that there be a base contract provided to applicants at the beginning of the application process. (340)

#### a The Application Process For A New Gtld

Reflective of the GNSO's new gTLD policy, the AGB served as a manual for the application procedure – it guides the applicant through the process detailing the requisite documents and information, the financial and legal commitments and what to expect during the application and evaluation periods. The AGB contained a base registry agreement that

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applicants were presumed to enter into upon the successful completion of the application and evaluation process. Having passed through all the application stages, applicants were expected to make their gTLD operational, and this is why a detailed plan for the launch and operation of the proposed gTLD had to be submitted as part of the application process. If a successful applicant did not progress the gTLD into the root system within twelve months of the gTLD being delegated, ICANN could terminate the registry agreement.

The AGB described in detail what information was required in order to apply successfully for a new gTLD. Generally speaking, ICANN required applicants for new gTLDs to describe their administrative, operational, technical and financial capability to launch and operate a new gTLD extension for a term of at least ten years. There were fifty different questions on the basis of which such capability was to be determined by external evaluators to be appointed by ICANN.


Applicants had to describe in detail their background and the mission and purpose of the applied-for gTLD. They had to demonstrate their operational and technical capability as well as their financial capacity to run the proposed gTLD registry. Applications had to include detailed business plans and contingency planning, identifying risks and worst-case scenarios. It is not surprising that ICANN asked for abundant and detailed information, given its responsibility for preserving the security, stability and global inter-operability of the Internet. As applicants apply to control a critical piece of the Internet infrastructure on which millions of Internet users may rely, extensive scrutiny of each applicant is necessary to ensure new gTLD registries will be able to comply with ICANN's contract and to follow all best practices and standards.

There are a number of distinct steps in the application process for new gTLDs:

- (1) Application preparation and submission;
- (2) Application evaluation;
- (3) Contract negotiation and execution; and
- (4) New gTLD delegation and testing.

After having completed these steps, the successful applicant for the TLD was able to start registering domain names in the TLD, allowing the introduction of websites and emails.

#### **b What Was Icann Expected To Do?**

ICANN was expected to review the applications regardless of whether or not it called upon third parties to help with the technical and financial evaluation or to solve objections. ICANN was expected to assess applicants' capabilities on the basis of objective, measurable and transparent criteria. The ICANN Board remained responsible for the new gTLD program, which implies in our view that ICANN had to perform  quality controls and that it was expected to assess whether the third party advice or resolution was reasoned and meaningful, and to take the appropriate time to perform the assessments.

##### **(1) The Evaluation Phase**

After the application window, there were several evaluation stages, each with its own estimated duration. During the evaluation process, ICANN had to check whether the application met the requirements. ICANN first checked whether an application was administratively complete (Have all mandatory questions been answered? Have all required supporting documents been provided in the proper format(s)? Have the evaluation fees been received?). Unless there were exceptional circumstances, an application that was not administratively complete was rejected.

Then, ICANN performed the initial evaluation. The initial evaluation started with a background screening of the applicant. Background screening criteria were introduced in recognition of ICANN's duty 'to protect the public interest in the allocation of critical Internet resources.' (341) ICANN affirmed the right to deny an otherwise qualified application, and gave applicants a list of circumstances that would ordinarily result in the automatic disqualification of an applicant. (342) The list contains various types of criminal or cybersquatting behavior. (343) Applicants also had to provide an explanation for 'any additional background information that may be found concerning the applicant or any individual named in the application, which may affect eligibility.' (344) Finally, applicants had to warrant that statements and representations in the application were true, accurate and complete in all material respects. A change in circumstances that would render any information provided in the application false or misleading had to be notified to ICANN in writing. (345) Background screening was needed to make sure that critical Internet resources were allocated to reliable parties.

Once the background screening was completed, ICANN checked whether the application met the administrative, operational, technical and financial requirements.

If an application passed the initial evaluation and there were no objections, no GAC Advice and no identity or confusing similarity with another (applied-for) gTLD, the application immediately moved to the delegation phase.

Applicants failing certain elements of the initial evaluation process were allowed to request an

extended evaluation. In the context of an extended evaluation, the applicant was entitled to exchange additional information with the evaluators in order to clarify information contained in the application. An additional payment was required. However, the same evaluation criteria were used during the initial and the extended evaluation.

To perform the evaluations, ICANN had selected independent evaluation panels which were to use a point scoring system to assess answers to the fifty questions posed in the application form and which were to consider, among other things, what influence the applied for gTLD could have on the stability of the DNS and whether the applied for gTLD was confusingly similar to existing gTLDs or other applications.

There was a minimum pass score applicable to most sections of the application form which had to be met for the application to progress.

