

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

In the Matter of the Independent Review Process:

ICM Registry, LLC,

Claimant,

v.

Internet Corporation For Assigned Names and  
Numbers ("ICANN"),

Respondent.

CASE MANAGER: Carolina Cárdenas

ICDR Case No. 50 117 T 00224 08

**ICANN'S RESPONSE TO  
CLAIMANT'S MEMORIAL ON THE MERITS**

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ALAC	ICANN's At-Large Advisory Committee
DNS	domain name system
DNSO	Domain Name Supporting Organization
ERC	ICANN Evolution and Reform Committee
Evaluation Panel	independent panel of experts convened in April 2004 to review and make recommendations with respect to the sTLD applications
GAC	ICANN's Governmental Advisory Committee
GNSO	ICANN's Generic Names Supporting Organization
gTLD	generic Top Level Domain
ICANN	Internet Corporation for Assigned Names and Numbers
ICDR	International Centre for Dispute Resolution
ICDR Rules	ICDR International Arbitration Rules
ICM	ICM Registry, LLC
IFFOR	International Foundation for Online Responsibility
IP	Internet Protocol
IRP	ICANN's independent review process
Memorial	ICM's Memorial on the Merits
NTIA	National Telecommunications and Information Administration (an agency of the United States Department of Commerce)
Panel	IRP Panel
RFP	request for proposal
sTLD	sponsored Top Level Domain
TLD	Top Level Domain
uTLD	unsponsored Top Level Domain

Pursuant to Article IV, section 3 of the Bylaws for the Internet Corporation for Assigned Names and Numbers (“ICANN”), and the Rules of the International Centre for Dispute Resolution (“ICDR”) as amended and supplemented in this proceeding, ICANN hereby submits this Response (the “Response”) to Claimant’s Memorial on the Merits submitted by ICM Registry, LLC (“ICM”).

## **I. INTRODUCTION**

1. This dispute relates to ICM’s proposal to operate a new sponsored Top Level Domain (an “sTLD”) on the Internet known as “.XXX.” The .XXX sTLD was intended to serve the online adult-entertainment (*i.e.*, pornography) community. ICM asserts that ICANN’s denial of ICM’s proposal violated ICANN’s Bylaws and Articles of Incorporation, in particular that the Board did not act in an open, transparent, and procedurally fair manner.

2. The ICANN Board did deny ICM’s application, but only after a multi-year and extensive debate, during which the Board: (i) repeatedly allowed ICM to provide information in support of its application and to amend its proposed registry agreement to address ICANN’s concerns; (ii) received a significant amount of input from members of the “community” that ICM proposed to represent, as well as from several governments that were concerned about the proposed .XXX sTLD; (iii) debated the issues publicly and at great length; and (iv) ultimately determined that ICM had failed to meet the criteria established for the delegation of a sponsored TLD. Throughout ICANN’s review, evaluation and ultimate rejection of ICM’s proposal, ICANN adhered rigorously to its Bylaws and Articles of Incorporation. Indeed, it is hard to imagine a process that could have been *more* open, transparent, and procedurally fair.

3. These independent review proceedings are truly unique. ICANN, which has existed since 1998, established the process of independent review in Bylaws revisions that were adopted in 2002. The Bylaws provide that the limited purpose of independent review is to provide a forum to address whether ICANN acted inconsistently with its Bylaws and Articles of Incorporation. ICM’s challenge is the first time that the process has been invoked.

4. The independent review process must, of course, adhere strictly to the Bylaws that established the process. The process was not intended to provide for a “Supreme Court” of ICANN that would address all aspects of ICANN’s conduct, nor was the process intended to



provide for a panel of three jurists who would substitute their views on the operation of the Internet's domain name system for the views of the ICANN Board following a *de novo* review of all the facts. This, however, is ICM's position in these proceedings, a position that is utterly inconsistent not only with the Bylaws but with the extensive process that resulted in ICANN's adoption of the Bylaws.

5. In this Response, ICANN will address these subjects in detail. After providing some general background on ICANN and the dispute at issue, this Response will proceed as follows:

- First, ICANN will address the nature of these proceedings and the fact that the Panel's declaration will not be legally binding on ICANN. *See infra* Section III.A.1.
- Second, ICANN will address the appropriate standard of review that applies to these proceedings, and show that decisions of the Board are entitled to significant deference. *See infra* Section III.A.2.
- Third, ICANN will address the law that applies to these proceedings. ICM attempts to import "international law" and assorted claims arising under international law, but the Articles and Bylaws are clear that international law does not apply here. *See infra* Section III.A.3.
- Fourth, and with respect to the factual merits of ICM's claims, ICANN will address the four major factual disputes that ICM has identified. ICANN will demonstrate that ICM's interpretation of the facts is demonstrably wrong in each respect. As a result, and whatever deference that the Panel elects to afford to the decisions of the Board, ICM has no basis for claiming any inconsistency with ICANN's Articles and Bylaws. *See infra* Sections III.B and III.C.

6. ICANN regrets the need to address so many issues. ICM knows better than to be arguing that these proceedings are binding or that the Panel should be conducting a *de novo* review. Indeed, ICM's own counsel, who participated in drafting the Bylaws governing these proceedings, has written that these proceedings are merely advisory and not binding. Under the standards unambiguously set out in the Bylaws, these proceedings are not nearly as complicated as ICM attempts to make them, and a hearing with live witnesses is unnecessary for the Panel to carry out its mandate, particularly in view of the enormous amount of materials that the parties have submitted to the Panel. In any event, there is little doubt that the ICANN Board's

extremely comprehensive review of ICM's application for the .XXX sTLD was fully compliant with the Bylaws and Articles. The fact that ICM did not like the final outcome hardly means that ICANN violated its Bylaws or Articles; to the contrary, as will be discussed in this Response, ICANN devoted a tremendous amount of time to the .XXX sTLD application because: (i) the application was controversial; (ii) it involved complex issues in a world-wide setting that were not easily resolved; (iii) from the outset, the application generated significant concerns that it did not meet the "sponsorship" requirements for ICANN to approve .XXX as a *sponsored* TLD (as the application criteria clearly required); and (iv) it was the only sTLD application that ICANN received that did not appear to have support from the "community" it proposed to represent and, even more complicating, generated significant opposition over time.

7. Nearly all of ICM's arguments rest on the assertion that, in June 2005, the ICANN Board finally and unconditionally deemed ICM's application to satisfy ICANN's requirements for approval of a sponsored TLD. But the facts (including the resolutions that the Board adopted), and the parties' course of conduct following the June 2005 Board resolutions, make clear that the Board did not unconditionally approve ICM's application; to the contrary, the Board remained extremely concerned that ICM's application was lacking with respect to a critical component – sponsorship. Many Top Level Domains do not have (or require) sponsorship, but sponsorship was the key ingredient in this particular process that the ICANN Board had adopted and under which ICM submitted its application.

8. ICM assumes incorrectly that the two steps involved in reviewing sTLD applications (namely, review of the application's compliance with the requirements for issuance and the negotiation of an acceptable contract) could never overlap in time, so that *any* authorization to proceed with contract negotiations would always constitute an implicit approval of the application. This assumption is baseless. The language of the rules governing the process, the understanding of the participants, the operation of the process in practice, ICANN's historical practice, and common sense all uniformly show that ICANN was free to consider both steps simultaneously, because contract negotiations could sometimes facilitate resolution of issues regarding the requirements for any sTLD. The evidence shows beyond any doubt that this is precisely what ICANN did with respect to ICM's application. Because the ICANN Board did not approve ICM's application in June 2005, but merely voted to allow negotiations to proceed

with ICM for the purpose of determining whether such negotiations might bear on the outstanding issues surrounding the application, ICM's arguments collapse.

9. ICM's insinuation that ICANN denied ICM's application based on vague public policy considerations is false. ICANN denied the application for the same reasons, among others, that had caused a completely independent Evaluation Panel to recommend that ICANN not proceed with ICM's .XXX sTLD – because ICM failed to satisfy essential “sponsorship” requirements. ICM's suggestion that these determinations were somehow pretextual is amply refuted by the fact that the Evaluation Panel reached precisely the same conclusion as ICANN, as well as by copious evidence demonstrating that those requirements were not, as a matter of fact, satisfied. Further, as ICANN explains herein, the Board properly considered the substantial public policy objections that numerous governments asserted during the course of the Board's deliberations.

10. ICANN could have denied ICM's application immediately upon the adverse recommendation of the Evaluation Panel, which determined that ICM failed to satisfy essential requirements for an sTLD and recommended that ICM's application receive no further consideration. Nonetheless, ICANN's Board chose to extend far greater review and latitude to ICM than was required by the process, permitting additional submissions, written and oral presentations to ICANN, and efforts to address ICM's shortcomings through negotiation. None of these additional activities were required by the sTLD process that ICANN had adopted for evaluating sTLD applications, but ICANN extended them to ICM (and others) nevertheless. Perhaps the Board should have denied ICM's application in 2004, but it extended the process in order to determine whether ICM could ultimately satisfy the necessary criteria for the TLD it proposed to operate. Over time, the answer turned to be “no,” but the notion that ICANN somehow violated its Bylaws or Articles of Incorporation in the process is unsupportable as a legal or factual matter.

## **II. BRIEF SUMMARY OF RELEVANT FACTS AND ICM'S MEMORIAL.**

### **A. ICANN'S FUNCTION AND DECISION-MAKING.**

11. ICANN is a not-for-profit public benefit corporation that was organized under California law in 1998.<sup>1</sup> ICANN's mission is to protect the stability, integrity, and utility of the Internet domain name system (the "DNS") on behalf of the global Internet community,<sup>2</sup> pursuant to a series of agreements with the United States Department of Commerce.<sup>3</sup> In carrying out its functions, ICANN solicits and receives input from a wide variety of Internet stakeholders.

12. ICANN has a Board of Directors, a Staff, an Ombudsman, a Nominating Committee for Directors, three Supporting Organizations,<sup>4</sup> four Advisory Committees, and numerous other stakeholders that participate in the ICANN process.<sup>5</sup> ICANN's Board of Directors (the "Board") consists of one compensated voting director (the President and CEO)

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<sup>1</sup> Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (last modified November 21, 1998), attached to Claimant's Memorial on the Merits, Exhibit 4 (Hereinafter referred to as "Cl. Ex. \_\_").

<sup>2</sup> ICANN Bylaws, Article 1, § 1 (Mission), Cl. Ex. 5.

<sup>3</sup> See, e.g., Memorandum of Understanding between the U.S. Department of Commerce and ICANN, November 25, 1998, Cl. Ex. 32.

<sup>4</sup> The Supporting Organizations are responsible for the development and recommendation of policies concerning the Internet's technical management within their areas of expertise. For example, the Generic Names Supporting Organization (the "GNSO") is responsible for advising the ICANN Board on substantive policy issues relating to generic top-level domains. See Generic Names Supporting Organization, GNSO Reference Documents, available at <http://gns0.icann.org/reference-documents.htm> (last visited May 4, 2009), attached hereto as ICANN Exhibit A.

<sup>5</sup> ICANN Bylaws, *supra* note 2, Articles V-XI. ICANN's Bylaws provide for four Advisory Committees – the Governmental Advisory Committee (discussed in the next paragraph), the Security and Stability Advisory Committee, the Root Server System Advisory Committee, and the At-Large Advisory Committee. See *id.* at Article XI, §§ 1-2 (Advisory Committees). The Bylaws also provide that the ICANN Board may liaise with additional Committees, which it has done with the Technical Liaison Group and the Internet Engineering Task Force. The Bylaws established the Technical Liaison Group as a group of four preexisting, non-ICANN organizations intended to "connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN's activities." See *id.* at Article XI-A, §§ 1-2 (Technical Liaison Group). The Internet Engineering Task Force, which is also a non-ICANN organization, is an "open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet." Overview of the IETF, available at <http://www.ietf.org/overview.html> (last visited May 4, 2009), attached hereto as ICANN Exhibit B.

and fourteen volunteer voting directors,<sup>6</sup> two-thirds of whom presently reside outside of the United States. In addition, each of the Advisory Committees, along with the Technical Liaison Group (the “TLG”) and the Internet Engineering Task Force (the “IETF”), appoint a volunteer, non-voting liaison to the Board, who takes part in Board discussions and deliberations.<sup>7</sup>

13. The Governmental Advisory Committee (the “GAC”) is one of ICANN’s Advisory Committees, made up of representatives of national governments and intergovernmental organizations.<sup>8</sup> The GAC provides advice to ICANN on issues of public policy, acting as a conduit for different national governments to express their views to ICANN. In particular, the GAC considers ICANN’s activities and policies as they relate to the concerns of governments, particularly in matters where there may be an interaction between ICANN’s policies and national laws or international agreements.<sup>9</sup>

14. ICANN’s Bylaws provide that the ICANN Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues.<sup>10</sup> The GAC may also “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”<sup>11</sup>

15. The Bylaws *require* the ICANN Board to consider the GAC’s advice.<sup>12</sup> Where the Board elects to take actions that are inconsistent with the GAC’s advice, it must inform the

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<sup>6</sup> ICANN Bylaws, *supra* note 2, Article VI, § 1 (Board of Directors). Eight directors are selected by ICANN’s Nominating Committee and the other six directors are selected by ICANN’s three Supporting Organizations (each selecting two). The ICANN President also serves as a voting director. *Id.* at Article VI, § 2.

<sup>7</sup> *Id.* at Article VI, § 9 (Non-Voting Liaisons).

<sup>8</sup> *Id.* at Article XI, § 2.

<sup>9</sup> *Id.* at Article XI, § 2.1(a); *see also* The Internet Domain Name System and the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), Cl. Ex. 40; ICANN Governmental Advisory Committee, Operating Principles, Cl. Ex. 41 (“GAC’s Operating Principles”).

<sup>10</sup> ICANN Bylaws, *supra* note 2, Article XI, § 2.1(h) (Advisory Committees).

<sup>11</sup> *Id.* at Article XI, § 2.1(i).

<sup>12</sup> *Id.* at Article XI, § 2.1(j); *see also* GAC’s Operating Principles, *supra* note 9 (“The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments and where they may affect public policy issues. The Advice of the

GAC and state its reasons for doing so. The GAC and the ICANN Board must then attempt to find a mutually acceptable solution.<sup>13</sup>

**B. THE INITIAL ROUND FOR INTRODUCING NEW TLDs AND ICM'S APPLICATION FOR AN UNSPONSORED .xxx TLD.**

16. When ICANN was formed, there were only three “generic” TLDs – .com, .net, and .org.<sup>14</sup> Since its inception, ICANN has worked to introduce new TLDs. Indeed, ICANN began to explore the possibility of adding new TLDs to the DNS shortly after ICANN's formation in 1998.

17. There are several types of TLDs. Currently, the TLDs with three or more characters are called “generic” TLDs or “gTLDs.” Other types of TLDs include two-letter country-code TLDs, such as .fr and .cz. TLDs are run by “registries” (or “registry operators”).

18. gTLDs can be subdivided into two types: “unsponsored” TLDs (“uTLDs”) and “sponsored” TLDs (previously defined as “sTLDs”). In general, a uTLD operates for the benefit of the global Internet community and has no restrictions on which “second level” domain names – *i.e.*, “google.com” – can be registered in that TLD. An sTLD, by contrast, is a specialized TLD that has a “Sponsor” representing a specified community for whose benefit it wishes to operate the TLD, and the Sponsor places limitations on those who wish to register second level domain names.

19. An sTLD “Sponsor” (or “sponsoring organization”) is delegated the authority to control the operation of the sTLD. Each sTLD has a “Charter,” which defines the purpose of the

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(continued...)

Governmental Advisory Committee on public policy matters shall be duly taken into account by ICANN, both in the formulation and adoption of policies.”)

<sup>13</sup> ICANN Bylaws, *supra* note 2, Article XI, § 2.1(j).

<sup>14</sup> There were also four other limited-use TLDs that are sometimes referred to as “gTLDs”: .gov (for United States government use); .edu (for educational institutions, mainly in the United States); .int (for international treaty organizations); and .arpa (for infrastructural identifier spaces).

sTLD. The Sponsor must develop policies to implement the Charter for the benefit of a defined group of stakeholders, known as the “Sponsored TLD Community.”<sup>15</sup>

20. On July 16, 2000, after lengthy deliberation and public comment, the ICANN Board adopted a “measured and responsible” application process for the introduction of new gTLDs.<sup>16</sup> This initial round was a preliminary effort to constitute a “proof of concept” to improve ICANN’s understanding and experience in practical and policy issues involved in adding new TLDs.<sup>17</sup>

21. ICANN received forty-seven applications for over 200 new gTLDs (both unsponsored and sponsored). Among the forty-seven proposals was an application by ICM for an *unsponsored* .XXX TLD. ICANN staff recommended that the Board not select .XXX during this “proof of concept” round for three reasons: (1) a .XXX TLD “did not appear to meet unmet needs”; (2) there was significant “controversy surrounding” the application; and (3) the application adopted a “poor definition of the hoped-for benefits” of .XXX.<sup>18</sup> “The evaluation concluded that at this early ‘proof of concept’ stage with a limited number of new TLDs

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<sup>15</sup> The purpose and function of uTLDs and sTLDs may evolve as ICANN continues to add new TLDs to the DNS. With respect to sTLDs, ICM’s expert, Dr. Milton Mueller, criticizes ICANN for being “in the position of approving who [is] the appropriate representative of a ‘community,’” and argues that “[s]uch a determination bears little direct connection to ICANN’s technical mandate.” ICM Memorial, Expert Report of Dr. Milton Mueller at p. 23. Dr. Mueller’s criticism is misplaced. Sponsorship permits sTLD policies to be developed by an independent sponsor, with more limited supervision by ICANN than is present in uTLDs. Far from accreting power to ICANN, sponsorship shifts policymaking *away* from ICANN in favor of independent actors.

<sup>16</sup> ICANN TLD Application Process: Information for Applicants, *available at* <http://www.icann.org/en/tlds/tld-application-process.htm> (last visited May 4, 2009), attached hereto as ICANN Exhibit C; *see also* Resolutions of the ICANN Board on New TLDs, July 16, 2000, *available at* <http://www.icann.org/en/tlds/new-tld-resolutions-16jul00.htm> (last visited May 4, 2009), attached hereto as ICANN Exhibit D.

<sup>17</sup> ICANN Criteria for Assessing TLD Proposals, August 15, 2000, Cl. Ex. 52 (“The current program of establishing new TLDs is intended to allow the Internet community to evaluate possible additions and enhancements to the DNS and possible methods of implementing them. Stated differently, the current program is intended to serve as a ‘proof of concept’ for ways in which the DNS might evolve in the longer term.”).

<sup>18</sup> ICANN Report on TLD applications: Application of the August 15 Criteria to Each Category or Group, November 9, 2000, *available at* <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm> (last visited May 4, 2009), attached hereto as ICANN Exhibit E.

contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs.”<sup>19</sup>

22. On November 16, 2000, the ICANN Board passed a resolution authorizing ICANN’s President and General Counsel to commence contract negotiations with seven of the applicants, each for one TLD, including four uTLDs (.biz, .info, .name, and .pro) and three sTLDs (.museum, .aero, and .coop).<sup>20</sup> These seven were selected for negotiations following extensive input from ICANN staff, outside advisors, and the Internet community as a whole. ICM’s .XXX TLD application was not among those selected.<sup>21</sup>

23. The Board’s resolution that authorized ICANN staff to conduct contract negotiations with the proposed registry operators and sponsoring organizations did not constitute “final approval” of any proposed TLD:

Resolved [00.89], the Board selects the following proposals for negotiations toward appropriate agreements between ICANN and the registry operator or sponsoring organization, or both: JVTeam (.biz), Afiliias (.info), Global Name Registry (.name), RegistryPro (.pro), Museum Domain Management Association (.museum), Société Internationale de Télécommunications Aéronautiques (.aero), Cooperative League of the USA dba National Cooperative Business Association (.coop); [and]

Resolved [00.90], the President and General Counsel are authorized to conduct those negotiations on behalf of ICANN and, ***subject to further Board approval or ratification, to enter into appropriate agreements . . .***<sup>22</sup>

24. After the November 16, 2000 resolution, ICANN commenced lengthy negotiations with the seven applicants, after which negotiated contracts were submitted to the

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<sup>19</sup> *Id.*

<sup>20</sup> Preliminary Report, Second Annual Meeting and Organizational Meeting of the ICANN Board, available at <http://www.icann.org/en/minutes/prelim-report-16nov00.htm> (last visited May 4, 2009), attached hereto as ICANN Exhibit F.

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

<sup>22</sup> Minutes of Second Annual Meeting of the Board, November 16, 2000, available at <http://www.icann.org/en/minutes/minutes-annual-meeting-16nov00.htm> (last visited May 4, 2009) (emphasis added), attached hereto as ICANN Exhibit G.



Board for approval. For example, authorization to enter into the agreement for “.museum” was granted on September 10, 2001, concurrently with a resolution in favor of further negotiation of the registry agreements for the “.aero” and “.coop” sTLDs. The “.pro” TLD was not approved until March 14, 2002, after negotiations finally demonstrated a solution to serious issues that had stood in the way of its approval.<sup>23</sup>

25. Even with the approval of the ICANN Board, these TLDs could be added to the DNS only upon United States Department of Commerce approval because the Department of Commerce retains ultimate authority to approve or reject recommendations by ICANN for inclusion of new TLDs into the root zone.