Since it is not possible for two or more identical strings to occupy the Internet space, the String Contention procedure would come into effect should there be applications for identical strings. The String Contention procedure aimed in the first instance at a self-resolving of the contention by the parties by mutual agreement.

Also, if there were two or more applications for confusingly similar strings, only one application could be granted and therefore the String Contention procedures would also come into effect. Again, applicants were always given the opportunity to resolve the contention in a mutually acceptable settlement amongst themselves.

ICANN selected the various evaluation panelists through a call for 'Expressions of Interest'. Each panelist had to abide by the Code of Conduct and Conflict of Interest guidelines included in the Applicant Guidebook.

These were the main evaluation panels:

– String Similarity Panel

This Panel was tasked with assessing whether a proposed gTLD string was likely to result in user confusion due to similarity with any reserved name, any existing TLD, any requested Internationalized Domain Name (IDN) ccTLD, or any new gTLD string applied for in the same application round. This assessment had to take place as part of the string similarity review at the initial evaluation stage. (346)

– DNS Stability Panel

This Panel had to determine whether the proposed *string* might adversely affect the security or stability of the DNS. This was planned to occur during the DNS stability string review at the initial evaluation stage. (347)

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– Registry Services Panel

This Panel had to look for any adverse impact on security or stability of the *registry services* proposed in the application. If applicable, this review was planned to take place during the extended evaluation period. (348)

– Geographical Names Panel

This Panel was responsible for the review of each applied-for gTLD to determine whether it represented a geographic name. In the event that the string represented a geographic name and required government support, the panel was then to also review and verify the supporting documentation. (349)

– Technical Evaluation Panel

This Panel was expected to review the applicant's technical and operational capability to run a gTLD registry as proposed in its application. This review was to take place during the technical/operational reviews at the initial evaluation stage, and might also occur in the extended evaluation stage if necessary. (350)

– Financial Evaluation Panel

This Panel was asked to review the applicant's financial capability to maintain a gTLD registry against the relevant business, financial and organizational criteria contained in the Applicant Guidebook. This review was planned to take place during the financial review at the initial evaluation stage, and might also occur in the extended evaluation stage if necessary. (351)

On numerous occasions, ICANN has indicated that it followed the recommendations of its evaluation panels almost automatically. However, the lack of transparency in the selection of the panels and in their workings has given rise to severe criticism by applicants. (352)

(2) The Objection Phase

The new gTLD program also gave various categories of third parties the opportunity to challenge the application for a particular gTLD via Alternative Dispute Resolution (ADR) mechanisms. Such challenges (called 'objections') could be initiated with so-called independent DRSP according to a pre-established set of rules. (353) Under these rules, objections could be based on the following grounds:

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- String Confusion: (354) The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications. Objectors could be existing TLD operators or gTLD applicants in the current round.
- Legal Rights: The applied-for gTLD string infringes the existing legal rights of the objector. Objectors could be rights holders, for example, trademark holders.
- Community: There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. Objectors could be an established institution associated with a clearly delineated community.
- Limited Public Interest: The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law such as racially abusive strings.

The ground for objection dictates which DRSP was to manage the dispute process: String Confusion Objections (SCOs) were managed by the International Centre for Dispute Resolution (ICDR). Legal Rights Objections (LROs) were managed by the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO). Limited Public Interest Objections and Community Objections were managed by the International Chamber of Commerce (ICC).

Parties were not prevented from taking a matter to court. However, decisions obtained through the ADR mechanisms established within the framework of the new gTLD program were likely to be quicker and easier to execute. We are not aware of any objection to an application for which the objector did not pursue the proposed ADR mechanism. In rare instances, court action has followed the outcome of an ADR decision. (355)

In the assessment of objections and the objection grounds, it should be kept in mind that the new gTLD program was launched with the goal of enhancing competition, consumer choice and innovation through the introduction of new gTLDs. ICANN designed the objection process to protect the legitimate rights of certain specific, defined groups, while also ensuring that objectors cannot prevent the delegation of legitimate TLDs. Accordingly, objections were only permitted on four specific grounds enumerated by ICANN: string confusion, legal rights, community opposition and limited public interest.

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### (3) Delegation of New gTLDs

Once an application had passed all the evaluation and selection processes, including objection processes and final approval, it entered the pre-delegation stage. During this stage, the applicant entered into an agreement with ICANN and was expected to pass technical tests before the new gTLD was delegated to the root zone.

New gTLDs are being introduced carefully so that the process does not cause instability in the Internet. A maximum of 1000 new gTLDs can be delegated per year. ICANN planned to start with the evaluation and delegation of the IDNs. Other gTLDs were to be delegated according to a prioritization number that was provided in a draw.

The successful applicant for a particular new gTLD obtains an exclusive right to operate the applied for gTLD. Having become a registry operator, the applicant becomes a 'trustee' of the top-level domain for the global Internet community.

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- 203) ICANN, *CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations*, 3 August 2015 <https://community.icann.org/pages/viewpage.action?pageId=53783460>; ICANN, *CCWG-Accountability, 3rd Draft Proposal on Work Stream 1 Recommendations*, 30 November 2015, <https://community.icann.org/pages/viewpage.action?pageId=56145016>.
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- 205) NTIA, *Remarks of Lawrence E. Strickling Assistant Secretary of Commerce for Communications and Information ICANN Meeting*, 21 June 2015, <https://www.ntia.doc.gov/speechtestimony/2015/remarks-lawrence-e-strickling-assistant-secretary-comm...>
- 206) ICANN, *Cross Community Working Group on Enhancing ICANN Accountability Charter*, 3 November 2014, <https://community.icann.org/display/acctcrosscomm/Charter>.
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- 229) ICANN, Articles of Incorporation, Article 4.
- 230) Expert Report of Jack Goldsmith, in ICDR Case No. 50 117 T 00224 08, 22 January 2009, pp. 12–16, §§ 23–27.
- 231) *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Independent Review Panel Declaration, 19 February 2010, para. 140.
- 232) Although ICANN has expressed the intention to change the Articles of Incorporation following the IANA transition, the version of 21 November 1998 is still in place.
- 233) See e.g., PCIJ, *Interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration, signed at Neuilly-sur-Seine on November 27th, 1919 (Question of the Greco-Bulgarian ‘communities’)*, Advisory Opinion of 31 July 1930, P.C.I.J. Rep., Series B, No. 17, 32; PCIJ, *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzich territory*, Advisory Opinion of 4 February 1932, P.C.I.J. Rep., Series A/B, No. 44, 24; ICJ, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 April 1947*, Advisory Opinion of 26 April 1988, I.C.J. Rep 1988, 12, § 57.
- 234) *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, 9 October 2015, §§ 67, 124.
- 235) ICANN adopted new Bylaws on 27 May 2016, which incorporate the Affirmation of Commitments.
- 236) ICANN Bylaws, Article I(2).
- 237) ICANN Bylaws, Article I(2).
- 238) *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (20 Dec.) (merits); see also *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275, 296 (11 June) (good faith is a ‘well established principle of international law’).
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- 241) ICANN Bylaws, as adopted effective 21 November 1998, Article IV(1)(c), <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-23-en>.