26. ICANN considered the launch of the seven new TLDs to be successful because, among other things, the launch did not impair the security or stability of the Internet, and the new TLDs facilitated additional competition. As a result, following the completion of the “proof of concept” round and the addition of the new TLDs to the DNS, ICANN considered adopting procedures for the introduction of more TLDs, as described in the next section.

**C. THE SECOND ROUND FOR INTRODUCING NEW TLDs AND ICM’S APPLICATION FOR A SPONSORED .XXX TLD.**

27. On October 18, 2002, then-ICANN President Stuart Lynn issued “A Plan for Action Regarding New gTLDs.”<sup>24</sup> Mr. Lynn recommended that the ICANN Board consider initiating a new round of proposals for “sponsored” TLDs.

28. In 2003, ICANN solicited public comments about developing proposed criteria and procedures for evaluating sTLD proposals.<sup>25</sup> Consistent with its mandate for open and

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<sup>23</sup> ICANN Montevideo Meeting Topic: New TLD Agreements, September 5, 2001, *available at* <http://www.icann.org/en/meetings/montevideo/new-tld-topic.htm> (last visited May 4, 2009), attached hereto as ICANN Exhibit H.

<sup>24</sup> A Plan for Action Regarding New gTLDs, Stuart Lynn, ICANN President, October 18, 2002, Cl. Ex. 60.

<sup>25</sup> Although Mr. Lynn’s Action Plan suggested limiting the number of sTLDs in this round of proposals to three, community comment encouraged ICANN not to adopt that limit. *See* Establishment of new sTLDs: Request for Proposals (Draft for public comment), June 24, 2003, Cl. Ex. 72.

transparent processes, ICANN posted a draft Request for Proposals (“RFP”) for new sTLDs on June 24, 2003, and invited further public comment through August 25, 2003.<sup>26</sup>

29. The draft RFP received significant input through ICANN’s online public comment forum. The ICANN Board reviewed the public comments provided on the draft RFP and noted “an appreciation of the importance to the community of this topic, and the intent to seek further input and open communication with the community on this topic” before arriving at any decision.<sup>27</sup>

30. On October 9, 2003, ICANN’s At-Large Advisory Committee (the “ALAC”), which is “responsible for considering and providing advice on the activities of ICANN as they relate to the interests of individual Internet users (*i.e.*, the ‘At-Large’ community),” drafted a “Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes.”<sup>28</sup> ICANN’s Generic Names Supporting Organization (the “GNSO”)<sup>29</sup> provided its comments shortly thereafter and called upon the ICANN Board to move forward with the process for sTLDs.<sup>30</sup>

31. On October 31, 2003, the ICANN Board met in Carthage, Tunisia, and passed resolutions for the introduction of new sponsored TLDs.<sup>31</sup> The Board also determined that a

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

<sup>27</sup> ICANN Minutes, Special Meeting of the Board, October 13, 2003, *available at* <http://www.icann.org/en/minutes/minutes-13oct03.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit I.

<sup>28</sup> At-Large Advisory Committee (ALAC), At-Large Community Website, *available at* <http://www.icann.org/en/committees/alac/> (last visited May 5, 2009), attached hereto as ICANN Exhibit J; Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes, October 9, 2003, *available at* <http://www.atlarge.icann.org/correspondence/response-stld-process-09oct03.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit K.

<sup>29</sup> The GNSO succeeded ICANN’s Domain Name Supporting Organization (the “DNSO”) with respect to gTLD responsibilities. ICANN, Registrars, *available at* <http://gns0.icann.org/registrars/> (last visited *date*) (“On December 14, 2002 the DNSO has been replaced by the GNSO.”), attached hereto as ICANN Exhibit L.

<sup>30</sup> GNSO Council Carthage Meetings Minutes, October 29, 2003, *available at* <http://gns0.icann.org/meetings/minutes-gns0-29oct03.shtml> (last visited May 5, 2009), attached hereto as ICANN Exhibit M.

<sup>31</sup> ICANN Board Resolutions in Carthage, Tunisia, October 31, 2003, Cl. Ex. 78.

policy process should commence through ICANN’s newly-formed GNSO to establish how the new uTLDs or “generic” TLDs would be added into the Root Zone in the future. (This policy process culminated with the ICANN Board vote in June 2008 for the policy to introduce new gTLDs. Presently, ICANN is working on a proposal to allow the launch of numerous additional unsponsored TLDs.<sup>32</sup>)

32. On December 15, 2003, ICANN launched the sTLD selection process by posting the final RFP and permitting interested parties to apply for the creation of new sTLDs.<sup>33</sup> Unlike the “proof of concept” round, this new round was limited to “sponsored” TLDs; as a result, all applications needed to satisfy additional requirements related to the sponsorship of TLDs.

33. The RFP began with an introduction “provid[ing] applicants with explanatory notes on the process as well as an indication of the type of information requested by ICANN.”<sup>34</sup> The RFP then included an application form setting out the selection criteria that would be used to evaluate proposals. These “objective criteria” were designed to enable the independent evaluators to determine which applicants “best” met ICANN’s requirements.<sup>35</sup> The selection criteria consisted of four categories: (1) Sponsorship Information; (2) Business Plan Information; (3) Technical Standards; and (4) Community Value.<sup>36</sup>

34. The RFP’s explanatory notes provided that the sponsorship criteria required “the proposed sTLD [to] address the needs and interest of a ‘*clearly defined community*’ (the Sponsored TLD Community), which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.” Accordingly, applicants had to demonstrate that the Sponsored TLD Community was:

- (a) Precisely defined, so it can readily be determined which persons or entities make up that community; and

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<sup>32</sup> ICANN, New gTLD Program, *available at* <http://www.icann.org/en/topics/new-gtld-program.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit N; P. Twomey Witness Statement, ¶ 14.

<sup>33</sup> New sTLD Application, December 15, 2003, Cl. Ex. 45.

<sup>34</sup> *Id.* (Part A. Explanatory Notes – Selection Criteria).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

- (b) Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community.<sup>37</sup>

35. The sponsorship criteria further required applicants to provide an explanation of the Sponsoring Organization’s policy-formulation procedures, demonstrating that the organization:

- (a) Would operate primarily in the interests of the Sponsored TLD Community;
- (b) Has a clearly defined delegated policy-formulation role and is appropriate to the needs of the Sponsored TLD Community;
- (c) Has defined mechanisms to ensure that approved policies are primarily in the interests of the Sponsored TLD Community and the public interest; and
- (d) Is *tailored to meet the particular needs of the defined Sponsored TLD Community* and the characteristics of the policy formulation environment.<sup>38</sup>

36. Finally, the sponsorship criteria required the applicant to demonstrate support for the TLD from the Sponsored TLD Community: “A key requirement of a sTLD proposal is that it demonstrates *broad-based support* from the community it is intended to represent.”<sup>39</sup>

Accordingly, applicants were required to “demonstrate that there is”:

- (a) Evidence of *broad-based support* from the Sponsored TLD Community for the sTLD, for the Sponsoring Organization, and for the proposed policy-formulation process; and

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<sup>37</sup> *Id.* (Part A. Explanatory Notes – Sponsorship Information – Definition of Sponsored TLD Community) (emphasis added).

<sup>38</sup> *Id.* (Part A. Explanatory Notes – Sponsorship Information – Appropriateness of the Sponsoring Organization and the Policy Formulation Environment) (emphasis added).

<sup>39</sup> *Id.* (Part A. Explanatory Notes – Sponsorship Information – Level of Support from the Community) (emphasis added).

- (b) An outreach program that illustrates the Sponsoring Organization's capacity to represent a wide range of interests within the community.<sup>40</sup>

37. ICM contends that “the final criteria were completely silent on the subject of adult content, or morality or offensive content generally, and the related public relations controversy.”<sup>41</sup> But in fact, such considerations were squarely embraced by the community value component, which required the applicants to demonstrate that their proposal “represents an endeavor or activity that has importance across multiple geographic regions.”<sup>42</sup> This necessarily requires an understanding of how sTLDs such as ICM's proposed adult content sTLD would be received globally.

38. Given the debate surrounding ICM's application for an unsponsored .XXX TLD in the 2000 “proof of concept” round, combined with the fact that ICANN had specifically noted in the 2000 uTLD round that “controversy surrounding” .XXX was great,<sup>43</sup> ICM had to know that its proposed sTLD inevitably would generate public policy concerns.

#### **D. CONSIDERATION AND ULTIMATE DENIAL OF ICM'S SPONSORED .XXX TLD APPLICATION.**

39. ICANN received a total of ten sTLD applications, including ICM's March 16, 2004 application for a .XXX sTLD.<sup>44</sup> The International Foundation for Online Responsibility (“IFFOR”) was proposed as .XXX's sponsoring organization. In light of ICM's previous application for the .XXX TLD as an unsponsored TLD, ICM knew that establishing the

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<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> ICM Memorial ¶ 121.

<sup>42</sup> New sTLD Application, December 15, 2003, Part A. Explanatory Notes – Community Value – Addition of new value to the Internet name space, Cl. Ex. 45.

<sup>43</sup> ICANN Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group, November 9, 2000, *available at* <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit E. *See also* ICM Memorial, Dr. Elizabeth Williams Witness Statement, ¶ 7 (“It was also obvious from the 2000 ‘proof of concept’ round that an application for an adult content string would be controversial from a public relations standpoint.”).

<sup>44</sup> New sTLD RFP Application, .XXX, Part B. Application Form, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit O.

requisite “community” of a sponsored TLD and other sponsorship-specific requirements presented complex issues that would need to be addressed.<sup>45</sup>

40. In April 2004, ICANN convened an independent panel of experts (the “Evaluation Panel”) to review and recommend those sTLD applications that satisfied the selection criteria.<sup>46</sup> After an initial review period, the Evaluation Panel submitted a list of questions to each applicant. The Evaluation Panel asked ICM to elaborate on how the proposed .XXX sTLD would “create a new and clearly differentiated space, and satisfy needs that cannot be readily met through the existing TLDs,” and how ICM planned to reconcile “various culturally-based definitions.”<sup>47</sup> Later that same month, ICM submitted a response to the Evaluation Panel.<sup>48</sup> The Evaluation Panel prepared a report regarding each application and made a determination as to whether the application met the baseline criteria set out in the RFP.<sup>49</sup>

41. The Evaluation Panel submitted to ICANN its evaluations for all ten sTLD applications by the end of August 2004. The Evaluation Panel found that two applicants – the applicants for .cat and .post – met all of the selection criteria of the RFP. It determined that three more applicants – applicants for .asia, .jobs, and .travel – did not meet all of the selection criteria but merited further consideration. The Evaluation Panel found that the remaining four

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<sup>45</sup> See P. Twomey Witness Statement, ¶ 16.

<sup>46</sup> For example, the sponsorship/community value team was chaired by Dr. Williams and included Pierre Ouédraogo and Daniel Weitzner. See Status Report on the sTLD Evaluation Process, at 5, Cl. Ex. 83. Dr. Williams had been active in ICANN’s Registrars’ Constituency and the ccTLD constituency as a member of the .auDA (the ccTLD for Australia) Board, among other activities. New sTLD Applications, Appendix D - Evaluation Reports, August 27, 2004, at 116, Cl. Ex. 110. Mr. Ouédraogo had been an Information Society Project Manager at the Francophone Institute for Information and Learning New Technologies (INTIF), as well as a founding member of AFRINIC (the African Internet Registry for IP addresses), the AfTLD (African Internet Top-Level Domain Names Association), AFNOG (African Network Operators Group), and AfrICANN (the African network of participants in the ICANN process), and also a member of the ccNSO launching group at ICANN and a technical contact for .bf ccTLD (Burkina Faso). *Id.* at 115. Mr. Weitzner had been a Director of the World Wide Web Consortium’s Technology and Society activities. *Id.* at 115-16.

<sup>47</sup> Confidential Exhibit – Evaluation Team Questions for ICM and IFFOR, attached to ICANN’s First Brief as Confidential Ex. A.

<sup>48</sup> Confidential Exhibit – ICM and IFFOR’s Joint Response to Evaluation Team Questions, attached to ICANN’s First Brief as Confidential Ex. B.

<sup>49</sup> sTLD Status Report, Appendix B, Status Report on the sTLD Evaluation Process, November 28, 2005, Cl. Ex. 108.

applicants – applicants for .mail, .mobi, .tel, and .XXX – did not meet all of the selection criteria and had “deficiencies [that] cannot be remedied within the applicant’s proposed framework.” The Panel recommended that ICANN not consider those four applications further.<sup>50</sup>

42. With respect to .XXX, the Evaluation Panel found that ICM’s application met both the technical and business selection criteria but concluded that the .XXX application did not meet four of the nine subparts of the sponsorship selection criteria.<sup>51</sup> Specifically, the Evaluation Panel: (1) “did not believe that the .XXX application represented a clearly defined community”; (2) found that the lack of cohesion in the community, and the planned involvement of child advocates and free expression interest groups, would preclude the effective formulation of policy for the community; (3) was not convinced that there was sufficient evidence of community support outside of North America or from child safety, law enforcement, or freedom of expression organizations; and (4) “did not agree that the application added new value to the Internet name space.”<sup>52</sup> Each of these issues ultimately plagued ICM’s application.

43. Because the Evaluation Panel had recommended approval of only two sTLD applicants, in August 2004, the ICANN Board decided to give all of the other sTLD applicants another opportunity to provide clarifying information and to answer further questions “relating to any potential deficiencies in the application that were highlighted in the independent evaluation.”<sup>53</sup> All applicants were encouraged to review the contents of the reports and to respond in writing to ICANN.<sup>54</sup> One of ICM’s witnesses praises the action of the ICANN Board in permitting a new chance, not required by the process outlined in the RFP, for applicants, including ICM, to pursue the creation of new sTLDs.<sup>55</sup>

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<sup>50</sup> ICANN, New sTLD Applications, Appendix D, Evaluation Reports, August 27, 2004, at 82, Cl. Ex. 110.

<sup>51</sup> *Id.* at 110.

<sup>52</sup> *Id.*

<sup>53</sup> Confidential Exhibit – Correspondence from Kurt Pritz, ICANN, to Stuart Lawley, ICM, erroneously dated July 31, 2004, enclosing Independent Evaluation Report for .XXX, Prepared for ICANN, Compiled on August 27, 2004, attached to ICANN’s First Brief as Confidential Exhibit D.

<sup>54</sup> *Id.*

<sup>55</sup> ICM Memorial, Ms. J. Beckwith Burr Witness Statement, ¶ 25.

44. ICM responded to the Board's request for more information and provided ICANN staff with a formal response to the Evaluation Panel's report, arguing that the Evaluation Panel's sponsorship concerns were unfounded.<sup>56</sup> The ICANN Board discussed ICM's application and its ability to satisfy the sponsorship criteria, and suggested that it might be helpful for ICM to make a formal presentation to the Board on this issue.<sup>57</sup> On April 3, 2005, ICM gave its presentation to the ICANN Board.<sup>58</sup>

45. On June 1, 2005, the ICANN Board held a special meeting via teleconference. The Board engaged in extensive discussion regarding ICM's .XXX sTLD application and ultimately passed two resolutions (with a 6-3 vote in favor, 2 abstentions, and 4 Board members absent):

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>59</sup>

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<sup>56</sup> Confidential Exhibit – Formal Response to ICANN's Independent Evaluation Report on .XXX sTLD, from Stuart Lawley, ICM, to Kurt Pritz, ICANN, October 9, 2004, attached to ICANN's Opening Brief as Confidential Exhibit F. ICM and IFFOR later provided the ICANN Board with a memorandum similar to its formal response to ICANN staff, outlining the reasons why they believed the ICANN Board should allow the .XXX sTLD to proceed despite the recommendation of the Evaluation Panel. *See* Confidential Exhibit – Memorandum to the ICANN Board of Directors, November 2, 2004, Revised December 7, 2004, attached to ICANN's Opening Brief as Confidential Exhibit G.

<sup>57</sup> ICANN Minutes, Special Meeting of the Board, January 24, 2005, Cl. Ex. 132.

<sup>58</sup> *See* Confidential Exhibit - ICM Slide Presentation, attached to ICANN's Opening Brief as Confidential Exhibit H.

<sup>59</sup> ICANN Minutes, Special Meeting of the Board, June 1, 2005, Cl. Ex. 120; *see also* ICANN Bylaws, *supra* note 2, Article II, § 1 (“With respect to any matters that would fall within the provisions of Article III, Section 6, the Board may act only by a majority vote of all members of the Board. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board.”).



46. While still uncertain whether ICM satisfied the requisite sponsorship criteria, the Board took this step of permitting contract negotiations to explore whether terms of a proposed contract could resolve some of the ongoing concerns regarding sponsorship.<sup>60</sup> Although the supplemental materials that ICM presented to the Board provided additional clarification, “the Board still expressed concerns about whether the applicant had met all of the criteria, and took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.”<sup>61</sup> “Other applicants have not yet been determined to meet the baseline criteria. We are working with them still actively to determine if the application can be configured in a way so that baseline criteria can be met.”<sup>62</sup> As the then-Chair of the ICANN Board explained, proceeding to contract negotiations would allow Board members “to understand more deeply exactly how [ICM’s] proposal would be implemented, and seeing the contractual terms, it seemed to [him], would put much more meat on the bones of the initial proposal.”<sup>63</sup>

47. Contrary to ICM’s position in these proceedings, the Board’s resolutions did *not* constitute an “unconditional” approval of ICM’s .XXX application, just as the Board’s original vote in November 2000 did not constitute final approval of the seven new TLDs at that time.<sup>64</sup> The resolutions themselves expressly disclaim any final decision by the Board that the .XXX application satisfied the sponsorship criteria (or any baseline selection criteria) set forth in the RFP. Instead, the resolutions expressly say that, notwithstanding the approval to negotiate, any ultimate “approval and authorization to enter into an agreement relating to the delegation of the sTLD” could only be sought in the future, and further Board action would be required to grant such approval.

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<sup>60</sup> Letter from Paul Twomey, ICANN, to Mohamed Sharil Tarmizi, GAC Chairman, May 4, 2006, Cl. Ex. 188.

<sup>61</sup> *Id.*

<sup>62</sup> ICANN Meetings in Mar Del Plata, April 7, 2005, *available at* <http://www.icann.org/en/meetings/mardelplata/captioning-public-forum-2-07apr05.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit P.

<sup>63</sup> *See, e.g.*, ICANN Meetings in Lisbon Portugal, Transcript – ICANN Board of Directors Meeting, March 30, 2007, Real-Time Captioning, Cl. Ex. 201.

<sup>64</sup> *Compare* ICM Memorial ¶ 186, *with* P. Twomey Witness Statement, ¶ 28; V. Cerf Witness Statement, ¶ 25; A. Pisanty Witness Statement, ¶ 16.

48. The plain language of the resolutions is reinforced by the subsequent conduct by members of the Board regarding its effect. Following the resolutions, which were promptly publicly posted (along with the Board minutes) on ICANN's website, the Board continued to debate ICM's ability to satisfy the sponsorship selection criteria at several Board meetings up to and including the March 30, 2007 meeting when the Board ultimately rejected the .XXX application and ICM's proposed registry contract.<sup>65</sup>

49. The Board's conduct with regard to other applicants also shows that permitting contract negotiations to proceed did not constitute an approval of the ICM application. The Board allowed applicants for other sTLDs – namely, .jobs and .mobi – to commence with contract negotiations despite open questions relating to the RFP selection criteria.<sup>66</sup> The Board permitted .jobs to proceed to contract negotiations while specifically requesting that during the negotiations, “special consideration be taken as to how broad-based policymaking would be created for the sponsored community, and how this sTLD would be differentiated in the name space.”<sup>67</sup> With respect to .mobi, the Board specifically requested that during contract negotiations “special consideration be taken as to confirm the sTLD applicant's proposed community of content providers for mobile phone users, and confirmation that the sTLD applicant's approach will not conflict with the current telephone numbering systems.”<sup>68</sup>

50. The Board's conduct after the June 2005 resolutions further demonstrates that those resolutions did not constitute a finding that ICM met the RFP criteria. In accordance with the June 2005 resolutions, ICANN staff entered into contract negotiations with ICM for a proposed registry agreement. By August 9, 2005, ICM's first draft .XXX sTLD registry agreement was posted on ICANN's website for public comment and submitted to the Board.

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<sup>65</sup> The meetings at which the Board discussed ICM's XXX sTLD application included Board meetings on September 15, 2005; April 18, 2006; May 10, 2006; February 12, 2007; and March 30, 2007.

<sup>66</sup> See, e.g., ICANN Minutes, Special Meeting of the Board, December 13, 2004, *available at* <http://www.icann.org/en/minutes/minutes-13dec04.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit Q.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

ICANN's next Board meeting was scheduled for August 16, 2005, at which time ICANN had planned on discussing ICM's first draft of the .XXX registry agreement.<sup>69</sup>

51. However, following the publication of ICM's first draft, the GAC's Chairman and several member countries expressed concerns with the proposed .XXX sTLD, and requested that the Board provide additional time for governments to express their concerns before the Board reached a final decision on the proposed registry agreement.<sup>70</sup> As shown above, *see supra* ¶ 15, ICANN was required by its Bylaws to consider these concerns, and the Board postponed discussion of ICM's first draft registry agreement to allow for input from the GAC.

52. In August and September 2005, members of the ICANN Board corresponded with various governments and members of the Internet community, and reflected on such communications at its September 15, 2005 Board meeting, where the ICANN Board engaged in a "lengthy discussion" regarding the sponsorship criteria, ICM's application and supporting materials, and the specific terms of ICM's draft .XXX sTLD registry agreement.<sup>71</sup> The Board did not approve the draft agreement, but instead voted 11-0 (with 3 abstentions) in favor of a resolution authorizing further negotiation.<sup>72</sup> Not a single Board member voted to approve the proposed agreement on the basis that the Board "already had approved" the .XXX sTLD.

53. The September 15, 2005 resolution of the ICANN Board specifically addressed the negotiation of sponsorship-related terms within the .XXX sTLD registry agreement:

Resolved (05.75), that the ICANN President and General Counsel are directed to discuss possible additional contractual provisions or modifications for inclusion in the .XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the

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<sup>69</sup> See ICM Draft, August 1, 2005, Sponsored TLD Registry Agreement, *available at* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf> (last visited May 5, 2009), attached hereto as ICANN Exhibit R.

<sup>70</sup> See Letter from Mohamed Sharil Tarmizi, GAC Chairman, to ICANN Board Regarding .XXX TLD, August 12, 2005, Cl. Ex. 163; Letter from Michael D. Gallagher, U.S. DOC, to Vinton Cerf, received August 15, 2005, Cl. Ex. 162.

<sup>71</sup> ICANN Minutes, Special Meeting of the Board, September 15, 2005, Cl. Ex. 119.

<sup>72</sup> *Id.*

President and General Counsel are requested to return to the board for additional approval, disapproval or advice.

54. At that point, in view of the controversy surrounding .XXX (with continuing correspondence from GAC members),<sup>73</sup> and at the specific request of ICM,<sup>74</sup> the Board decided to postpone formal consideration of ICM's proposed registry agreement until the GAC was able to review and comment on ICM's proposal. ICANN staff continued to work with ICM on its proposed registry agreement in order to address concerns posed by various members of the Internet community. In March 2006, a second draft of the registry agreement was posted.

55. As the time approached for the ICANN Board's March 31, 2006 meeting in Wellington, New Zealand, several of the GAC member countries expressed the view that they and other member countries should address the public policy issues raised by the .XXX sTLD application. Thus, after extensive meetings and discussions among 33 GAC members over the course of several days, the GAC issued a document (the "Wellington Communiqué") on March 28, 2006. The Wellington Communiqué stated that the public interest benefits promised by ICM had not yet been included as ICM's obligations in the draft .XXX sTLD registry agreement,<sup>75</sup> and asked that ICANN confirm that any final registry agreement contain enforceable provisions covering all of ICM's commitments. The Wellington Communiqué also stated that "without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD."<sup>76</sup>

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<sup>73</sup> ICANN continued to receive correspondence from GAC members specifically requesting ICANN to defer any decisions on the .XXX sTLD to allow for further comment. *See, e.g.*, Letter from Peter Zangl, European Commission, to Vint Cerf, ICANN, September 16, 2005, Cl. Ex. 172 (urging ICANN to reconsider any decision to proceed with the .XXX sTLD application until the GAC has an opportunity to comment); Letter from Dr. Kai-Sheng Kao, GAC Representative to Taiwan, to ICANN Board, September 30, 2005, Cl. Ex. 169 (requesting the Board defer final decision on the .XXX sTLD to allow for further public comment; noting that ICANN should "consider all social and cultural aspects" of the TLD "to reduce the possible negative impacts and ill effects").

<sup>74</sup> Letter from Stuart Lawley, ICM, to Paul Twomey, August 15, 2005, *available at* <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf> (last visited May 5, 2009) ("[T]o preserve the integrity of the ICANN process, we request that the Board defer final approval of the ICM Registry Agreement."), attached hereto as ICANN Exhibit S.

<sup>75</sup> GAC Communiqué – Wellington, New Zealand, March 28, 2006, Cl. Ex. 181.

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

56. Following the issuance of the Wellington Communiqué, the ICANN Board conducted its March 31, 2006 meeting in Wellington and adopted by a 12-0 vote (with 3 abstentions) a resolution directing ICANN's President and General Counsel to "analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor's policies."<sup>77</sup>

57. ICANN staff and ICM continued to negotiate a revised registry agreement to address the GAC's concerns. Although the staff believed serious issues remained, ICM insisted that the Board vote at the May 10, 2006 Board meeting on the existing registry agreement.<sup>78</sup> At that May 10, 2006 meeting, the ICANN Board, after considerable discussion, voted 9-5 against ICM's draft of the proposed .XXX sTLD registry agreement.<sup>79</sup> Because a number of Board members did not view the contract negotiations as having adequately resolved the underlying sponsorship issues, some ICANN Board members were beginning to think that further contract negotiations would be pointless.<sup>80</sup>

58. The Board's May 10, 2006 vote did not deny ICM's application outright. Instead, ICANN permitted ICM another opportunity to negotiate with ICANN staff and attempt to revise the registry agreement to conform to the RFP specifications. ICANN staff and ICM thereafter worked to negotiate additional revisions to the draft .XXX sTLD registry agreement that addressed the concerns regarding the sponsorship requirements, among others.

59. After another revised .XXX sTLD registry agreement was posted on the ICANN website, various members of the purported .XXX community provided comments on ICANN's online public comment forum in opposition to the proposed .XXX sTLD. At the Board's

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<sup>77</sup> ICANN Minutes, Regular Meeting of the Board, March 31, 2006, Cl. Ex. 184.

<sup>78</sup> ICANN Minutes, Special Meeting of the Board, April 18, 2006, Cl. Ex. 186 (Dr. Cerf noting "the desire of ICM to have an up or down vote at the May 10[, 2006] meeting").

<sup>79</sup> ICANN Minutes, Special Meeting of the Board, May 10, 2006, *available at* <http://www.icann.org/en/minutes/minutes-10may06.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit T.

<sup>80</sup> P. Twomey Witness Statement, ¶¶ 30, 55; V. Cerf Witness Statement, ¶¶ 35-37.

meeting held on February 12, 2007, several Board members expressed concern about the apparent splintering of community support for the .XXX sTLD, a key RFP sponsorship requirement. As a result, the Board unanimously approved a resolution directing ICANN staff to further consult with ICM in an effort to inform the Board's upcoming decision on whether the sponsorship criteria could be met.<sup>81</sup>

60. Nevertheless, it had become increasingly clear to several members of the ICANN Board that ICM's proposal was not going to satisfy the RFP sponsorship criteria. On March 30, 2007, the Board adopted (by a 9-5 vote) a resolution rejecting ICM's revised agreement and denying ICM's application for the .XXX sTLD.<sup>82</sup>

#### **E. ICM'S INITIATION OF THE INDEPENDENT REVIEW PROCESS AND ICANN'S RESPONSE**

61. On June 6, 2008 (over a year after the final rejection of its application), ICM initiated this independent review proceeding pursuant to Article IV, Section 3 of ICANN's Bylaws. That provision allows "[a]ny person materially affected by a decision or action of the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws [to] submit a request for independent review of that decision or action."<sup>83</sup> After ICM submitted its initial brief requesting independent review, and ICANN submitted its response, ICM submitted its Memorial on January 22, 2009.

62. Invoking provisions in ICANN's Articles and Bylaws on openness, transparency, procedural fairness, and non-discrimination, along with ICANN's mission and "international law," ICM's Memorial challenges the Board's consideration and review of ICM's .XXX sTLD application. ICM's fundamental claim is that the Board acted contrary to the RFP, and that many Board members simply acted irrationally in voting to reject the .XXX application.

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<sup>81</sup> ICANN Minutes, Special Meeting of the Board, February 12, 2007, Cl. Ex. 199 (The Board passed a Resolution directing "ICANN staff [to] consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is met for the creation of a new .XXX sTLD.").

<sup>82</sup> ICANN, Meeting of the Board, Transcript, March 30, 2007, *available at* <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit U.

<sup>83</sup> ICANN Bylaws, *supra* note 2, at Article IV, § 3.

63. Along with its Memorial, ICM submitted statements from Dr. Elizabeth Williams, Ms. J. Beckwith Burr, and Mr. Stuart Lawley, as well as expert reports from Dr. Milton Mueller and Professor Jack Goldsmith. Dr. Williams, who chaired the Evaluation Panel that twice rejected ICM's Application on the grounds that it failed to satisfy the sponsorship criteria, states that it was her "personal belief" that (even after the extensive discussion of the sponsorship criteria and the negative recommendation prepared by her own panel) the ICANN Board's June 1, 2005 vote "was a definitive statement that the Board . . . had approved the application based on its determination that the application met the selection criteria."<sup>84</sup> Similarly, Ms. Burr, ICM's counsel during the contract negotiations, now claims that the Board's June 1, 2005 vote irreversibly established that ICM had met the RFP criteria and was thereby entitled to delegation of the new sTLD regardless of the outcome of the contract negotiations.<sup>85</sup> (Notably, Ms. Burr does not address whether these proceedings are binding under ICANN's Bylaws, even though, during her work drafting the Bylaws, she acknowledged that independent review proceedings would be advisory and not binding on the ICANN Board.<sup>86</sup>) Mr. Lawley, ICM's President and CEO, articulates his "suspicion" that his company's application was rejected solely based on opposition by the United States government.<sup>87</sup> Dr. Mueller, ICM's "expert" on ICANN, shares this view.<sup>88</sup> Professor Goldsmith addresses the law governing this proceeding, opining that Article 4 of ICANN's Articles of Incorporation is a "choice-of-law provision" importing international law principles into this dispute.

64. In response, ICANN will show that the Board's consideration and rejection of ICM's application was fully consistent with ICANN's Articles and Bylaws. As described more fully in Section III.B below, the Board ultimately rejected ICM's application because, after thorough consideration of the application, the Board determined that ICM had failed to satisfy the RFP requirements in the following ways:

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<sup>84</sup> ICM Memorial, Dr. Elizabeth Williams Witness Statement, ¶ 24.

<sup>85</sup> ICM Memorial, Ms. J. Beckwith Burr Witness Statement, ¶ 32.

<sup>86</sup> See, e.g., Becky Burr, Recommendations Regarding Accountability at II (August 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm> (last visited May 5, 2009, attached hereto as ICANN Exhibit V).

<sup>87</sup> ICM Memorial, Mr. Stuart Lawley Witness Statement, ¶ 65.

<sup>88</sup> ICM Memorial, Expert Report of Dr. Milton Mueller at p. 44-45.

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

65. The RFP required ICM to address each of these items to the Board's satisfaction, but the Board ultimately concluded (just as the Evaluation Panel previously had) that ICM had failed in each of these respects. In all respects, ICANN operated in a fair, transparent, and reasoned manner in accordance with its Bylaws and Articles of Incorporation. Indeed, it is difficult to imagine a process more open and transparent, fair, and non-discriminatory – ICANN is quite unique in how it conducts its business, and its review of ICM's application was entirely consistent with its corporate requirements.

66. In support of its brief, and in response to ICM's filings, ICANN submits statements from the following individuals, each of whom was associated with ICANN at the time of the issue in dispute: Alejandro Pisanty (then-Vice Chair of the Board), Dr. Vinton Cerf (then-Chair of the Board), and Dr. Paul Twomey (ICANN's then- and current-President).

67. ICANN also submits an expert opinion by Professor David D. Caron to address ICM's international law arguments based on Professor Goldsmith's report. Professor Caron is a member of the Faculty of Law at the University of California at Berkeley, where he has taught since 1987 and since 1996 has held the C. William Maxeiner Distinguished Professor of Law Chair. Professor Caron's scholarship covers various aspects of international law and organization, with the corpus of this work focusing on public and private international dispute resolution, international courts and tribunals, the United Nations, the law of the sea, international environmental law, climate change, and general theory of international law. Professor Caron's other positions and awards are noted in his opinion and attached curriculum vitae.



**III. THE PANEL SHOULD DECLARE THAT THE ICANN BOARD DID NOT ACT INCONSISTENTLY WITH ICANN'S ARTICLES AND BYLAWS IN CONSIDERING AND ULTIMATELY DENYING ICM'S APPLICATION.**

68. ICM's claims are premised on several mischaracterizations of the nature of the independent review process and the law that applies to the facts and circumstances at issue here. In Section III.A, ICANN addresses these preliminary issues. Specifically, ICANN demonstrates that: (i) the decision that the Panel has been asked to render will not be legally binding on ICANN; (ii) decisions of the Board are entitled to great deference; and (iii) claims arising based on principles of international law do not apply in the circumstances of this proceeding.

69. With these legal matters clarified, ICANN will turn to the merits of ICM's claims, which revolve around four central factual assertions. As explained in Section III.B, the record makes clear that ICM's central assertions are wrong. As a result, and as shown in Section III.C, ICM's claims have no merit. At every stage in the process of considering and ultimately denying ICM's application, the ICANN Board acted in a manner consistent with ICANN's Articles and Bylaws.

**A. ICM MISCHARACTERIZES THE NATURE OF THESE PROCEEDINGS AND THE LAW THAT APPLIES TO THEM.**

70. This independent review process (the "IRP") is designed to provide a forum to address whether ICANN acted inconsistently with its Articles and Bylaws. The unique process was established to ensure that parties had the ability to seek consideration of actions of the ICANN Board by an entity outside of ICANN.

71. Despite the manner in which ICM has approached these proceedings, the process is not open-ended or all-encompassing. To the contrary, the provisions of the ICANN Bylaws that created the process are quite clear as to the purpose of these types of proceedings and the scope of the review they afford. Without meaningfully addressing the actual language of the Bylaws, ICM grossly mischaracterizes the nature of the IRP and the law that governs these proceedings. These mischaracterizations would radically transform this proceeding in a manner directly contrary to the plain and unambiguous language of the documents governing this proceeding, and would essentially place the Panel in the position of the "Supreme Court" of

ICANN. This concept was explored and completely rejected at the time that ICANN adopted the current version of the IRP.

72. ICANN wishes to make clear that its rejection of ICM's positions does not diminish in any way the seriousness with which ICANN approaches this proceeding. The thoroughness of this response should put to rest any issue in this regard. Frankly, the lengths to which ICM appears willing to mischaracterize the Panel's role and the applicable authority suggest an appreciation by ICM of the weakness of its claims and the need to create new legal theories and standards of review that were never intended to apply in an IRP proceeding.

73. ICM's mischaracterizations of the IRP concern three aspects of the Panel's role.<sup>89</sup> *First*, ICM claims that the Panel should declare that its results are "binding" on ICANN.<sup>90</sup> As an initial matter, the Panel need not address that question: the ultimate binding or non-binding character of IRP declarations is an issue to be resolved later, if necessary, in any subsequent forum where the effect of a ruling may be involved. In any event, ICM's position is plainly wrong. The language and drafting history of the provisions governing the IRP make clear that any IRP results are not binding, but rather are addressed to the discretion of the ICANN Board to consider.

74. *Second*, ICM claims that the Panel should conduct a "full review" of ICANN's actions and decisions, by which ICM means *de novo* review without any deference to reasonable judgments of the ICANN Board.<sup>91</sup> This argument again ignores the plain language of the provisions governing the IRP, as well as other provisions in ICANN's Bylaws consistently demonstrating that substantial deference is owed to judgments of the ICANN Board. ICM's argument is also contrary to well-settled principles of the law governing review of corporate board actions.

75. *Third*, ICM claims that the Panel should apply international law to this proceeding (and thus that the Panel should consider claims under international law that are not referenced in

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<sup>89</sup> See ICM Memorial ¶ 279.

<sup>90</sup> *Id.* ¶¶ 279, 284-309.

<sup>91</sup> *Id.* ¶¶ 279, 310-23.

the Bylaws that created the IRP process). ICM makes this claim despite the fact that the IRP procedure provides for review only of ICANN’s “conformity” with its Bylaws and Articles of Incorporation.<sup>92</sup> In claiming that ICANN’s actions and decisions should be evaluated under international law, ICM misinterprets Article 4 of ICANN’s Articles of Incorporation (which states that ICANN will operate for the benefit of the Internet community by carrying out its activities “in conformity with relevant principles of international law”) as a “choice-of-law provision” governing the IRP, thereby allowing a party to bring into an IRP freestanding claims based on any and all general principles of international law (or to interpret ICANN’s Articles and Bylaws under any and all general principles of international law).<sup>93</sup> ICM’s reading – which is in no way “straightforward[]” as ICM contends<sup>94</sup> – contravenes the plain language of the governing provisions as well as their drafting history. Because ICM’s misreading is the basis for many of ICM’s claims, many of those claims may and should be disregarded.<sup>95</sup>

### **1. The Results of The Independent Review Process Are Not Binding.**

76. Ordinarily, the binding or non-binding character of a declaration issued by a panel such as this one would not be addressed by the panel itself; any such questions would be addressed in future proceedings, if needed. Nonetheless, ICM asks the Panel to state affirmatively that its declaration is “final and binding” on ICM and ICANN.<sup>96</sup> ICM’s request is improper, but, in any event, the Bylaws and other provisions governing IRPs make clear that this proceeding leads to a declaration that the ICANN Board must review and consider, but which it is not bound to act upon.

77. ICM suggests that, if the Panel’s declaration is not “binding,” ICANN will somehow take the process less seriously. ICANN hopes that its approach to this proceeding has made clear that ICANN takes this process seriously. Indeed, as shown below, ICANN

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<sup>92</sup> See *id.* ¶ 279.

<sup>93</sup> See *id.* ¶¶ 279, 324-42.

<sup>94</sup> *Id.* ¶ 332.

<sup>95</sup> See Caron Opinion ¶¶ 23-24 (stating that ICM’s interpretation of Article 4 “misapprehends the question” before the Panel, and this “confusion infuses ICM’s argument”).

<sup>96</sup> ICM Memorial ¶ 279.

established the IRP to serve the important function of increasing accountability by leading to public decisions that “shall be posted on the [ICANN] Website when they become available.”<sup>97</sup> The underlying petitions and claims must also be posted on the ICANN website, as ICANN has in fact done.<sup>98</sup> Because ICANN’s continuing existence is premised on its long tradition of transparency and involvement from the broader Internet community, the ICANN Board will be under enormous public pressure to take seriously its duty to “consider” and “review[]” IRP declarations as directed in the Bylaws.<sup>99</sup> But the seriousness with which ICANN addresses this proceeding is beside the point for the Panel and not a basis for the Panel to find that the proceedings are, or should be, “binding” in some fashion not contemplated by the Bylaws.

**a. The Bylaws And Their Drafting History Make Clear That IRP Declarations Are Not Binding.**

78. The plain language of the IRP provisions, which are set forth in Article IV, section 3 of ICANN’s Bylaws, provides that the Panel’s declaration is advisory to the ICANN Board and not binding. The drafting history of the development of the IRP provisions – history that ICM ignores even though its own counsel participated in it – similarly makes clear that IRP declarations are not binding on ICANN.

**i. The Bylaws Make Clear That IRP Declarations Are Not Binding.**

79. The starting point is the plain text of the Bylaws governing the IRP process. A reader of ICM’s Memorial would be unaware that any text of the Bylaws addresses the effect of a panel’s declarations. Yet the Bylaws speak directly to the manner in which ICANN should treat a panel’s declarations, and makes clear that such declarations are advisory and not binding.

80. The Bylaws that govern the IRP process, entitled “Independent Review of Board Actions,” provide in full:

1. In addition to the reconsideration process described in Section 2 of this Article [on reconsideration by the Board], ICANN shall

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<sup>97</sup> ICANN Bylaws, *supra* note 2, Article IV, § 3.13. ICANN’s Bylaws require ICANN to “maintain a publicly-accessible Internet World Wide Web site.” *Id.* at Article III, § 2.

<sup>98</sup> *Id.*; see generally [www.icann.org](http://www.icann.org) (last visited May 5, 2009).

<sup>99</sup> ICANN Bylaws, *supra* note 2, Article IV, §§ 3.8.c, 3.15.

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

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.
3. Requests for such independent review shall be referred to an Independent Review Panel (“IRP”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.
4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN (“the IRP Provider”) using arbitrators under contract with or nominated by that provider.
5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.
6. Either party may elect that the request for independent review be considered by a three-member panel; in the absence of any such election, the issue shall be considered by a one-member panel.
7. The IRP Provider shall determine a procedure for assigning members to individual panels; provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims.
8. The IRP shall have the authority to:
  - a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
  - b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
  - c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

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

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

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

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

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

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

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

81. In several places, the Bylaws make clear that panel declarations are advisory and not binding. The Bylaws charge the Panel with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."<sup>100</sup> The Panel's "declarations" on this question are not binding on the Board. To the contrary, the IRP provisions repeatedly explain that panel declarations are committed to the ICANN Board for review and

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<sup>100</sup> *Id.* at Article IV, § 3.3.

consideration. In particular, the Bylaws direct the Board to “consider” the declaration.<sup>101</sup> The direction to “consider” the Panel’s declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding, such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement.