- 242) ICANN Bylaws, as adopted effective 15 December 2002, Article II(3), <https://www.icann.org/resources/unthemed-pages/bylaws-2002-12-15-en>.
- 243) The requirement to act fairly has been further elaborated upon in ICANN's core values, which instruct ICANN to make 'decisions by applying documented policies neutrally and objectively, with integrity and fairness' (ICANN Bylaws as amended on 15 December 2002, Article I(2)(8). Since the Bylaws amendment of 1 October 2016, this core value has become an ICANN commitment (ICANN Bylaws as amended on 1 October 2016, Article 1(2)(a)(v).
- 244) ICANN's constituent bodies were named subordinate entities until ICANN's 'new' Bylaws were adopted effective 15 December 2002.
- 245) ICANN Bylaws, Article I(2)(7). The core values, along with the concept of core values, were introduced with the 'new' Bylaws as adopted effective 15 December 2002.
- 246) Affirmation of Commitments, *supra*n. 135, Articles 3, 7, 9.1 and 10.
- 247) See A. Kotera, *Regulatory Transparency*, in P. Muchlinski, F. Ortino and C. Schreuer, *Oxford Handbook of International Investment Law* 619(2008); see Stacy Baird, *The Government at the Standards Bazaar*, 18 *Stanford Law & Policy Review* 35, 96–97 (2007).
- 248) See Sacha Prechal and Madeleine de Leeuw, *Dimensions of Transparency: The Building Blocks for a New Legal Principle?*, *Review of European Administrative Law* 51 (2007).
- 249) Esther Dyson referred to Frank Fitzsimmons, one of the nine initial directors of ICANN. He served on the ICANN Board from October 1998 to December 2002.
- 250) ICANN Public Meeting Transcript, Meeting Held in Cambridge, Massachusetts Saturday, 14 November, 9:00 am – 4:00 pm, 14 November 1998, <http://cyber.law.harvard.edu/icann/cambridge-1198/archive/transtransparency.html>, p. 222.
- 251) Affirmation of Commitments, *supra*n. 135, Article 7.
- 252) Affirmation of Commitments, *supra*n. 135, Article 9.1.
- 253) See Affirmation of Commitments, *supra*n. 135, Article 9.1.
- 254) See NTIA, *A Proposal to Improve Technical Management of Internet Names and Addresses – Discussion Draft*, <https://www.ntia.doc.gov/files/ntia/publications/dnsdrft.txt> (accessed 11 May 2016) ('Green Paper'); NTIA, *Management of Internet Names and Addresses: statement of policy*, [https://www.ntia.doc.gov/files/ntia/publications/6\\_5\\_98dns.pdf](https://www.ntia.doc.gov/files/ntia/publications/6_5_98dns.pdf), pp. 31742, 31743, 31744 at n. 18, pp. 31745–31746, 31747–31748, 31749, 31751.
- 255) Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, 25 November 1998, Articles II.A, II.C.2, IV, V.C.3.
- 256) ICANN Bylaws as amended on 15 December 2002, Article I(2)(2), (5)-(6); The duty to '[r]espect 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' has been taken up as a 'commitment in ICANN's Bylaws as amended on 1 October 2016, Article I(2)(a)(iii).
- 257) ICANN Bylaws as amended on 15 December 2002, Article II(3); ICANN Bylaws as amended on 1 October 2016, Article 2(3).
- 258) Affirmation of Commitments, *supra*n. 135, Article 3.
- 259) Affirmation of Commitments, *supra*n. 135, Article 9.3.
- 260) Affirmation of Commitments, *supra*n. 135, Articles 3 and 9.1.
- 261) ICANN Bylaws as amended on 15 December 2002, Article I(2)(10). With the adoption of its amended Bylaws of 1 October 2016, this core value has become a commitment.
- 262) .mil for use by the U.S. military, .gov for U.S. Government use, .edu for educational institutions (mainly in the U.S.), .int for international treaty organizations, and .arpa for infrastructural identifier spaces.
- 263) .com, .net and .org.
- 264) Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, p. 1.
- 265) ISO 3166 is a standard of the International Organization for Standardization that defines codes for the names of countries, dependent territories, and special areas of geographical interest and their principal subdivisions. The first part of ISO 3166 (referred to as ISO 3166-1 defines three sets of codes for the names of countries, dependent territories and special areas of geographical interest. ISO 3166-1 alpha-2 offers a set of two-letter country codes. It is the ISO 3166-1 alpha-2 codes that are used for ccTLDs.
- 266) Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, p. 2.
- 267) Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, pp. 2 and 4.
- 268) NTIA, *supra*n. 83, p. 31742.
- 269) NTIA, *supra*n. 83, 31744.
- 270) See Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, p. 1.
- 271) OLG Frankfurt am Main, decision from 29.04.2008, case number 11 U 32/04 ("VW.de"); LG Frankfurt am Main, decision from 14.10.1998, case number 2/06 O 283/98 ("Ambiente").
- 272) Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, pp. 2–3.
- 273) Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, pp. 1, 2.
- 274) Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, p. 2.

- 275) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, pp. 1, 3–4.
- 276) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, p. 4.
- 277) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, p. 8.
- 278) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, p. 4.
- 279) *Supra* Chapter 2.A.2.b(2); ICANN, *Cooperative Agreement No. NCR-9218742*, <http://archive.icann.org/en/ansi/coopagmt-01jan93.htm> (accessed 11 May 2016).
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- 282) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, June 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-01>, p. 7.
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- 284) NTIA, *supra*n. 83, p. 31745.
- 285) NTIA, *supra*n. 83, pp. 31745–31746.
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- 288) The DNSO, *i.e.*, the predecessor of the GNSO.
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- 290) ICANN, *ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains*, 13 June 2000, <https://archive.icann.org/en/meetings/yokohama/new-tld-topic.htm>.
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- 292) ICANN, *Resolution 00.47*, Regular Meeting of the Board Minutes, 16 July 2000, <https://www.icann.org/resources/board-material/minutes-2000-07-16-en>.
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- 294) ICANN, *Criteria for Assessing TLD Proposals*, 15 August 2000, <http://archive.icann.org/en/tlds/tld-criteria-15aug00.htm>.
- 295) ICANN, *Resolution 00.48*, Regular Meeting of the Board Minutes, 16 July 2000, <https://www.icann.org/resources/board-material/minutes-2000-07-16-en>; ICANN, *New TLD Application Instructions*, 15 August 2000, <https://archive.icann.org/en/tlds/new-tld-application-instructions-15aug00.htm>.
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- 313) ICANN, *Resolutions 03.169-171*, 31 October 2003, <https://www.icann.org/news/advisory-2003-10-31-en>; ICANN, *ICANN Launches Broad Strategic Initiative for New Generic Top-Level Domain*, 31 October 2003, <https://www.icann.org/news/announcement-2003-10-31-en>.
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- 315) ICANN, *New sTLD Application*, 15 December 2003, <https://archive.icann.org/en/tlds/new-stld-rfp/new-stld-application-parta-15dec03.htm>.
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