82. Another provision similarly states that the Board is to “review[]” IRP determinations, again making clear that ultimate authority is reserved to the Board.<sup>102</sup> ICM argues that the word “review” entails a supervisory (and hence controlling) function.<sup>103</sup> Yet, this argument actually defeats ICM’s position because the ICANN Board is specifically directed to “review” the Panel’s declarations, not to “implement” them.<sup>104</sup>

83. ICM offers no explanation for how the Panel’s declarations could be binding where the Board is expressly directed to “consider” and “review” the declarations, and is nowhere required to implement them uncritically (or otherwise).<sup>105</sup> ICM also offers no explanation for how declarations could be binding where the Panel is not given authority to issue injunctions or award damages.

84. Notably, the Board is not even required to review or consider the declaration immediately, or at any particular time. Instead, the Bylaws simply encourage the Board to consider the declaration at the next Board meeting, but specifically provide that the Board need only do so “[w]here feasible.”<sup>106</sup> The use of non-mandatory language in this timing provision reinforces the fact that the Board’s action (review and consideration) is not itself contemplated to require acceptance of the Panel’s declaration.

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<sup>101</sup> *Id.* at Article IV, § 3.15.

<sup>102</sup> *Id.* at Article IV, § 3.8.c.

<sup>103</sup> *See* ICM Memorial ¶¶ 281, 312.

<sup>104</sup> *See also* V. Cerf Witness Statement, ¶¶ 10-12 (explaining that the IRP provisions “demonstrate that the ICANN Board retains ultimate authority over ICANN’s affairs, and that any declaration by the Independent Review Panel is not binding on the ICANN Board”).

<sup>105</sup> Likewise, the Bylaws do not provide – as they would have had the dispute resolution process been intended to result in a binding decision – for a process by which the parties could enforce the panel’s decision. Nor do the Bylaws provide how any decision of the panel might be self-enforcing. The absence of all such provisions merely confirms again that the panel’s decision is not binding.

<sup>106</sup> ICANN Bylaws, *supra* note 2, Article IV, § 3.15.

85. Providing still further proof of the Board’s ultimate authority, for the period during which the Board is reviewing and considering the Panel’s declaration, the Panel may merely “*recommend* that the Board stay any action or decision, or that the Board take any interim action.”<sup>107</sup> The Panel’s limited authority to recommend, rather than to require, temporary action reinforces the conclusion that the Board retains ultimate authority to decide what actions to take – both temporary and permanent – in response to the Panel’s conclusions in an IRP. If *final* declarations were binding, it would make no sense for *interim* remedies merely to be *recommended* to the Board. ICM offers no explanation as to how this provision can be reconciled with its position urging a binding effect for the Panel’s results.

**ii. The Drafting History of the Bylaws Makes Clear That IRP Declarations Are Not Binding.**

86. The lengthy drafting history of ICANN’s independent review process confirms that ICM’s position is wrong. ICM ignores *all* of this history, despite the fact that one of its witnesses in this proceeding was directly involved in the drafting, and her recognition during the drafting that a Panel’s findings would *not* be binding could not have been more clear.

87. The original version of the Bylaws, adopted in November 1998 when ICANN was first formed, did not contain a provision establishing an independent review process. The Bylaws simply stated that “[t]he Board may, in its sole discretion, provide for an independent review process by a neutral third party.”<sup>108</sup> When the Bylaws were revised later that month, this provision was amended to direct the adoption of a review process, but it did not provide additional specificity as to the process itself.<sup>109</sup>

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<sup>107</sup> *Id.* at Article IV, § 3.8.c (emphasis added).

<sup>108</sup> ICANN Bylaws, Article III, § 4 (November 6, 1998), *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit W.

<sup>109</sup> The revised provision states that the Board shall, “following solicitation of input from the Advisory Committee on Independent Review and other interested parties and consideration of all such suggestions, adopt policies and procedures for independent third-party review of Board actions alleged by an affected party to have violated the Corporation’s articles of incorporation or bylaws.” ICANN Bylaws, Article III, § 4(b) (November 21, 1998), *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-23nov98.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit X.



88. In nine subsequent revisions to the Bylaws during ICANN’s early formative period, from March 31, 1999, through February 12, 2002, the IRP Bylaws remained the same.<sup>110</sup> But during that period, ICANN proceeded with various activities to establish the independent review process as directed by the Bylaws. As part of that process, an advisory committee began working on the development of an independent review process and ultimately issued draft principles on matters ranging from the number of panelists to their length of service and required qualifications.<sup>111</sup>

89. Throughout its work, the committee consistently emphasized the non-binding nature of the review process. For instance, in comments issued in 1999, the committee stated that the IRP would be persuasive in its authority, “rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions.”<sup>112</sup> But the committee explained that “the ICANN Board *should retain ultimate authority* over ICANN’s affairs – after all, it is the Board, not the [independent review panel], that will be chosen by (and is directly accountable to) the membership and the supporting organizations,” and that the “reasoned and persuasive decision[s]” of the panel, which would be “made public,” would “have to be taken seriously by the Board.”<sup>113</sup>

90. When the committee’s ideas were discussed at the Board’s open meeting in May 1999, the non-binding nature of the contemplated process was again confirmed. A question was asked whether the Board’s action would have “[p]recedence” over the conclusion of the

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<sup>110</sup> See generally ICANN Bylaws Archive, Cl. Ex. 38.

<sup>111</sup> See Draft Principles for Independent Review, Interim Report of the Advisory Committee on Independent Review With Addendum, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit Y; *see also* Independent Review Policy, March 10, 2000, *available at* <http://www.icann.org/en/committees/indreview/policy.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit Z.

<sup>112</sup> Draft Principles for Independent Review, Interim Report of the Advisory Committee on Independent Review With Addendum, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit Y.

<sup>113</sup> *Id.* (emphasis added).

reviewing panel.<sup>114</sup> The response was clear as to the non-binding effect of a panel's results: "If the board disagreed with the independent review committee, the board would do what it thought was appropriate. But it would all be public."<sup>115</sup>

91. The committee's work did not lead to the creation of an independent review process in 1999, but ICANN renewed its efforts in 2001 as part of a broader evaluation of its structure and processes.<sup>116</sup> In November 2001, ICANN established a committee that became known as the Committee on ICANN Evolution and Reform (the "ERC"), with responsibility for recommending changes to ICANN's structure and processes.<sup>117</sup> The ERC was tasked with, among other things, identifying workable "checks and balances that will ensure both the effectiveness and the openness of the organization."<sup>118</sup> To that end, in June 2002, the ERC issued a report entitled "ICANN: A Blueprint for Reform," which outlined the Committee's recommendations.<sup>119</sup> The Board subsequently adopted the Blueprint.

92. The Blueprint stated unequivocally that any new independent review process would be non-binding. In a section entitled "Accountability," the Blueprint recommended (and the Board agreed) that the Board would "create a process to require *non-binding* arbitration by an

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<sup>114</sup> ICANN Open Meeting – Afternoon Session, May 25 & 26, 1999, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/open2.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit AA.

<sup>115</sup> *Id.* Indeed, the committee initially described the review process as resulting in "advisory opinions." *Id.* While the committee later substituted that phrase with the term "declar[at]ions," it made clear that this change merely reflected the committee's interest in "more firmly root[ing]" the independent review process in the overall structure of ICANN (*id.* at Addendum to Interim Report) and did not alter the non-binding nature of the review process.

<sup>116</sup> The delay in implementing the committee's suggestions resulted from the need for procedures and requirements for appointing the panelists, which proved more time-consuming to accomplish than anticipated. *See* Draft Principles for Independent Review, Interim Report of the Advisory Committee on Independent Review, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit Y.

<sup>117</sup> *See* Committee on ICANN Evolution and Reform, *available at* <http://www.icann.org/en/committees/evol-reform> (last visited May 5, 2009), attached hereto as ICANN Exhibit AB.

<sup>118</sup> *See id.*

<sup>119</sup> *See* ICANN: A Blueprint for Reform (June 20, 2002) (the "Blueprint"), *available at* <http://www.icann.org/en/committees/evol-reform/blueprint-20jun02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AC.

international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws."<sup>120</sup> The Blueprint included three other recommendations for accountability: establishing an office of ombudsman; establishing a public-outreach staff position; and modifying the pre-existing reconsideration process in certain respects.<sup>121</sup> Each of these recommendations, along with the IRP process, served the common purpose of "advanc[ing] ICANN's core values of openness and transparency."<sup>122</sup>

93. ICM's counsel in conjunction with its sTLD application, Ms. J. Beckwith Burr, actively participated in the process and expressly agreed that the review process would *not* be binding. Ms. Burr, who had previously worked for the United States Department of Commerce, where she was responsible for issues related to ICANN, was in private law practice in 2002 (at the firm where she later represented ICM with respect to its .XXX sTLD application<sup>123</sup>) when the ERC asked her to suggest ways to implement the Blueprint's recommendations on accountability. In a report dated August 23, 2002, Ms. Burr provided her suggestions, within the framework of the ERC's concern that "ICANN's decision making process must be perceived as unbiased."<sup>124</sup>

94. In addressing the independent review process, Ms. Burr explained that IRP "*decisions will be nonbinding, because the Board will retain final decision-making authority.*"<sup>125</sup> Ms. Burr further noted that, especially when compared to the reconsideration process administered by the Board rather than a "neutral" entity, the significance of the IRP process was not any binding effect but rather the IRP's status as a "formal process to review allegations that the Board has acted in conflict with ICANN's Bylaws."<sup>126</sup> Accountability would

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<sup>120</sup> *Id.* at § 5 (emphasis added).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See ICM Memorial, Ms. J. Beckwith Burr Witness Statement, ¶ 7.

<sup>124</sup> Becky Burr, Recommendations Regarding Accountability at II (August 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit V.

<sup>125</sup> *Id.* (emphasis added).

<sup>126</sup> *Id.*

be achieved by a panel’s “persuasive public power,” which would be possible by making panel announcements “easily available” to the public.<sup>127</sup>

95. In this proceeding, ICM has submitted a lengthy witness statement by Ms. Burr, but her statement does not address any of her work on the IRP drafting issue.<sup>128</sup>

96. The ERC ultimately proposed a set of substantially revised Bylaws to the Board, addressing a new independent review process as well as a host of other issues evaluated during the evolution-and-reform process.<sup>129</sup> In doing so, the ERC explained that the proposed IRP Bylaws (which became Article IV, section 3 of the Bylaws) “largely track[ed] the recommendations” of Ms. Burr.<sup>130</sup>

97. In preparing and proposing the new Bylaws, the ERC again emphasized the non-binding nature of the new IRP. In an August 2002 interim report, the ERC stated: “We do not believe that ICANN should have either a Supreme Court or a ‘Super Board’ with the ability to nullify decisions reached by the ICANN Board, which will be the most broadly representative body within the ICANN structure.”<sup>131</sup> In its final report issued in October 2002 along with the new set of Bylaws, the ERC similarly stated that “a ‘Supreme Court,’ with the power to revisit and potentially reverse or vacate decisions of the ICANN Board, would itself raise many difficult questions” and thus had not been adopted.<sup>132</sup> As these comments demonstrate, although focused on providing accountability for the Board’s actions through the IRP, the ERC did not replace the

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<sup>127</sup> Id.

<sup>128</sup> See ICM Memorial ¶ 10.

<sup>129</sup> See Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform, Art. 4, § 3, ¶¶ 12-13 (October 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/proposed-bylaws-23oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AD.

<sup>130</sup> ERC, Final Implementation Report and Recommendations, at § 5 (October 2, 2002) [“Final Implementation Report”], available at <http://www.icann.org/en/committees/evol-reform/final-implementation-report-02oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AE.

<sup>131</sup> ERC, First Interim Implementation Report, at § 2 (August 1, 2002), available at <http://www.icann.org/en/committees/evol-reform/first-implementation-report-01aug02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AF.

<sup>132</sup> Final Implementation Report, *supra* note 130.

ultimate authority of that broadly representative Board with that of an independent third party otherwise unconnected to ICANN and its constituencies.

98. In reviewing and ultimately adopting the ERC's proposed Bylaws in December 2002, the Board again confirmed the non-binding nature of the IRP. The Board agreed with the ERC that the Board would retain ultimate authority, and amended the language proposed by the ERC to clarify even further the non-binding nature of the IRP. Specifically, it replaced the ERC's reference to IRP "decisions" with the term "declarations."<sup>133</sup> As explained in the Board's minutes, this replacement was precisely to avoid any erroneous inference that the IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal.<sup>134</sup>

99. In his witness statement, Dr. Cerf, who was Chair of the ICANN Board when it adopted the IRP Bylaws, confirmed the Board's intent that the IRP would be non-binding. As he explained, "[w]hen the IRP was created, it was intended that an Independent Review Panel would consider claims that the ICANN Board violated ICANN's Articles of Incorporation or Bylaws, would conduct a reasoned and persuasive analysis of those claims, and would make public its conclusion and rationale so that members of the Internet community would understand the results of the process."<sup>135</sup> An independent review panel "was never meant to have the authority to overrule, nullify, or stay decisions of the ICANN Board."<sup>136</sup>

### **iii. ICM's Contrary Arguments Are Baseless.**

100. ICM does not acknowledge the Bylaws provisions and the substantial drafting history. Instead, in support of its argument that the IRP Bylaws provide for "final and binding" declarations, ICM takes a few fragmentary phrases in the IRP Bylaws out of context.

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<sup>133</sup> Compare Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform, Art. 4, § 3, ¶¶ 12-13 (October 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/proposed-bylaws-23oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AD, with ICANN Bylaws, Art. 4, § 3, ¶¶ 12-13 (December 15, 2002) (referring to panel "declarations"), available at <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AG.

<sup>134</sup> See ICANN Minutes, October 31, 2002, available at <http://www.icann.org/en/minutes/minutes-31oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AH.

<sup>135</sup> V. Cerf Witness Statement, ¶ 9.

<sup>136</sup> *Id.*

101. ICM's primary argument is that the IRP Bylaws' use of the word "arbitration" necessitates the conclusion that the IRP is binding.<sup>137</sup> This is wrong. The Bylaws never characterize the IRP as "arbitration." To the contrary, they consistently refer to the proceeding as an "independent review" and never as "arbitration."<sup>138</sup> The Bylaws' one use of the word "arbitration" refers not to the nature of the IRP proceeding, but rather to the *entity* that will implement the IRP.<sup>139</sup> Because arbitral bodies are suitable entities to implement the process that ICANN established, it is unremarkable that they would be used to implement the IRP, and an occurrence of the word "arbitration" in that context does not support ICM's contention. In limiting the word's occurrence to a reference to the entity conducting the review, and consistently refraining from using the term to characterize the nature of the proceedings or the effects of the Panel's conclusions, the Bylaws actually reinforce that the IRP is not binding. Plainly, the Bylaws used the word "arbitration" where appropriate, so the failure to use the word "arbitration" in explaining the nature of the proceeding was deliberate.

102. Moreover, as shown above, the drafters of the Bylaws obviously did not understand the term "arbitration" to refer to a proceeding with necessarily binding results; in the course of the drafting history, they occasionally used the phrase "non-binding arbitration" to refer to the process.<sup>140</sup> Thus, the word "arbitration" would not be dispositive even if it had been used in reference to the proceeding as ICM wrongly claims.

103. ICM's only other textual argument is to quote phrases in the Bylaws out of context that, according to ICM, also suggest a "binding" effect. Thus, ICM points to the phrases "independent review," "declaration," "decisions/opinions," "writing[s]," "act[ing] upon the opinion of the IRP," and "prevailing party."<sup>141</sup> None of these terms, standing on their own and especially in their context, can possibly be read to require a binding decision, particularly in the

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<sup>137</sup> ICM Memorial ¶¶ 291-92, 298-302.

<sup>138</sup> See ICANN Bylaws, *supra* note 2, Article IV, §§ 3.1-6, 3.9.

<sup>139</sup> See *id.* at Article IV, § 3.4 (stating that the review process should be administered by an "international arbitration provider . . . using arbitrators under contract with or nominated by that provider").

<sup>140</sup> See Blueprint, *supra* note 119, at § 5.

<sup>141</sup> See ICM Memorial ¶¶ 282, 304, 306-07.

face of the voluminous evidence ignored by ICM showing that the contrary was presupposed.<sup>142</sup> ICM offers no contextual analysis that could in any way support its bare assertions.

104. ICM also quotes statements by then-ICANN president Stuart Lynn and current-president Dr. Paul Twomey discussing the need for transparency and accountability in ICANN's structure and processes.<sup>143</sup> ICM's quotations are badly inapposite. Interest in greater transparency and accountability, however, obviously does not require, or even suggest, a binding result. To the contrary, these statements make clear that the driving purpose of the IRP was *not* to create a new tribunal to impose binding decisions, but rather to provide another means to foster openness and accountability, which the IRP accomplishes through the persuasive public power of the panel's declarations.<sup>144</sup>

105. ICM's heavy emphasis<sup>145</sup> on Dr. Twomey's use of the word "final" is particularly mystifying. During hearings before Congress in 2006 in which he addressed three "processes for accountability in [ICANN's] decision-making and in its bylaws," Dr. Twomey characterized the IRP as the Bylaws' "final method of accountability."<sup>146</sup> The IRP process was certainly "the final" (*i.e.*, the last in time) of the three methods to which Dr. Twomey referred (the first two

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<sup>142</sup> With respect to the phrase "prevailing party," ICM relies on case law addressing that term for purposes of attorneys' fee awards in civil rights litigation. *See* ICM Memorial ¶ 306. ICM provides no basis for applying that authority to the different situation here of an alternative dispute resolution where neither judicial litigation, civil rights, nor attorneys' fees are at issue. Obviously, a party "prevails" here if the panel issues a declaration in that party's favor, whether or not that declaration is binding.

<sup>143</sup> *See* ICM Memorial ¶¶ 284-89. Indeed, ICM claims that "it is instructive to consider" these statements "[b]efore considering the plain language of the provisions governing the Independent Review Process." ICM Memorial ¶ 284 (emphasis added). ICM's backward approach to interpreting the Bylaws underscores the absence of any textual basis for ICM's argument.

<sup>144</sup> *See* ICANN Governance, Hearing before the S. Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science, and Transportation, 107 Cong. 2 (2002) (statement of Mr. Lynn that any reform efforts should "retain the fair, open, and transparent character of ICANN processes"); Hearings Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications & the Internet of the Committee on Energy and Commerce, 109th Cong. 19 (2006) (statement of Dr. Twomey emphasizing that the IRP is part of ICANN's "well-established principles and processes for accountability").

<sup>145</sup> ICM Memorial ¶¶ 288-89.

<sup>146</sup> Hearings Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications & the Internet of the Committee on Energy and Commerce, 109th Cong. 19 (2006).

being the Board’s initial decision-making process and the reconsideration process administered by the Board). Dr. Twomey obviously was not addressing whether an IRP declaration was legally binding on ICANN.

106. Likewise, ICM’s reliance on Mr. Lynn’s and Dr. Twomey’s references to “arbitrators” or “arbitration” is similarly misplaced.<sup>147</sup> The context of the statements ICM references makes clear that neither Mr. Lynn nor Dr. Twomey was referring to the question of whether a panel’s declarations were binding.<sup>148</sup> The word “arbitration” in this context does not have any relevance to the effect of IRP declarations, because, as shown above, ICANN has expressly used the term “arbitration” to refer to a “non-binding” process.<sup>149</sup>

107. In short, nothing in the IRP provisions in any way suggests that the Panel’s declaration is “binding.” To the contrary, the provisions’ plain language and drafting history make clear that the Panel’s declarations, have persuasive and advisory force, but do not bind the ICANN Board.

**b. The Supplementary Procedures Governing The IRP Confirm That IRP Declarations Are Not Binding.**

108. The operating rules and procedures for the IRP confirm that IRP declarations are not binding. Pursuant to Article IV, section 3.5 of the ICANN Bylaws, ICANN established rules to govern the IRP, selecting the ICDR International Arbitration Rules (“ICDR Rules”)<sup>150</sup> as amended by ICANN’s Supplementary Procedures.<sup>151</sup> ICANN’s individualization of the ICDR

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<sup>147</sup> See ICM Memorial ¶¶ 287-88.

<sup>148</sup> See ICANN Governance, Hearing before the S. Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science, and Transportation, 107 Cong. 2 (2002) (statement of Mr. Lynn that ICANN was creating a mechanism for “independent review of ICANN Board actions by experienced arbitrators”); Hearings Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications & the Internet of the Committee on Energy and Commerce, 109th Cong. 19 (2006) (statement of Dr. Twomey describing the IRP as “an independent review panel or arbitration process”).

<sup>149</sup> See Blueprint, *supra* note 119, § 5.

<sup>150</sup> See International Centre for Dispute Resolution, International Dispute Resolution Procedures [“ICDR Rules”], Cl. Ex. 11.

<sup>151</sup> See Supplementary Procedures for Internet Corporation for Assigned Names and Numbers [“Supplementary Procedures”], Cl. Ex. 12.



Rules, through those Supplementary Procedures, makes clear that IRP declarations are not binding.

109. Supplementary Procedures 6 and 8 are determinative. Supplementary Procedure 6, entitled “Interim Measures of Protection,” tracks the similar provision in the IRP Bylaws by stating that the Panel may merely “*recommend* that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”<sup>152</sup> As noted above, the authority merely to “recommend” temporary action, until the Board “reviews” the panel’s conclusions, demonstrates that the panel’s declarations do not have binding force. Moreover, this Supplementary Procedure replaces Article 21 of the ICDR Rules, also entitled “Interim Measures of Protection.” Article 21 authorizes an arbitral panel to “take whatever measures it deems necessary, including injunctive relief and measures for the protection or conservation of property” or “an interim award” that may require “security for the costs of such measures.”<sup>153</sup> By replacing the ICDR rule that authorizes the panel itself to award interim relief, and providing its own rule that retains the ICANN Board’s judgment and decision-making authority, ICANN ensured that even interim declarations by a panel would not be binding on the Board.

110. Supplementary Procedure 8 similarly confirms the non-binding nature of IRP declarations. In the ICDR Rules, Article 27 is entitled “Form and Effect of the Award” and specifies that arbitration awards are “final and binding.”<sup>154</sup> ICANN, however, adopted Supplementary Procedure 8, which replaces this provision. The title of Supplementary Procedure 8 – “Form and Effect of an IRP Declaration” – corresponds to Article 27 but, again, is tailored to ICANN’s particular review process. Like the IRP Bylaws that it tracks,<sup>155</sup> the supplementary rule refers to “declarations” and specifically *omits* the Article 27 reference to a

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<sup>152</sup> *Id.* at Supplementary Procedure 6 (emphasis added). The IRP Bylaws state that the panel may “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.” ICANN Bylaws, *supra* note 2, Article IV, § 3.8.c.

<sup>153</sup> ICDR Rules, *supra* note 150, Article 21; *see also id.*, Article 27(7) (“In addition to making a final award, the tribunal may make interim, interlocutory or partial orders and awards.”).

<sup>154</sup> *Id.* at Article 27.

<sup>155</sup> *See* ICANN Bylaws, *supra* note 2, Article IV, § 3.12.

binding effect. The supplementary rule states that declarations shall: (i) “be made in writing, promptly by the [panel], based on the documentation, supporting materials and arguments submitted by the party,” (ii) “designate the prevailing party,” (iii) “be made public” if the parties consent, and (iv) be provided to the parties.<sup>156</sup> Supplementary Procedure 8 thus squarely rejects the “final and binding” language contained in Article 27.<sup>157</sup>

111. ICM claims that Supplementary Rule 8 has no effect on Article 27 or its reference to “final and binding” awards.<sup>158</sup> ICM would have the Panel reach the absurd conclusion that there are *two* different rules, both labeled “Form and Effect” of a result, with largely overlapping but different content, despite the fact that one was specially adopted for this proceeding and differs from the other, which is a standardized rule governing proceedings in the absence of modification. ICM’s only rationale for this nonsensical position is that, whereas ICANN expressly provided that another ICDR Rule (Article 37 addressing procedures for emergency proceedings) “will not apply,” ICANN did not make a similar statement with respect to Article 27. But it would have made no sense for ICANN to have made such a statement regarding Article 27. Unlike with Article 37, which ICANN eliminated wholesale without any corresponding replacement, ICANN *modified* Article 27 by expressly adopting a supplemental provision with a corresponding title that altered the content of Article 27. In light of Article 27’s modification, rather than entire elimination, it would have made no sense for ICANN to state, as it did with respect to Article 37, that Article 27 “did not apply.”

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<sup>156</sup> See Supplementary Procedures, *supra* note 151, Supplementary Procedure 8.

<sup>157</sup> Setting aside prefatory Supplementary Procedures 1 and 2 (identifying definitions and scope of the Supplementary Procedures), ICANN’s other Supplementary Procedures, like Procedures 6 and 8, correspond to particular provisions in the ICDR Rules. Specifically, Procedure 3, entitled “Number of Independent Review Panelists,” corresponds to Article 5 on “Number of Arbitrators”; Procedure 4, entitled “Conduct of the Independent Review,” corresponds to Article 16 on “Conduct of the Arbitration”; Procedure 5, entitled “Written Statements,” corresponds to Article 17 of the same name; Procedure 7, entitled “Declarations,” corresponds to Article 26 on “Awards, Decisions and Rulings”; and Procedure 9, entitled “Costs,” corresponds to Article 31 of the same name. In modifying the ICDR Rules in each instance, ICANN replaced references to “arbitration” or “tribunal” with “independent review” or “IRP”; references to “arbitrators” with “independent review panelists”; and references to “award, decision, or ruling” with “declaration.” ICANN’s consistent and repeated tailoring of the ICDR Rules confirms that ICANN rejected any binding effect of results otherwise provided for in those Rules.

<sup>158</sup> See ICM Memorial ¶¶ 282, 308. ICM does not address the significance of Supplementary Rule 6’s replacement of Article 21.

112. ICM also argues that the act of using the ICDR Rules on arbitration somehow transforms this proceeding into a binding arbitration.<sup>159</sup> But the use of the ICDR Rules – as amended by ICANN’s Supplementary Procedures – actually proves just the opposite. While the ICDR Rules on arbitration apply well-established rules to the conduct of an IRP – to govern such procedural matters as the appointment of panelists, scheduling, and the manner in which the parties may discuss and provide evidence – the Supplementary Procedures expressly replace those provisions in the ICDR Rules that concern the effect of a panel’s determinations, tailoring the rules to ICANN’s process in which a panel’s declarations are not binding. In relying superficially on the word “arbitration” in the title of the ICDR Rules, ICM ignores the content of ICANN’s amendments to those rules. Some of those amendments would not have been required if ICANN had intended the IRP to be binding. As a result, to the extent any aspects of “arbitration” are part of the IRP, they relate to the operation of the proceeding, not to its results, which are governed by ICANN’s Supplementary Procedures that render the results non-binding.<sup>160</sup>

113. Finally, as with ICM’s misplaced reliance on various terms in the Bylaws, ICM cannot rely on the Supplementary Procedures’ various references to “independent review,” “declaration,” “decisions/opinions,” “writing[s],” “act[ing] upon the opinion of the IRP,” or “prevailing party” to infer a binding nature of the IRP.<sup>161</sup> Whether in isolation or in context, none of those terms implies a binding result.

## **2. The Actions Of The ICANN Board Are Entitled To Substantial Deference From This Tribunal.**

114. As explained above, ICANN created the IRP process as part of its effort to allow aggrieved parties to challenge whether the conduct of the ICANN Board was inconsistent with

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<sup>159</sup> See ICM Memorial ¶ 293.

<sup>160</sup> ICM argues that the fact that ICANN selected the ICDR Rules on arbitration over its mediation rules supports ICM’s argument. See ICM Memorial ¶ 293. Mediation, however, is an entirely different and inapposite process designed to facilitate agreement of the parties, not an independent review. See Black’s Law Dictionary 996 (7th ed. 1999) (defining mediation as “help[ing] the disputing parties reach a mutually agreeable solution”). Mediation could not possibly have supplied the form of review called for in ICANN’s Bylaws.

<sup>161</sup> See ICM Memorial ¶¶ 282, 304-07.

ICANN’s Bylaws and Articles of Incorporation. ICANN and its community deliberated with great care in crafting the rules governing this proceeding, and the rules and proceeding are unique to ICANN.

115. ICM suggests that the ICANN-created process, including the plain language of the governing Bylaws, be ignored and that the Panel should engage in a “full, non-deferential review of the ICANN’s actions.”<sup>162</sup> ICM’s argument is also contrary to well-settled principles of law on deferential review of corporate board decisions. ICM rests its argument instead on a misinterpretation of a single word (“independent”) that has absolutely nothing to do with the appropriate degree of deference in this proceeding.

**a. ICANN’s Bylaws Expressly Confer Discretionary Authority Upon The Board In Applying The Provisions At Issue Here.**

116. The Bylaws provisions to which ICM asks the Panel to compare ICANN’s actions are collected and summarized in section 2 of Article I. This section identifies eleven “core values” of ICANN governance, several of which (*e.g.*, the adoption of “open and transparent” decision-making procedures (Article I, section 2) form the basis of ICM’s request for review.<sup>163</sup> This section directly speaks to the degree of latitude afforded to the Board and other ICANN decision-makers in implementing the provisions in question.

117. Article I, section 2 explains that the core values are “very general,” and that therefore “situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.” The Bylaws thus make clear that the requirements must not be construed in a “narrowly prescriptive” manner. To the contrary, Article 1, section 2 emphatically provides that the ICANN Board is vested with broad discretion in implementing these provisions. The section begins by noting that the core values “should guide” ICANN’s decisions and actions, and the section concludes by elaborating on this broad guidance:

*Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply*

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<sup>162</sup> ICM Memorial ¶ 323.

<sup>163</sup> ICM expressly relies on core values 1, 2, 7, and 8.

to the specific circumstances of the case at hand, and to determine, if necessary, *an appropriate and defensible balance among competing values*.<sup>164</sup>

118. The discretion given to the Board with respect to the core values contrasts with the unconditional requirement of adhering to ICANN’s mission – the other provision in Article I. Whereas the mission statement in Article 1, section 1 provides ultimate (albeit expansive) boundaries on ICANN’s scope, the core values in Article 1, section 2 provide judgment-driven guidance for “performing its mission” within that scope.<sup>165</sup>

119. While several provisions governing ICANN’s obligations on which ICM relies are provisions other than Article I, section 2, the Board’s actions pursuant to those obligations are due the same deference that applies to Board actions pursuant to Article I, section 2.<sup>166</sup> Each of these other obligations in ICANN’s governing documents either repeats core values as to which Board deference is expressly afforded in Article I, or implements Article I core values in specific contexts. For instance, the Bylaws addressing openness and transparency in Article III, section 1 simply repeat the core value on the same topic.<sup>167</sup> And the Bylaws prohibiting ICANN from providing “disparate treatment unless justified by substantial and reasonable cause” address more specifically what the core values of neutral, objective, and fair decision-making state in

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<sup>164</sup> *Id.* (emphasis added).

<sup>165</sup> ICANN Bylaws, *supra* note 2, Article I, § 2.

<sup>166</sup> ICM relies on the following provisions in ICANN’s Bylaws and Articles that occur elsewhere than in the list of core values in Article I, section 2 (but nonetheless implement those core values, as discussed in the accompanying text): Article I, section 1 of the Bylaws and Article III of the Articles (both on the stable and secure operation of the Internet), which implement core value 1 on the same topic; Article II, section 3 of the Bylaws (on non-discriminatory treatment), which implements core value 8 on neutral, objective, and fair decision-making; Article III, section 1 of the Bylaws and Article IV of the Articles (both on openness and transparency), which implement core value 7 on the same topic; and Article XI, section 2.1 of the Bylaws (on the role of the GAC) and Article IV of the Articles (on operating for the benefit of the Internet community, carrying out activities in conformity with relevant principles of international law), which implement core values 4 and 11 on seeking and supporting diverse input, including from governments, in policy development and decision-making.

<sup>167</sup> Compare ICANN Bylaws, *supra* note 2, Article III, § 1 (requiring ICANN and its constituent bodies to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”), with Article I, § 2.7 (identifying the core value of “[e]mploying 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”).

general terms.<sup>168</sup> Because the Bylaws expressly confer on ICANN bodies the discretion to make reasonable judgments as to how to balance the various core values, it would make no sense to interpret other similar Bylaws' provisions as silently taking that discretion away because there is no superfluous reiteration that discretion should be exercised.

120. By its terms, then, the deference expressly accorded to the Board in implementing the core values applies to all of these provisions. ICM itself appears to recognize this point, as it nowhere urges a different degree of deference to the Board's judgment.

121. In sum, the Bylaws expressly confer upon the ICANN Board the authority – in “its judgment” – to select and “balance” the principles that ICM claims were contravened in this case (both those listed in the core-values provision and those identified elsewhere). Thus, by its terms, the Bylaws' conferral of discretionary authority makes clear that any reasonable decision of the ICANN Board is, *ipso facto*, not inconsistent with the Bylaws and consequently must be upheld. Indeed, the Bylaws even go so far as to provide that outright departure from a core value is permissible in the judgment of the Board, so long as the Board reasonably “exercise[s] its judgment” in determining that other relevant principles outweighed that value in the particular circumstances at hand.

122. Here, as will be shown in the factual discussion in Parts III.B and III.C, there was not even any *arguable* departure from any of the Bylaws or Articles provisions that ICM cites. Thus, even without the substantial deference due to ICANN's reasonable actions pursuant to those provisions, ICANN's handling of the ICM application should not be found to violate the Bylaws or Articles. But because such substantial deference is in fact due, there is no basis whatsoever for a declaration in ICM's favor because the Board's decisions in this matter were, at a minimum, clearly justified and within the range of reasonable conduct.

123. The deference due to the ICANN Board is further reinforced by the Bylaws provision governing the independent review process itself. Article IV, section 3 strictly limits

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<sup>168</sup> Compare ICANN Bylaws, *supra* note 2, Article II, § 3 (prohibiting ICANN from providing “disparate treatment unless justified by substantial and reasonable cause”), with Article I, § 2.8 (identifying core value of “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

the scope of independent review proceedings to the narrow question of whether ICANN acted in a manner “inconsistent with” the Articles of Incorporation and Bylaws. In confining the inquiry into whether ICANN’s conduct was *inconsistent with* its governing documents, the presumption is one of consistency so that inconsistency must be established, rather than the reverse. Other language in section 3 confirms this deference. The provision charges the Panel with the duty of “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with” those two documents. By making clear that the Panel’s role is limited to finding actual and specific violations of express provisions of the Bylaws or Articles (as opposed to a broader inquiry into the propriety of Board actions more generally), the provision governing this tribunal’s review makes clear that independent review is not to be used as a mechanism to upset arguable or reasonable actions of the Board.

124. The drafters of the IRP provision (including Ms. Burr) confirmed this plain meaning in explaining the IRP’s purpose and effect. In the Report that recommended the language of the IRP provision, the drafters stated that the IRP “is not the ‘Supreme Court of ICANN’ that some in the community have urged.”<sup>169</sup> The Report made clear that the limited scope of review proceedings had been decided precisely in light of the appropriate latitude of the Board to make decisions on behalf of ICANN. “We believe that the ICANN Board envisioned in the New Bylaws . . . is broadly representative of the entire range of ICANN stakeholders, and is thus the most appropriate body to make final decisions on ICANN policies, within the scope of the mission also set forth in those New Bylaws.”<sup>170</sup> For instance, the Board is composed of fifteen members – who, except for ICANN’s President, are volunteers – drawn from a variety of different constituencies in the Internet community. Two-thirds of the Board members presently reside in countries other than the United States, reflecting ICANN’s commitment to represent the

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<sup>169</sup> Final Implementation Report, *supra* note 130, at § 5.

<sup>170</sup> *Id.* See also, e.g., Committee on ICANN Evolution and Reform, First Interim Implementation Report § 2 (August 1, 2002), available at <http://www.icann.org/en/committees/evol-reform/first-implementation-report-01aug02.htm> (last visited May 5, 2009) (“We do not believe that ICANN should have either a Supreme Court or a ‘Super Board’ with the ability to nullify decisions reached by the ICANN Board, which will be the most broadly representative body within the ICANN structure.”), attached hereto as ICANN Exhibit AB; Becky Burr, *Recommendations Regarding Accountability* at II (August 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit V.

views and interests of the Internet community globally. Thus, as the drafters explained and in keeping with the plain language of the Bylaws, the narrow scope of the independent review process was designed precisely to protect the prerogatives of the Board in making decisions for which there is a range of reasonable conduct. Deference to such discretionary Board determinations is therefore inherent in the structure, as well as the text, of the Bylaws.

125. ICM offers no response to any of the foregoing Bylaws provisions or their drafting history. ICM's silence is puzzling in light of the fact that ICANN addressed these issues in its previous brief to the Panel.<sup>171</sup> Because the Bylaws directly speak to the question and make clear that a violation of the Bylaws and Articles can be found only in the event of a plain and unequivocal contravention of those documents, the Panel should give substantial deference to the actions of the ICANN Board in this proceeding.

**b. Well-Established Principles Of Corporate Law Independently Compel Strong Deference To Decisions Of The ICANN Board.**

126. Basic principles of corporate law supply an independent basis for the deference due to the reasonable judgments of the ICANN Board in this matter. It is black-letter law that “there is a presumption that directors of a corporation have acted in good faith and in the best interest of the corporation.”<sup>172</sup> This presumption ordinarily operates to “preclude[] judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes,” and, if unrebutted, forecloses a reviewing court from substituting its judgment for that of the board.<sup>173</sup>

127. In California, where ICANN is located and incorporated, these principles require deference to actions of a corporate board of directors so long as the board acted “upon reasonable investigation, in good faith and with regard for the best interests of” the corporation, and

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<sup>171</sup> See ICANN's Response to Request for Independent Review ¶ 87.

<sup>172</sup> 19 C.J.S. Corporations § 568 (2008); *accord, e.g.*, 18B Am. Jur. 2d Corporations § 1476 (2008). For the Panel's convenience, ICANN has submitted all legal authorities cited herein as ICANN Exhibits BF-BZ.

<sup>173</sup> *Id.*



“exercised discretion clearly within the scope of its authority.”<sup>174</sup> This includes the boards of not-for-profit corporations.<sup>175</sup> As California courts have explained, this doctrine rests on the well-accepted premise that those to whom decision-making has been entrusted are better equipped to make policy and management decisions than courts.<sup>176</sup> Thus, the amount of deference typically afforded to a board is extensive. Courts will only scrutinize the decisions of a corporate board where there are allegations of facts that tend to show that the board’s conclusions were made: (1) with inadequate information, or (2) in bad faith.<sup>177</sup> The presumption of sound business judgment is only rebutted by “allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts.”<sup>178</sup>

128. For instance, in *Lamden*, a case cited by ICM, the court found that the board of directors of a community association should be afforded similar deference as under the business judgment rule, holding that actions taken “upon reasonable investigation, in good faith, and in a manner the Board believed was in the best interests of the Association and its members” would withstand court scrutiny.<sup>179</sup> “The theory behind the business judgment rule is that directors are not required to guarantee that their decisions will succeed, rather they are only expected to use ordinary and reasonable care in making corporate policy.”<sup>180</sup>

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<sup>174</sup> *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 265 (1999); accord, e.g., *Lee v. Interinsurance Exchange of Auto. Club of S. Cal.*, 50 Cal. App. 4th 694, 714 (1996) (noting that these principles “insulate[] from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization’s best interest”); *Frances T. v. Village Green Owners Ass’n*, 42 Cal. 3d 490, 508 n.14 (1986) (noting that such judicial deference to corporate boards “exists in one form or another in every American jurisdiction”).

<sup>175</sup> See, e.g., *Harvey v. Landing Homeowners Ass’n*, 162 Cal. App. 4th 809, 821-22 (2008).

<sup>176</sup> *Lee*, 50 Cal. App. 4th at 711 (extending business judgment rule to members of the Board of Governors of the Insurance Exchange); *Frances T.*, 42 Cal. 3d at 508 n.14.

<sup>177</sup> *Lee*, 50 Cal. App. 4th at 716.

<sup>178</sup> *Id.* at 715.

<sup>179</sup> *Lamden*, 21 Cal. 4th at 265; see also *Hannula v. Hacienda Homes, Inc.*, 34 Cal. 2d 442, 447 (1949) (realty corporation’s building restriction must only meet the test of “a reasonable determination made in good faith”).

<sup>180</sup> *Hill v. State Farm Mut. Auto. Ins. Co.*, 166 Cal. App. 4th 1438, 1492 (2008).

129. Likewise, in *Katz v. Chevron Corp.*, the court emphasized that a board’s decisions or actions will be given deference if they are reasonable. In *Katz*, the court applied principles of reasonableness to reject challenges to the Chevron board’s response to a potential threat from Penzoil’s accumulation of stock and the amount of information that the board considered in developing its response.<sup>181</sup> The court explained that the business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”<sup>182</sup> Under the rule, “a court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.”<sup>183</sup> Because the board had both reasonably perceived what it believed to be a threat and acted reasonably in response, there was no triable issue of fact upon which to claim it had violated its duties.<sup>184</sup>

130. The California Corporations Code further supports the common law deference to corporate directors under the business judgment rule. The statutory rules for directors and management of for-profit and not-for-profit corporations provide, through the use of nearly identical language, that directors must act in good faith, in a manner the director believes to be in the best interests of the corporation, and with reasonable and prudent care under the circumstances.<sup>185</sup>

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<sup>181</sup> *Katz v. Chevron Corp.*, 22 Cal. App. 4th 1352, 1370-75 (1994).

<sup>182</sup> *Id.* at 1366 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)) (internal quotations omitted).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1375; *see also Lewin v. St. Joseph Hosp.*, 82 Cal. App. 3d 368, 384-85 (1978) (applying principles of reasonableness under the business judgment rule to a private not-for-profit hospital corporation, explaining that “[a] managerial decision . . . made rationally and in good faith by the board . . . should not be countermanded by the courts unless it clearly appears it is unlawful or will seriously injure a significant public interest”); *Harvey*, 162 Cal. App. 4th at 821-22 (evidence of the board’s efforts to conduct an investigation, consult with professionals, communicate with owners, and pass a resolution on the issue at hand indicated that the board performed a reasonable investigation in good faith); *Beehan v. Lido Isle Comm. Cmty. Ass’n*, 70 Cal. App. 3d 858, 865 (1977) (court would not substitute its judgment for that of nonprofit corporation where its board of directors, in deciding not to enforce amendment it believed had not been properly enacted, “acted in good faith and with a view to the best interests of the corporation and all its shareholders”).

<sup>185</sup> Cal. Corp. Code §§ 309, 7231 (2009). Furthermore, under California’s common law fair procedure doctrine, a Board’s action must be (1) substantively rational; and (2) procedurally fair. *Pinsker v. Pac.*

131. ICM's challenge stems from the ICANN Board's denial of an application. Therefore, long-established principles of corporate law require that Board decisions receive substantial deference, even apart from the fact that, in this case, such deference is required by the language of the Bylaws (as shown above).

132. This deference is particularly appropriate with respect to ICANN in light of the unusual and carefully crafted structure of its Board. As noted, the Board's fifteen members are drawn from a variety of different constituencies in the Internet community.<sup>186</sup> The Board is frequently called upon to make difficult decisions concerning complex issues that affect multiple constituencies, often issues for which there is no precedent of any kind. Certainly, the question of whether to add a "sponsored" Top Level Domain to the Internet that would be dedicated exclusively to pornography was not an issue that any corporation, entity, or government had ever addressed, which explains why ICANN, ICM, the GAC, and others struggled over an extended period to address the issues. It is unreasonable to suppose in this context that there would be no deference whatsoever to the decisions of the ICANN Board, yet that is exactly what ICM proposes.

133. ICM's primary argument against the extension of the ordinary deference to Board actions in this case is its suggestion that such deference "applies only to protect individual directors from liability."<sup>187</sup> Yet, ICM's only authority for this claim is *Lamden*, where the California Supreme Court *gave* such deference to board determinations despite the fact that the case (like this one) did not involve any attempt to impose liability on any individual directors.<sup>188</sup>

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(continued...)

*Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550-51 (1974). Fair procedure is violated where the decision is arbitrary, capricious, discriminatory, irrational or "contrary to public policy." *Id.* at 553.

<sup>186</sup> See, e.g., Final Implementation Report § 5, *supra* note 130 (noting "that the ICANN Board . . . is broadly representative of the entire range of ICANN stakeholders and is thus the most appropriate body to make final decisions on ICANN policies").

<sup>187</sup> ICM Memorial ¶ 470.

<sup>188</sup> See *Lamden*, 21 Cal. 4th at 265; see also *id.* at 258 (noting that "no individual directors are defendants here").

In short, California’s highest court rejected ICM’s argument in the very case ICM cites to support it.

134. ICM also cites the decision of a lower California court in *Ritter & Ritter, Inc. v. Churchill Condominium Association*, 166 Cal. App. 4th 103 (2008), which distinguished *Lamden*.<sup>189</sup> But the *Ritter* court merely observed that deference to a corporate board may not extend “to a board action involving an extraordinary situation.”<sup>190</sup> While the court found *Lamden* distinguishable on the facts,<sup>191</sup> it expressly recognized that, under *Lamden*, deference applies even in suits where individual board members are not defendants.<sup>192</sup> ICM makes no argument (and could not have) that the ICANN Board’s action in reviewing ICM’s application was an “extraordinary action” outside its ordinary competence. To the contrary, making decisions about adding TLDs, including decisions about registry operators and sponsoring organizations, is a Board activity that is explicitly within ICANN’s mission.<sup>193</sup>

135. ICM also observes that there is an exception to the requirement of deference where the Board’s own governing documents disclaim the need for such deference.<sup>194</sup> Yet, in this case, as shown above in Section III.A.2, far from eliminating deference, the governing Bylaws emphasize the strong need for, and propriety of, substantial deference to Board actions, particularly in the context of the present independent review proceeding. Because, as shown above, ICM offers no response whatsoever to this showing, the exception ICM cites is wholly inapplicable. Indeed, to the contrary, it reaffirms the need for deference, because the governing documents affirmatively demand it.

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<sup>189</sup> ICM Memorial ¶ 474.

<sup>190</sup> *Ritter*, 166 Cal. App. 4th at 122.

<sup>191</sup> *Id.* at 125.

<sup>192</sup> *Id.* at 122.

<sup>193</sup> See *supra* at Section II; ICANN Bylaws, *supra* note 2, Article I, §1 (stating that ICANN’s mission “is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” and this mission includes coordinating domain names).

<sup>194</sup> See ICM Memorial ¶ 475.

**c. ICM’s Other Argument Based On The Meaning Of  
“Independent Review” Is Baseless.**

136. ICM argues that no deference is necessary because the term “independent” modifies “review” in the Bylaws.<sup>195</sup> ICM concedes that “independent review” is “not a term of common usage or general meaning within the context of international law or dispute resolution,”<sup>196</sup> but it nonetheless contends that the word “independent” connotes a full, non-deferential standard of review.

137. While the word “independent” can have a variety of meanings depending upon the context, there can be no doubt what meaning it has in the context of Article IV, section 3 of the ICANN Bylaws because the Bylaws themselves make that clear. The word “independent” in section 3 merely refers to the fact that it is a review conducted by an entity separate from (*i.e.*, “independent” of) ICANN itself. The text eliminates any imaginable ambiguity on this point because the very sentence that introduces the term “independent” makes clear that it refers to the “third-party” nature of the entity, not to standards governing deference.<sup>197</sup> To carry out that independence, the Bylaws provide that a non-ICANN entity will operate the review process and appoint members to each panel, and further provides that no panel member may hold an official position or office within ICANN.<sup>198</sup> In addition, the Bylaws distinguish the independent review process as “separate” from the reconsideration process, which is not independent because it is administered by the ICANN Board.<sup>199</sup> In short, section 3 make clear that the word

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<sup>195</sup> ICM Memorial ¶¶ 311-17.

<sup>196</sup> ICM Memorial ¶ 313.

<sup>197</sup> *See id.* (noting that “ICANN shall have in place a separate process for independent *third-party* review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws” (emphasis added)).

Further reinforcing this conclusion is the language from the original Bylaws on the IRP, which called for “an independent review process by a neutral third party.” ICANN Bylaws, Article III, § 4 (November 6, 1998), available at <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit W. Especially where no reference is made to standards of review, the natural reading is that the independence of the review process refers to, and was effectuated by, the “neutral third party.”

<sup>198</sup> ICANN Bylaws, *supra* note 2, Article IV, §§ 3.4, 3.7, 3.9.

<sup>199</sup> *Id.* at Article IV, § 3.1.

“independent” simply refers to the fact that the panel conducting the review in question is not part of ICANN itself.<sup>200</sup>

138. The structure of ICANN’s Bylaws further reinforces this plain language; section 3 follows the “separate” accountability mechanism set out in section 2 – *i.e.*, the neutral reconsideration process conducted by the ICANN Board itself. Thus, the reference to “independent” review in section 3 plainly establishes a contrast from the internal reconsideration procedures set out in the preceding section, and does not connote a standard of review, as ICM acontextually argues. Ms. Burr’s comments during the drafting of the IRP provisions confirm this reading. She contrasted the IRP process with the reconsideration process “run by a subcommittee of the ICANN Board rather than a neutral.”<sup>201</sup> In short, the word “independent” refers to the fact that the panel conducting the review in question is a “neutral” entity not part of ICANN itself.

139. ICM’s citation of a handful of judicial decisions using the word “independent” or cognates thereof in discussing a *de novo* standard of review merely reinforces the error in ICM’s argument.<sup>202</sup> None of these cases uses the phrase “independent review” as synonymous with *de novo* inquiry; rather, they merely use the word “independent” to refer to the fact that, under *de novo* review, the decision of an appellate tribunal is reached, in some sense, “independent” of the decision of a trial court. Here, the IRP provisions do *not* provide for *de novo* review but, as explained above, require substantial deference. Thus, cases that use the word “independent” in the context of *de novo* review are beside the point. ICM is trying to bootstrap its inapposite

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<sup>200</sup> In addition, in comments issued by the advisory committee that was tasked with establishing principles for an earlier version of the IRP, the committee explained that “independent review should be conducted by a body that is independent of the ICANN Board of Directors, both in its appointment and in its proceedings.” Draft Principles for Independent Review: Interim Report of the Advisory Committee on Independent Review With Addendum, available at <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit Y. Here again, “independent” plainly refers to the independence of the reviewing body from ICANN, not to any standards of review.

<sup>201</sup> Becky Burr, Recommendations Regarding Accountability at II (August 23, 2002), *available at* <http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit V.

<sup>202</sup> ICM Memorial ¶¶ 311-17.

interpretation of “independent” in the present context with cases using an inapposite interpretation of that word; ICM’s argument is easily rejected.

140. Moreover, case law on any standard of review (whether *de novo* or otherwise) can have no possible application here, even under ICM’s own incorrect theory that this proceeding is a form of arbitration. Because the issue in those cases involved the standards governing review of the decision of a lower tribunal, they have no application to the present context. Here, the Panel is not reviewing the intermediate decision of a lower tribunal that reviewed the Board’s actions. Instead, the issue is deference to the ICANN Board. The fact that the word “independent” can occasionally occur in discussions of appellate review standards cannot possibly bear on the meaning of the term in the context of section 3 of ICANN’s Bylaws.

### **3. ICM’s Cited Principles Of International Law Do Not Apply To The Circumstances At Issue In This Proceeding.**

141. ICM claims that the Panel should declare whether ICANN acted in conformity with certain “principles of international law” in considering and rejecting ICM’s .XXX application. Specifically, ICM refers to general commercial principles of good faith, estoppel, legitimate expectations, and abuse of rights. ICM’s invocation of international law depends on a two-step argument: first, ICM interprets Article 4 of the Articles of Incorporation (which provides that ICANN will operate for the benefit of the Internet community “in conformity with relevant principles of international law”) as a “choice-of-law provision” requiring ICANN to conform to an unlimited set of principles of international law; second, ICM infers that any violation of any principles of international law constitutes a violation of Article 4 (thus allegedly falling within the Panel’s jurisdiction to evaluate ICANN’s consistency with its Articles and Bylaws). Thus, ICM’s reading obliterates the express and straightforward limitation of the IRP Bylaws to ensure simple consistency with the Bylaws and Articles.

142. ICM’s interpretation of Article 4 contravenes the plain language of the governing provisions as well as their drafting history. Article 4 does not operate as a “choice-of-law provision” importing international law into the IRP without limitation. Instead, the substantive provisions of the Bylaws and Articles, as construed in light of the law of California (where ICANN is incorporated), govern the claims before the Panel. In any event, even if Article 4 did

operate as ICM contends, the particular principles of international law that ICM invokes are not relevant to the circumstances at issue in this proceeding.

**a. Article 4 Is Not A “Choice-Of-Law Provision.”**

143. ICM argues that Article 4 operates as a “choice-of-law provision” permitting ICM to shoehorn into the IRP process any claim that ICANN acted in a manner inconsistent with any and all general principles of international law.<sup>203</sup> This is wrong.

144. To determine the meaning of Article 4, California law (where ICANN is incorporated) applies the common rules of statutory interpretation.<sup>204</sup> The use of California law to interpret Article 4 is not controversial. Not only does California law follow generally accepted rules for interpreting articles of incorporation, but ICM agrees that California law governs this issue.<sup>205</sup> Under the rules of interpretation, the plain language of the article controls, supplemented by canons of interpretation and the article’s drafting history.<sup>206</sup>

145. The plain language shows that Article 4 is not a “choice-of-law provision.”<sup>207</sup> Article 4 provides in full:

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.

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<sup>203</sup> See, e.g., Goldsmith Report ¶ 24 (claiming that Article 4 committed ICANN to follow “international law in all its forms”).

<sup>204</sup> See, e.g., *Sanchez v. Grain Growers Ass’n*, 126 Cal. App. 3d 665, 672 (1981); see also Caron Opinion ¶ 27 (“California law would be applicable particularly to the question of interpretation of the Articles of Incorporation and the Bylaws,” and California law uses “the common rules of statutory interpretation” to interpret articles of incorporation.).

<sup>205</sup> See ICM Memorial ¶ 336 (stating that California law applies to the interpretation of ICANN’s Articles and Bylaws and, in any event, interpretation “would almost certainly be the same in any jurisdiction”); Goldsmith Report ¶¶ 20-21.

<sup>206</sup> See *Sanchez*, 126 Cal. App. 3d at 672.

<sup>207</sup> See also Caron Opinion ¶ 22 (observing that “Article 4 is not by its language a choice of law clause”).



146. The article thus begins by reiterating ICANN’s mission and purpose to “operate for the benefit of the Internet community as a whole.”<sup>208</sup> The same sentence states that ICANN will, in so operating, “carry[] out its activities in conformity with relevant principles of international law and applicable international conventions and local law” and, as appropriate and consistent with ICANN’s two governing documents, “through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>209</sup> The second sentence adds that, to meet the objective of the first sentence, ICANN “shall cooperate as appropriate with relevant international organizations.”<sup>210</sup> ICM does not allege that ICANN acted in a manner inconsistent with this latter sentence, so it is not at issue here.

147. The specific “activities” that ICANN must “carry[] out in conformity with relevant principles of international law and applicable international conventions and local law” are, in turn, set out in the preceding Article 3.<sup>211</sup> As the list of activities in Article 3 makes clear, the activities in question are those relating to ICANN’s mission and purpose of operating for the benefit of the Internet community as a whole, which Article 3 describes in more detail as ICANN’s “charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet.”<sup>212</sup>

148. Article 3 refers to ICANN’s activities in the following areas, which relate to the global nature of the Internet:

- (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet;

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<sup>208</sup> Articles of Incorporation, Article 4, Cl. Ex. 4.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *See also* Caron Opinion ¶ 38.

<sup>212</sup> Articles of Incorporation, Article 3, Cl. Ex. 4; *accord* ICANN Bylaws, *supra* note 2, Article I, § 1 (stating that ICANN’s overall mission “is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internets unique identifier systems”).

- (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space;
- (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system;
- (iv) overseeing operation of the authoritative Internet DNS root server system; and
- (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).<sup>213</sup>

149. Taking these two provisions together, the word “relevant” in Article 4 means only that principles of international law that are relevant *to the activities specifically referred to in the same sentence* and addressed with greater specificity in the adjoining Article 3, namely, principles concerned with ICANN’s substantive Internet activities are included.<sup>214</sup> Because the word “relevant” is a relational concept, which requires that the modified phrase be relevant to something else, the first clause of the same sentence, discussing ICANN’s mission, sets out what the referenced international law principles must be relevant to.<sup>215</sup> Therefore, only principles of international law that are specially relevant or related to ICANN’s Internet-related activities, and not merely principles of general applicability that apply to the Internet only in the same way that they apply to other kinds of conduct, are included as “relevant” principles in Article 4. This limitation of the referenced principles of international law in Article 4 to those specially relevant to the Internet makes perfect sense. ICANN did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant

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<sup>213</sup> *Id.*

<sup>214</sup> See Articles of Incorporation, Articles 3 & 4, Cl. Ex. 4.

<sup>215</sup> See Caron Opinion ¶ 24 (chart) (explaining that, in Article 4, “ICANN has offered an IRP process to decide whether an act of the Board was inconsistent with it operating for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law”); *id.* ¶ 56 (“[I]n my opinion the word ‘relevant’ implies those principles of international law that are . . . addressed to the subject matter of the first sentence of Article 4, that is, relevant to the ‘activities’ which are carried out so as to ‘operate for the benefit of the Internet community as a whole’ as contemplated by Article 3.”).

to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments.<sup>216</sup>

150. For instance, a concern leading to the adoption of this language was that in its absence, ICANN might exclusively apply “U.S. trademark law as the law of the Internet.”<sup>217</sup> In other words, the provision was directed to ICANN’s special operation of the Internet, and incorporates only those international law principles specially “relevant” to those activities. Even ICM’s expert has acknowledged (in a separate publication not written for this proceeding) that the substantive issues specific to the operation of the Internet – “a revolutionary medium of communication” – include “a debate about speech governance.”<sup>218</sup> The principles of international law relied upon by ICM in this proceeding – the requirement of “good faith” and related doctrines – are principles of general applicability, and are not specially directed to concerns relating to the Internet, such as freedom of expression or trademark law. Therefore, those principles are not among the class of “relevant” principles directed to ICANN’s particular function and activities.

151. This conclusion is reinforced by the circumstances surrounding ICANN’s formation, and ICANN’s commitment to consider and act in conformity with certain law from sources beyond the United States. When authority for the DNS was being transferred from the U.S. Department of Commerce to ICANN, some members of the Internet community, particularly those outside the United States, expressed concern that a U.S. corporation deriving its authority from the U.S. government would lead the corporation to institute Internet policies closely patterned solely on United States law, thereby diminishing the Internet’s promise as a

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<sup>216</sup> The parties agree that Article 4’s reference to “international law” means public international law. See Caron Opinion ¶ 47; ICM Memorial ¶ 345. For that reason, the principle of *lex mercatoria* (the law of merchants) does not come into play here, because it is not a part of public international law. See *id.* ¶ 51. Thus, the international sports cases cited by ICM (although not by its expert), which refer to a sports-based body of law akin to *lex mercatoria*, are off point. See ICM Memorial ¶¶ 381-84.

<sup>217</sup> See United States Department of Commerce, Statement of Policy, Cl. Ex. 31.

<sup>218</sup> Jack Goldsmith & Tim Wu, *Who Controls the Internet?* 150 (2008) (emphasis omitted).

truly global resource.<sup>219</sup> For instance, when the Department of Commerce solicited comments for its general policy statement that the DNS should be managed by a private corporation headquartered in the United States, some commentators were concerned “that the proposal to headquarter the new corporation in the United States represented an inappropriate attempt to impose U.S. law on the Internet as a whole” and that requiring domain name registrants to agree to the jurisdiction of U.S. courts in the event of a domain-name trademark dispute would be “an inappropriate attempt to establish U.S. trademark law as the law of the Internet.”<sup>220</sup> In its responses, the Department of Commerce focused on the new corporation’s mission of serving “the Internet community as a whole” – the same beneficiary identified in Article 4.<sup>221</sup>

152. In light of such concerns about the historic role of the U.S. government in overseeing the global resource of the Internet, and recognizing ICANN’s important responsibility for serving the global Internet community, ICANN (the new corporation headquartered in the United States) made clear in Article 4 that it will act in conformity with sources of law beyond U.S. law with respect to policies developed for the world-wide Internet community (*i.e.*, the “Internet community as a whole”). In other words, Article 4’s reference to “international law” ensures that ICANN policy governing the Internet is suitably international to promote the Internet as a broadly accessible, truly global resource.<sup>222</sup>

153. ICM interprets the reference to “relevant principles of international law” in Article 4 far too broadly and entirely out of context. Article 4 does not operate as a choice-of-law provision requiring ICANN to adapt its conduct to any and all principles of international law, such as the general principles relating to commercial contracting that ICM invokes in this

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<sup>219</sup> *Accord* ICM Memorial ¶¶ 45-49, 326-28. As noted above, ICANN has authority over the naming and numbering system pursuant to a series of agreements with the U.S. Department of Commerce.

<sup>220</sup> *See* United States Department of Commerce, Statement of Policy, Cl. Ex. 31.

<sup>221</sup> *Id.*; *see also id.* (reiterating that “[t]he new corporation should operate as a private entity for the benefit of the Internet community as a whole”).

<sup>222</sup> *See* Draft Articles of Incorporation, Fifth Iteration, Cl. Ex. 209 (noting that the Articles of Incorporation included a reference to international law “in response to various suggestions to recognize the special nature of this organization and the general principles under which it will operate”).

proceeding.<sup>223</sup> ICM’s misreading stems from a myopic focus on the excerpted phrase “conformity with relevant principles of international law.” Article 4 requires more specifically that ICANN “*operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law...*” When read in context, Article 4 does not operate as a choice-of-law provision for IRP proceedings, nor is it concerned with commercial principles of international law of the sort that ICM invokes as “a prism through which” the Articles and Bylaws must be read or, even more drastically, as freestanding claims that take the IRP process well beyond that envisioned in the Bylaws.<sup>224</sup> Instead, Article 4 and its “relevant principles of international law” are intended to promote achievement of “the benefit of the Internet community as a whole” (the clause that the international-law phrase modifies), and are therefore concerned with ensuring that ICANN does not establish policies for coordination of the Internet that are contrary to international legal principles relevant to the global community’s use of the Internet.<sup>225</sup>

154. Thus, as Professor Caron explains, ICM’s arguments are contrary to the plain language of Article 4. “Article 4 is not by its language a choice of law clause,” so any conclusion that it is a choice-of-law provision “must be implied.”<sup>226</sup> And any such implication would be unwarranted. While there is no dispute as to the theoretical possibility of a choice-of-law provision in a corporate charter, such a theoretical possibility does not establish that the possibility is actuality here.<sup>227</sup> ICM and its expert simply “jump” from the theoretical possibility of having such a provision to their conclusion that Article 4 is such a provision, without offering “an analysis of *why* Article 4 in particular is such a choice of law clause.”<sup>228</sup> Especially where

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<sup>223</sup> See Caron Opinion ¶ 54 (noting that international law “is not by its own terms applicable to the manner in which a California non-profit corporation is ‘carrying out its activities’”).

<sup>224</sup> ICM Memorial ¶ 344.

<sup>225</sup> In light of the foregoing discussion, which makes clear ICANN’s position that Article 4 incorporates international legal principles (but not those relied upon by ICM), ICM’s claim that ICANN reads Article 4 to “create[] no obligations or responsibilities” under international law is entirely wrong. ICM Memorial ¶ 329.

<sup>226</sup> Caron Opinion ¶ 22.

<sup>227</sup> See *id.* ¶ 21.

<sup>228</sup> *Id.* (emphasis in original).

the plain language points in the opposite direction, ICM’s lack of analysis is remarkable. For instance, as Professor Caron notes, “it is unlikely, and at a minimum unusual, that a choice of law clause would designate three sources of law joined by the conjunction ‘and,’ that is, three laws at the same level of hierarchy,” without further choosing among those three.<sup>229</sup>

155. As to how ICANN runs its business and interacts in a commercial manner with another entity, California law governs those matters, just like the law of the state of incorporation governs the operational matters of any other corporation.<sup>230</sup> Moreover, this application of California law arises out of ICANN’s incorporation – not Article 4’s reference to “local law.”<sup>231</sup> Article 4’s reference to “local law,” like its reference to international law, has a scope directed at the nature of ICANN’s global-coordination policies that do not reach ICM’s dispute here. As Professor Caron observes, there is no “doubt that California courts and the California Attorney General would apply the law of the State of California” to questions concerning ICANN’s Articles of Incorporation and Bylaws.<sup>232</sup> He thus concludes that, without a choice-of-law provision governing this dispute, the Panel “should ascertain the meaning of the various articles of the Bylaws and Articles in accordance with the law of the State of California.”<sup>233</sup>

156. The extensive drafting history of the IRP provisions similarly confirms that Article 4 is not a “choice-of-law provision” for IRP proceedings. As noted above, the IRP Bylaws were drafted with an eye to improving ICANN’s accountability and transparency. Nowhere in this drafting history did ICANN associate the IRP with Article 4 to treat the latter provision as a choice-of-law clause governing the IRP. Indeed, nowhere in this extensive drafting history did ICANN even *mention* Article 4, which was written years before the current IRP provisions were added to the Bylaws, as discussed below. ICANN implemented

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<sup>229</sup> *Id.* ¶ 22.

<sup>230</sup> ICM concedes that California law governs ICANN’s affairs. *See, e.g.*, ICM Memorial ¶ 336 & n.680.

<sup>231</sup> *See* Draft Articles of Incorporation, Fifth Iteration, Cl. Ex. 209 (noting that ICANN’s incorporation under California law means that California’s “reasonably well-defined nonprofit corporation jurisprudence” governs ICANN).

<sup>232</sup> Caron Opinion ¶ 26; *see also* ICDR Rules, *supra* note 150, Article 28 (directing the panel to apply the law it determines to be “appropriate” if the parties have not designated the applicable law).

<sup>233</sup> Caron Opinion ¶ 28.

transparency and accountability in other, explicit ways, such as establishing the IRP itself and providing that IRP declarations be made public. Further, the language governing the scope of IRP proceedings, which confines the issues before the Panel to the narrow question of whether ICANN violated the specific provisions of the Bylaws or Articles, was crafted precisely to constrain the analysis and to foreclose the consideration of vague and open-ended standards drawn from sources external to those documents of exactly the sort ICM relies upon here.

157. The fact that Article 4 and the IRP provisions were enacted at different times – indeed, four years apart – and in different documents reinforces the conclusion that Article 4 does not operate as a choice-of-law provision for an IRP. Article 4, along with all of ICANN’s Articles of Incorporation, was adopted in 1998 when ICANN first incorporated. The point of that document was to incorporate ICANN under California law, not to establish rules governing dispute resolution (and certainly not a dispute resolution process that had not yet been created). During its formation, ICANN never alluded to any expectation that in its Articles it would incorporate by reference all international law principles without any limitation.

158. The IRP provisions, by contrast, are found in ICANN’s Bylaws. When ICANN incorporated and adopted Article 4 in 1998, there was no IRP provision, only a direction to consider adopting one.<sup>234</sup> No particulars about the process itself were provided, and certainly no indication that ICANN intended Article 4 of the Articles of Incorporation to act as an “implicitly and retroactively incorporated” choice-of-law provision governing the type and scope of claims that could be raised in an IRP. Thus, when the current IRP provisions were drafted and adopted in 2002, neither Article 4 nor the idea of applying international law in IRP proceedings was mentioned. Given ICANN’s silence on Article 4 when later enacting the IRP provisions, it

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<sup>234</sup> See ICANN Bylaws, Article III, § 4(b) (November 21, 1998), *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-23nov98.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit X.

After an initial provision merely permitting ICANN to establish an IRP, the Articles were amended directing the Board, “following solicitation of input from the Advisory Committee on Independent Review and other interested parties and consideration of all such suggestions, [to] adopt policies and procedures for independent third-party review of Board actions alleged by an affected party to have violated the Corporation’s articles of incorporation or bylaws.” *Id.*

would require a tortured reading of Article 4 to find an intent to adopt “principles of international law” retrospectively as governing a review process created four years later.<sup>235</sup>

159. Professor Caron makes the same observation about the different enactment dates of Article 4 and the IRP Bylaws. As he notes, “Article 4 was adopted at an earlier point in time [than the IRP provisions], yet it is not referenced in the Bylaws.”<sup>236</sup> He succinctly points out that the IRP provisions “could have made an explicit choice of the law for the IRP, but did not.”<sup>237</sup>

160. For all of these reasons, the general commercial principles of international law on which ICM relies – good faith, estoppel, legitimate expectations, and abuse of rights – do not fall within the scope of Article 4. Thus, in its review of ICANN’s consideration and rejection of ICM’s .XXX sTLD application, the Panel has no basis for considering whether, pursuant to Article 4, ICANN acted in conformity with those principles of international law. As a precaution, ICANN addresses these factual issues below, but if the Panel agrees with ICANN’s view of the applicable law, this portion of ICM’s “claims” should be disregarded.

161. ICM’s other arguments for importing any and all international law into this proceeding are equally without merit. The fact that the issuance of a particular TLD would have international effects does not make general commercial principles of international law “relevant” pursuant to Article 4.<sup>238</sup> As made clear by the context and language of Article 4, the principles that are relevant under Article 4 concern ICANN’s obligation to operate for the benefit of the Internet community as a whole, not ICANN’s commercial activities with respect to a particular TLD applicant. ICANN’s governing corporate law – California law – fills that latter role.

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<sup>235</sup> Also undercutting ICM’s reading of Article 4 is the later establishment of the procedures and criteria for the sTLD application process that ICM has put at issue here. ICANN did not post the criteria for the sTLD applications until December 2003; in those, ICANN never mentioned principles of international law governing ICANN’s (or any other party’s) negotiating conduct. In light of this omission, and especially given that international legal principles are general and evolving, it would be remarkable to interpret Article 4 as an “implicitly and retroactively incorporated” choice-of-law provision applying general principles of international law to the application process.

<sup>236</sup> Caron Opinion ¶ 22.

<sup>237</sup> *Id.*

<sup>238</sup> See ICM Memorial ¶ 339; see also Goldsmith Report ¶ 26.



162. Likewise, the Bylaws' direction that the IRP shall be conducted by an "international arbitration provider" does not provide support for ICM's position that any and all international law applies here.<sup>239</sup> Arbitration or other adjudication described as "international" recognizes that the parties likely come from different nation-states, and that principles of international law that are "relevant" in the sense contemplated by Article 4 (unlike those relied upon by ICM here) may be raised in the proceedings; the description does not import international law into the proceeding indiscriminately.

163. As a final matter, ICANN notes that, by their terms, the IRP provisions are limited to determining whether the Board acted in a manner that is *inconsistent* with the Bylaws or Articles. As the above discussion on deference noted, the IRP is not to be used to upset arguable or reasonable actions of the Board; this includes the Board's reasonable interpretations of what the Bylaws and Articles mean. Thus, to the extent there is any ambiguity (and there is none) about the scope and meaning of Article 4, the Panel should defer to ICANN's understanding – *i.e.*, that Article 4's reference to relevant principles of international law means well-established substantive principles tailored to ICANN's Internet-based purpose and mission – so that ICM's cited principles do not apply here.

**b. Even If Article 4 Were Read As Broadly As ICM Urges, ICM's Cited Principles Of International Law Still Would Not Apply To This Dispute Between Two Private Entities From The Same Nation.**

164. Even if Article 4 were interpreted as a choice-of-law provision requiring ICANN to comply with principles of international law even if unrelated to ICANN's Internet-based activities (and thus unmoored to the limiting first clause in Article 4), the particular principles that ICM cites, including the underlying authorities, still would not apply because they are not "relevant." If the term "relevant" in Article 4 means anything, it must mean principles of international law that apply to a private entity such as ICANN. As Professor Caron explains, in this sense of the word "relevant," "the 'principles of international law' to be considered [] are not those principles applicable to States, but rather those rare principles of international law intended

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<sup>239</sup> See ICM Memorial ¶¶ 7, 340 (quoting Goldsmith Report ¶ 26 that "ICANN itself chose an international arbitral institution for this Independent Review").

to be applicable to private entities such as ICANN.”<sup>240</sup> ICM’s principles and cited authorities are not of that rare sort, and, to the extent they are, they are merely duplicative of California law.<sup>241</sup>

165. In urging the application of its cited principles, ICM and its expert repeatedly cite international law governing sovereigns.<sup>242</sup> For instance, ICM relies on *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176 (August 27, 1952).<sup>243</sup> Yet, that case involved Morocco’s and the United States’ competing claims, as sovereigns, to establish the import value for the purpose of assessing customs to United States imports into Morocco.<sup>244</sup> By its terms, the decision has no application to a dispute between ICM and ICANN, two private entities.

166. In relying on these cases involving sovereigns, ICM and its expert claim that they can treat ICANN as if it were a sovereign for purposes of ICM’s international law claims because, they assert, ICANN agreed to be treated as such in Article 4.<sup>245</sup> But Article 4 says nothing of the kind, and neither ICM nor its expert offers any textual exegesis to support this bare assertion. Even if Article 4 incorporated international law as some sort of “choice-of-law” provision, at most it would incorporate “relevant” international law. Here, “relevant” law could only mean law governing private actors because ICANN is a private entity. ICM does not dispute ICANN’s private-party status,<sup>246</sup> and ICANN’s governing documents confirm that ICANN is not a sovereign – to the contrary, ICANN’s Articles of Incorporation note that ICANN is designed to “lessen[] the burdens of government.”<sup>247</sup>

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<sup>240</sup> Caron Opinion ¶ 58.

<sup>241</sup> See Section III.C.5, *infra* (addressing duplicative international law analysis).

<sup>242</sup> See ICM Memorial ¶¶ 418, 428-31, 434-38, 441-43; see also Goldsmith Report at 14-15, 17-18, 20-21.

<sup>243</sup> See ICM Memorial ¶ 428.

<sup>244</sup> See *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176 at 181, 212 (August 27, 1952).

<sup>245</sup> See ICM Memorial ¶ 351.

<sup>246</sup> See ICM Memorial ¶ 350; see also Goldsmith Report ¶ 26. Although ICM and its expert claim that ICANN “voluntarily subjected itself to” international law governing sovereigns (Goldsmith Report ¶ 26; accord ICM Memorial ¶ 350), that “is a very substantial assumption” (Caron Opinion ¶ 59), and, as addressed above, one for which ICM and its expert provide no support.

<sup>247</sup> Articles of Incorporation, Article 3, Cl. Ex. 4.

167. As a private party, ICANN is not subject to law governing sovereigns. International law governing sovereigns generally does not carry over automatically to private entities, and ICM provides no reason for proceeding otherwise here, other than its wholly baseless assertion that ICANN volunteered to be treated as such. ICM's expert has acknowledged (outside of the context of this proceeding) that "international law addresses itself to states"; "for the most part," it does not address itself "to individuals."<sup>248</sup> Accordingly, whether read as a "choice-of-law provision" or in any other broad manner, Article 4's reference to "relevant principles of international law" does not incorporate international law governing the conduct of nations. To put it another way, a private party's choice-of-law clause incorporating "French law" would not, of course, be interpreted as assuming the obligations of the French sovereign.<sup>249</sup> Similarly, any incorporation by Article 4 of "international law" cannot properly be interpreted as assuming the obligations governing nations, because ICM has chosen not to dispute (nor could it reasonably dispute) that ICANN is a wholly private actor. Accordingly, ICM cannot support its claims with inapposite international legal principles and authorities directed to states instead of private entities. At most, ICANN would be governed by "those admittedly rare principles of international law intended to be applicable to private entities such as ICANN."<sup>250</sup>

168. Nor is ICANN an international organization<sup>251</sup>; indeed, ICM ignores this intermediate category between sovereigns and private entities.<sup>252</sup> But even assuming *arguendo* that ICANN were an international organization, it would not be bound by the same law applicable to states. International organizations that govern themselves according to international law are subject to different rules and principles than states. The distinction between

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<sup>248</sup> Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 5 (2005).

<sup>249</sup> See Caron Opinion ¶ 59.

<sup>250</sup> Caron Opinion ¶¶ 56, 66 (stating that "relevant" means at least "applicable to the actions of a private non-profit corporation").

<sup>251</sup> See Caron Opinion ¶ 61 n.44 (noting that "it is clear" that ICANN "is not an international organization, such as the World Bank or the United Nations" because, among other things, ICANN was not established pursuant to a treaty or other instrument of international law and its membership is not primarily or exclusively states).

<sup>252</sup> See ICM Memorial ¶ 350 (distinguishing between state actors and private corporations, and failing to mention international organizations).

states and international organizations – of which ICANN is neither – reinforces the meaningfully different status that ICANN has as a private entity, the least among the three to be subject to international law.<sup>253</sup>

169. Moreover, status as an “international” organization does not automatically make any and all international law “relevant” to that organization. An international organization may choose to be governed by the national law of one or more nation-states, and to the extent international law does apply, it is limited to certain categories of law, such as “international administrative law” and law governing “the interpretation” and “responsibility” of the organization.<sup>254</sup>

170. Again assuming, *arguendo*, that ICANN were treated as an international organization, the law that would be “of particular relevance” would be the principle “that international tribunals in reviewing discretionary acts of international organizations (or national agencies) do not substitute their own judgment for that of the agency under review but rather look for ‘an egregious error that calls into question the good faith’ of the body reviewed.”<sup>255</sup> As Professor Caron explains, this principle is “an analog to the business judgment rule” in California law that ICM seeks to avoid.<sup>256</sup> Under this principle, tribunals “afford[] a degree of deference when reviewing a decision made under the discretionary authority of an international organization.”<sup>257</sup> Thus, if ICM’s cited principles were “relevant,” this deferential-review principle would be “relevant” as well, and “the demands” of ICM’s cited principles would “require accommodation with” this principle.<sup>258</sup> ICM overlooks that its cited principles would

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<sup>253</sup> See Caron Opinion ¶¶ 62-65. As Professor Caron observes, “it must be emphasized it is difficult to transform the law of international organizations and distill principles applicable to a private non-profit corporation.” *Id.* ¶ 62.

<sup>254</sup> See Caron Opinion ¶ 65.

<sup>255</sup> *Id.* ¶ 99; see also *id.* ¶¶ 99-104.

<sup>256</sup> *Id.* ¶¶ 99-100.

<sup>257</sup> *Id.* ¶ 104.

<sup>258</sup> *Id.*

“not exist in a vacuum”<sup>259</sup> in which ICM could pick and choose only those principles that allegedly favor it.

171. Because ICANN is not a state nor an international organization, ICM errs in invoking the doctrine of non-abuse of rights. Because that doctrine applies to states, it does not apply in this proceeding.<sup>260</sup>

172. ICM similarly errs in relying on state-investor cases and government-procurement treaties.<sup>261</sup> For instance, ICM relies heavily on *Lauder v. The Czech Republic*, Final Award dated September 3, 2001 (UNCITRAL).<sup>262</sup> Yet, the dispute in that case was governed by the terms of a bilateral investment treaty; the tribunal expressly rejected the claimant’s attempt to rely on “general principles of international law” exclusive of express obligations under the treaty.<sup>263</sup> By its terms, therefore, *Lauder* has no application to a dispute between ICM and ICANN, two private entities.

173. Moreover, these cases depend upon the existence of a relevant treaty conferring the rights in question. They do not provide international legal principles relevant in the absence of such treaties. Of course, neither ICANN nor ICM is a party to any treaty conferring rights on the other, and ICM does not make any contrary contention.<sup>264</sup>

174. To the extent any of ICM’s cited principles have some application to private parties beyond treaties, the principles still are not relevant here because of the domestic nature of the dispute.<sup>265</sup> International legal principles of the sort cited by ICM do not govern commercial

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<sup>259</sup> *Id.* ¶ 99.

<sup>260</sup> See Caron Opinion ¶ 81 (stating, with respect to non-abuse of rights, that he “fail[s] to readily see the application in these proceedings of a doctrine applied to States”).

<sup>261</sup> See ICM Memorial ¶¶ 359-67, 384-85, 397, 446-53; see also Goldsmith Report ¶ 30.

<sup>262</sup> See ICM Memorial ¶¶ 384-85.

<sup>263</sup> *Lauder* at ¶ 209.

<sup>264</sup> See also Caron Opinion ¶¶ 78, 90-92 (explaining that ICM “inappropriately relies” on cases in which obligations of good faith, legitimate expectations, and transparency arise from treaties).

<sup>265</sup> See Caron Opinion ¶ 57 (stating that “relevant” “bear[s] on the particular subject matter addressed or implicated in the action of the Board”).

disputes between two private U.S. corporations regarding a contract to be performed by one of those U.S. parties within the United States.<sup>266</sup>

175. Indeed, ICM recognizes that only one country is involved by conceding<sup>267</sup> that California law is the only applicable local law; ICM nowhere identifies the law of any other country that could conceivably be relevant. With only one country involved, international legal principles are not needed to avoid favoritism, to provide an “even playing field,” or to protect another sovereign – the typical purposes of applying international legal principles to a dispute that contains an international element.<sup>268</sup> Accordingly, the cases that ICM (although not its expert) cites, in which the conduct of certain private parties (international sports federations) were subject to principles of international law, are irrelevant; in each of those cases, the disputing parties were from different countries.<sup>269</sup> Moreover, the principles applied in those international sports cases had “developed and consolidated along the years” to address the specific conduct of international sports leagues.<sup>270</sup> ICM does not contend that any such body of law has developed and consolidated with respect to the consideration of TLD name applications.

176. ICM suggests that, even for this transaction involving two U.S. corporations, international law is “relevant” because awarding a TLD can have global effects.<sup>271</sup> But international legal principles do not apply to a dispute between private entities located in the

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<sup>266</sup> See, e.g., *de Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985) (“With a few exceptions [not applicable here], international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens.”); *id.* at 1396 (recognizing that “an injury by a state to its own nationals might implicate international law if the injury occurred within another state’s territory” but the injury must be “of such a nature as to” have a transnational element).

<sup>267</sup> See ICM Memorial ¶¶ 246-65; see also Goldsmith Report ¶ 22.

<sup>268</sup> See *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) (explaining that international law is not concerned with domestic rights and duties); CHESHIRE & NORTH’S PRIVATE INTERNATIONAL LAW 3 (11th ed. 1987) (noting that international law “functions only when” a “foreign element” is present in the dispute).

<sup>269</sup> See ICM Memorial ¶¶ 381-84 (citing cases involving disputes between parties from: the United Kingdom on the one side and Switzerland on the other; the United States on the one side and Monaco on the other; Greece and the Czech Republic on the one side and Switzerland on the other; and Switzerland on the one side and Spain on the other).

<sup>270</sup> *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)*, Arbitration CAS 98/200, award of 20 August 1999, at ¶ 156.

<sup>271</sup> See ICM Memorial ¶ 349.

same nation simply because the dispute may have global effects. Such a rule, apart from being unprecedented, would have the absurd effect of transforming all large disputes (*e.g.*, disputes between two U.S. companies that both operate in more than a single country) into cases governed by international law. A stronger international connection, such as “affront[ing] the territorial sovereignty” of a nation<sup>272</sup> or involving an international transaction, must exist for principles of international law to apply to private parties. ICM itself appears to recognize that U.S., not international, law would govern any contract ultimately formed between ICM and ICANN for the .XXX name.<sup>273</sup> Under those circumstances, any international effects of a TLD are simply beside the point.

177. Finally, two of ICM’s cited principles (so-called “principles” of estoppel and legitimate expectations), and its reliance on a good-faith application of transparency, are not even well established, and thus would not apply in any event.<sup>274</sup> Therefore, ICM’s invocation of them in this proceeding is especially off point.

**c. ICM’s Cited Principles Are Ineffective Because California Law More Specifically Governs The Dispute.**

178. Even if ICM’s cited principles were “relevant,” they nonetheless would not govern the Panel’s review because other law (namely, the ICANN Bylaws and Articles, as well as California law) deals specifically with the circumstances of this dispute. This more specific law renders unnecessary any resort to ICM’s general principles of international law.

179. By its terms, Article 4 acknowledges that types of law other than “relevant principles of international law” may be at issue. Specifically, in addition to referring to such principles, Article 4 refers to “applicable international conventions and local law.”<sup>275</sup> Those types of law are more specific than “principles of international law” and, as a general matter, will provide sufficient guidance without resort to principles. As Professor Caron puts it, while “[i]t is theoretically possible that satisfaction of all of the rules of applicable ‘international conventions’

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<sup>272</sup> *de Sanchez*, 770 F.2d at 1396

<sup>273</sup> See ICM Memorial ¶ 254 (referring to U.S. law as governing a contract for the .XXX sTLD).

<sup>274</sup> See Caron Opinion ¶¶ 84, 86-98.

<sup>275</sup> Articles of Incorporation, Article 4, Cl. Ex. 4.

and ‘local law’ might not also satisfy all ‘relevant principles of international law,’” that “would be a rare case.”<sup>276</sup>

180. To elaborate, treaties and local law are generally rule-based, making them “inherently more specific than principles.”<sup>277</sup> By contrast, principles are, as their name suggests, more general; they are “abstract statements of legal truth” that are used “to fill in the interstices between rules.”<sup>278</sup> Where gaps do not exist, principles are not needed. Professor Caron emphasizes that “the distinction between principles and rules is of critical and fundamental importance to the interpretation and application of Article 4.”<sup>279</sup>

181. In light of the distinction between rules and principles, the phrase “principles of international law” in Article 4 has “a limited general effect compared to ‘applicable international conventions’ or ‘local law.’”<sup>280</sup> This effect of Article 4 – “that the more exacting requirements of Article 4 are provided by the specific rules present in applicable international conventions and local law rather than by principles of international law” – is “not at all surprising” to Professor Caron.<sup>281</sup>

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<sup>276</sup> Caron Opinion ¶ 74. ICM’s expert himself recognizes that there is only a limited exception to the sufficiency of local law when that law covers the dispute. *See* Goldsmith Report ¶ 27 (noting that “arbitrators sometimes conclude that international law, including general principles, should trump *when in conflict* with national law” (emphasis added)). ICM never alleges such a conflict here. Indeed, ICM urges that the result would be the same under California law and ICM’s cited principles of international law. *See* ICM Memorial ¶¶ 336, 341; *see also* Goldsmith Report ¶ 22, 27.

<sup>277</sup> Caron Opinion ¶ 74.

<sup>278</sup> Caron Opinion ¶¶ 12, 85; *see also id.* ¶¶ 39-40; Riccardo Monaco, *Sources of International Law*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 429 (1984) (“Max Planck”) (“[R]ecourse may be had to [general principles of international law] in order to fill certain gaps in general international law.”); *id.* at 429 (even stating that general principles of international law are “not part of the formal category of sources” of international law). ICM’s expert acknowledges the vagueness of principles of international law, admitting that they are “primarily abstractions from a mass of rules.” Goldsmith Report ¶ 29 (citation omitted).

<sup>279</sup> Caron Opinion ¶ 105.

<sup>280</sup> *Id.* ¶ 74. Even without Article 4, principles of international law would likely have a limited effect because, as explained in the text above, principles of international law are generally secondary to other law.

<sup>281</sup> *Id.* ¶ 105.



182. The relatively diminished efficacy of principles is reinforced by the place of principles of international law among other sources of international law.<sup>282</sup> A “hierarchy” of laws “establish[es] which source [of international law] should prevail over the others” when more than one source of international law is potentially applicable.<sup>283</sup> There are three major categories of sources of international law: (1) treaties, (2) custom, and (3) “general principles” (which include “the general principles of civilized nations,” the sort of principles on which ICM and its expert rely).<sup>284</sup> Under the hierarchy, the more specific sources (treaties and custom) have priority because they are generally rule-based and addressed to particular circumstances; they can confidently be applied to those circumstances (and not to others). Giving precedence to this more specific law promotes certainty and predictability. Principles, as noted, are general and thus have a “subsidiary status.”<sup>285</sup> Generally speaking, then, general principles of international law take second place to other types of international law where the latter govern the conduct in question.<sup>286</sup> For instance, “if there is a custom, then one looks to it and not to general principles generally held by civilized nations.”<sup>287</sup>

183. ICM acknowledges<sup>288</sup> that its cited principles are of the least forceful type of international law – general principles.<sup>289</sup> Yet ICM treats its cited principles “with the

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<sup>282</sup> As noted, the parties agree that “international law” in Article 4 means public international law. See Caron Opinion ¶ 47; ICM Memorial ¶ 345.

<sup>283</sup> MAX PLANCK, *supra*, at 432-33; see also Caron Opinion ¶¶ 40, 55-56 (discussing the hierarchy of law).

<sup>284</sup> See Caron Opinion ¶ 47; accord Goldsmith Report ¶ 23.

<sup>285</sup> Caron Opinion ¶¶ 12, 38-40, 50, 68-71; *id.* at ¶ 68 (describing principles as “abstract considerations that might be applied in the way that the common law would term equity, and that can serve as the abstract limits within which more specific rules are articulated”); see also MAX PLANCK, *supra*, at 429-30.

<sup>286</sup> See MAX PLANCK, *supra*, at 429, 432 (noting that general principles of international law follow “constitutional principles, custom and agreement” in terms of priority); *id.* at 433 (“[B]elow customary rules, come the general principles of international law.”); *id.* (stating that “rules laid down by agreement” prevail over customary rules, which prevail over general principles of international law); *id.* at 427 (custom “is a primary source of law since it is itself capable of giving force to the rules which result from it”); see also Caron Opinion ¶ 40.

<sup>287</sup> Caron Opinion ¶ 49.

<sup>288</sup> See, e.g., ICM Memorial ¶¶ 346-47.

<sup>289</sup> Caron Opinion ¶ 12.

definiteness of rules rather than the generality of principles.”<sup>290</sup> In this way, ICM “inappropriately characterize[s]” its principles as more specific and exacting than they are.<sup>291</sup> As a result, as Professor Caron observes, ICM renders its analysis “unnecessarily confusing.”<sup>292</sup>

184. The opinion of ICM’s expert similarly confuses the analysis by discussing principles of international law as “amplify[ing]” and “giv[ing] detail” to more specific rules.<sup>293</sup> That is exactly the opposite of the way the different laws interact. As Professor Caron explains, “‘principles by their nature do not ‘amplify and give detail’ to requirements.”<sup>294</sup> Instead, principles “provide the outer boundaries of a norm.”<sup>295</sup> Thus, ICM’s expert misses the point in opining that ICM’s cited principles of international law “complement, amplify, and give detail to the requirements of independence, transparency, and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law.”<sup>296</sup> There is no “supplementary role”<sup>297</sup> for international law to play when more specific local law already addresses the matter.

185. The proper analysis, then, is to consider whether ICM’s cited principles would perform any clarifying role in this proceeding. They do not. In the circumstances at issue in this proceeding, the generally limited effect of Article 4’s “principles of international law” and the applicable rules set forth in the ICANN Bylaws and Articles as well as California law render resort to ICM’s cited principles unnecessary. As noted, local law is a specific type of law, almost always composed of rules rather than principles. That is the case here, where the Bylaws

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<sup>290</sup> *Id.* ¶ 48.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* As Professor Caron explains, ICM’s expert appears to have misinterpreted a list carefully distinguishing among different meanings ascribed to “general principles of international law” as a list showing “that all of these various meanings have come together.” *Id.* ¶ 51. As a result, “ICM and its expert move too easily among possible sources of general principles and in seeking to articulate the contours of a particular principle of international law on occasion refer to sources that are not necessarily on point and thus must be approached with care.” *Id.*

<sup>293</sup> Goldsmith Report ¶ 27.

<sup>294</sup> Caron Opinion ¶¶ 72, 76.

<sup>295</sup> *Id.*

<sup>296</sup> Goldsmith Report ¶ 27.

<sup>297</sup> *Id.*

and Articles provide clear rules of decision, and where California law, in its many particulars, extensively addresses a non-profit corporation's conduct of its general business activities such as deciding whether to enter into contracts with other U.S. corporations and how contracts are formed and interpreted. For instance, with respect to the principle of good faith (the primary principle on which ICM relies), Professor Caron explains that, to the extent that the principle is found to apply in this proceeding, "its place as a practical matter comes *after* more specific rules and laws" addressing the same concerns motivating the good-faith principle.<sup>298</sup> He elaborates: "[T]he principle of good faith, perhaps the most broad and general of general principles of law, must indeed play second fiddle to those rules and obligations that specifically apply in this review."<sup>299</sup> And while status as "second fiddle" does not itself render the principle wholly ineffective, the principle's role in "the background" is relevant only "to the extent that the rules and laws applicable in this review do not completely provide the basis for this Panel's consideration."<sup>300</sup> ICM agrees that the "applicable local law" under Article 4 is California law and that California law reaches the same result as its cited principles.<sup>301</sup> Moreover, as explained in Parts III.B and III.C below, ICANN's conduct was consistent with ICANN's Bylaws and Articles in every respect, under any exacting requirements of ICANN's Articles and Bylaws interpreted under the particulars of California law. Thus, even if ICM's cited principles were "relevant principles of international law" within the meaning of Article 4, they still would not play a role in this proceeding because local law and the Bylaws and Articles themselves provide sufficient guidance for the Panel's analysis. With ICM's principles providing no clarifying role, they are essentially irrelevant.

186. ICM also confuses the analysis by interpreting "principles of international law" to mean only "general principles of law recognized by civilized nations" and omitting any attention

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<sup>298</sup> Caron Opinion ¶ 85 (emphasis added).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*; see also *id.* ¶ 77 ("Indeed, many of the cases in which the term 'good faith' appears do not involve a finding that a party did not act in good faith but rather is a term added seemingly as a reminder to the parties of the conduct required by the principle.").

<sup>301</sup> See ICM Memorial ¶¶ 336, 341; see also Goldsmith Report ¶¶ 22, 27 (stating that California law is the applicable local law and that here "there are no conflicts between the various forms of law in Article 4").

to principles found elsewhere in international law, particularly in customary international law.<sup>302</sup> At ICM's request, ICM's expert does likewise, expressly refusing to discuss customary international law because he had been instructed not to do so.<sup>303</sup> But principles of international law are "found in customary international law" and "on occasion in universal multilateral treaties as well as general principles of law recognized by civilized nations."<sup>304</sup> Both ICM and its expert focus on only one source of principles – and indeed, the least forceful source of international law: "general principles of law recognized by civil nations".<sup>305</sup> As Professor Caron observes, "it is astounding" and "incomprehensible" that, in asking for an opinion on the meaning of Article 4, ICM directed its expert to not address issues of customary international law.<sup>306</sup> That omission is "disabling of any opinion" on Article 4's meaning.<sup>307</sup>

187. None of ICM's other arguments salvage its approach to Article 4. ICM claims that the order in which ICANN listed the types of law in Article 4 should establish that principles of international law are primary.<sup>308</sup> But ICM provides no support for this interpretation of Article 4, which is contrary to the well-established distinction between specific and general law. The less persuasive force of principles is inherent in their nature; they are characteristically stated broadly and govern only when no local law applies. Thus, regardless of the order in which sources of law happen to be listed in Article 4, principles (such as principles of international law)

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<sup>302</sup> See ICM Memorial ¶ 347.

<sup>303</sup> See Goldsmith Report ¶ 22 n.28.

<sup>304</sup> Caron Opinion ¶ 52. ICM's expert similarly observes that it would be unlikely that "principles of international law" would "pick out 'general principles' but exclude customary international law." Goldsmith Report ¶ 23 n.30.

<sup>305</sup> *Id.* ¶ 49 (identifying the "limited role given to 'general principles of law recognized by civilized nations'").

<sup>306</sup> *Id.* ¶ 48.

<sup>307</sup> *Id.* Indeed, as Professor Caron observes, if, as ICM contends, ICANN had intended to adopt international law governing sovereigns, such intent must also encompass custom, yet ICM and its expert remarkably and curiously elide any discussion of custom. See *id.* at ¶ 59; see also *id.* ¶ 47 n.26 (addressing the "clear interstate character" of customary international law).

<sup>308</sup> ICM Memorial ¶ 339 (contending that Article 4's placement of "relevant principles of international law before international conventions or local law" prioritizes the law with which ICANN agreed to act in conformity).

are less forceful than more specific law in treaties (which are listed second) and applicable local law (which is listed third).

188. ICM further suggests that, at least in this instance, local law is not more specific than ICM's cited principles, and therefore the cited principles provide an independent source of law to apply.<sup>309</sup> To urge this point, ICM falls back on its misplaced reliance on ICANN's oversight of the Internet as "a global resource."<sup>310</sup> As noted above, the international applicability of a TLD does not render this dispute – between two U.S. corporations concerning an application process governed by U.S. law – international in character for purposes of Article 4.

189. ICM also relies on its muddled application of the hierarchy of law to contend that international law has an independent role here. Quoting, once again, individual phrases out of context, ICM attempts to rely on the "general duty to bring internal [*i.e.*, local] law into conformity with obligations under international law."<sup>311</sup> As an initial matter, that duty applies only where international legal obligations already exist; here, no international legal obligations exist as relevant to these proceedings. Moreover, as the fuller context surrounding ICM's quotation confirms, this duty to conform local law to international law "aris[es] from the nature of treaty obligations and from customary law"<sup>312</sup> – two sources of international law that ICM does not rely on here. Nothing in the quoted excerpt suggests that specific local law must incorporate general principles of international law, which play only a gap-filling, not a primary, role.

190. In sum, even if Article 4 operates as a choice-of-law clause bringing general commercial principles of international law into an IRP proceeding, those principles nonetheless

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<sup>309</sup> See ICM Memorial ¶ 461 (contending that California law is "less analogous" to this dispute than ICM's cited principles of international law).

<sup>310</sup> ICM Memorial ¶ 461; *see also* Goldsmith Report ¶ 26.

<sup>311</sup> ICM Memorial ¶ 339 (quoting IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 35 (7th ed. 2008)).

<sup>312</sup> BROWNLIE, *supra*, at 35.

do not provide guidance in this particular proceeding because rules under local law provide more specific guidance for the circumstances at issue here.<sup>313</sup>

**B. EACH OF ICM’S KEY FACTUAL ASSERTIONS IS WRONG.**

191. ICANN now turns to the factual issues on which ICM focuses. Because of the limited nature of these proceedings and the fundamental infirmities of ICM’s claims, ICANN focuses its response on the four central factual issues that ICM has identified; each of ICM’s claims rests upon one of more of these four central issues.

192. With respect to each of these four issues, ICANN is absolutely confident that, even if (as ICM contends) these proceedings involved *de novo* review and the evaluation by this Panel sitting as a “Supreme Court of ICANN,” the Panel still would determine that ICANN’s conduct was not inconsistent with ICANN’s Bylaws and Articles in any respect. For this reason, ICANN addresses each of these four issues in some detail in order to demonstrate that ICM’s characterizations of the facts are wrong.

193. In so doing, however, ICANN does not wish to leave the impression that the Panel should (or somehow needs to) address these matters at this level of detail. To the contrary, in light of the deference that should be accorded to the Board’s decisions in this matter, the Panel should declare that ICANN’s conduct was not inconsistent with its Bylaws and Articles even if ICM’s version of the facts is largely correct (which it is not). The issues presented to the ICANN Board by the ICM .XXX sTLD application were difficult, and the Panel can determine that ICANN’s Board addressed ICM’s application with great care, devoted an enormous amount of time trying to determine the right course of action, allowed ICM to be heard frequently, and

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<sup>313</sup> Even setting aside that ICM’s cited principles of international law do not apply here because they are not relevant, those cited principles do not permit any relief to ICM. As demonstrated in Parts III.B and III.C below, ICANN’s conduct was appropriate and consistent with the international legal principles that ICM invokes. In asserting otherwise, ICM’s expert inappropriately exceeds his role as an expert by applying the law to the facts of this case. *See, e.g.*, Goldsmith Report ¶¶ 34, 37-40, 42. By doing so, ICM’s expert usurps not only the role of counsel in this proceeding but the role of the Panel as well, which has the sole province in this proceeding to declare whether, under the law as applied to the facts of this case, the ICANN Board has acted inconsistently with ICANN’s Articles and Bylaws. Moreover, ICM’s expert applies the law to *assumed* facts, which inappropriately overlooks the adversarial process because the facts here are disputed. *Id.* Thus, those portions of his report that apply the law to ICM’s facts should have no substantive bearing whatsoever on this proceeding.

deliberated openly and transparently. Indeed, ICANN is unaware of a corporate deliberative process that is *more* open and transparent than ICANN’s process, and that openness and transparency was fully apparent with respect to ICM’s application for .XXX. After this intensive process, the majority of the ICANN Board twice concluded that ICM’s proposal should be rejected, with no hint whatsoever of the “bad faith” ICM alleges.

194. In short, there is no basis to find that ICANN’s conduct was inconsistent with its Bylaws or Articles – to the contrary, ICANN tackled extremely difficult and controversial issues with great care, and each of the members of ICANN’s Board worked hard to try to identify the best answers. By the time of the last vote, five of the members of the Board supported the .XXX sTLD application, while nine of the members did not. ICM disagrees with the majority, but there is no basis to find that the Board – with each of the nine Board members in the majority expressing (often at some length) his or her own reasons for his/her vote – actually violated ICANN’s Bylaws or Articles in the course of this process.<sup>314</sup> The evidence before the Panel is in black and white, and no amount of “spin” can alter the foundational facts and reasons for the Board’s decisions.

195. *First*, ICM claims that ICANN adopted a rigidly non-overlapping two-step procedure for approving new sTLDs, under which applications would first be tested for baseline selection criteria, and only after the applications were finally and irrevocably approved by the ICANN Board could the applications proceed to technical and commercial contract negotiations with ICANN staff.

196. *Second*, ICM alleges that despite the Evaluation Panel’s conclusion that ICM did not satisfy the sponsorship criteria, ICANN’s Board “unconditionally approved” the .XXX TLD on June 1, 2005, when the Board allowed ICANN staff to begin registry agreement negotiations with ICM.

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<sup>314</sup> According to the Bylaws, the limited purpose of independent review is to provide a forum to address whether the ICANN Board as a whole, and not individual members, acted consistently with ICANN’s Bylaws and Articles of Incorporation. ICANN Bylaws, *supra* note 2, Article IV, § 3.1 (“ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”). Thus, while nothing suggests that any individual Board member violated the Bylaws or Articles, the relevant inquiry is the Board’s actions as a whole.

197. *Third*, ICM asserts that, during technical and commercial negotiations with ICANN staff, ICM satisfied all relevant concerns about the .XXX sTLD and presented a registry contract that the ICANN Board should have approved.

198. *And fourth*, ICM claims that, in a March 30, 2007 vote, the ICANN Board reversed its “unconditional approval” of the .XXX sTLD based on “vague and unannounced” notions of public policy, which were outside of the stated evaluation criteria for sTLDs.

199. In the sections below, ICANN demonstrates that ICM’s version of the facts is wrong in each respect. Much more importantly, none of these events supports a finding that the Board violated its Bylaws or Articles.

**1. ICANN Was Not Bound By A Non-Overlapping, “Two-Step” Procedure For Evaluating sTLD Applications.**

200. ICM’s claims begin with the notion that ICANN adopted, and was bound by, an inflexible, two-step procedure for evaluating sTLD applications. First, according to ICM, applications would be reviewed by the Evaluation Panel for the baseline selection criteria. Second, only after applications were finally and irrevocably approved by the ICANN Board would the applications proceed to contract negotiations with ICANN staff with no ability by the Board to address any of the issues that the Board previously had raised in conjunction with the sTLD application.

201. The RFP, however, decisively refutes this contention. Neither the RFP nor any other official statement regarding the RFP process suggests that ICANN had implemented a consecutive two-step process for evaluating sTLD applications in a manner that never permitted the evaluation process and contractual negotiations to overlap in time. The evaluation process in the RFP was described as follows:

- (a) The selection procedure is based on principles of objectivity, non-discrimination and transparency.
  
- (b) An independent team of evaluators will perform the evaluation process. The evaluation team will make recommendations about the preferred applications, if any applications are successful in meeting the selection criteria.



(c) Based on the evaluator’s recommendations, ICANN staff will proceed with contract negotiations and develop an agreement reflecting the commercial and technical terms to be agreed, although such terms may be subject to further amendment, as appropriate. ICANN will negotiate specific terms and conditions with each Registry Operator.<sup>315</sup>

202. The RFP makes clear that an sTLD registry agreement could not be presented to the Board for final approval without having proceeded through the evaluation process and contract negotiations. The RFP does not, however, suggest the Board’s allowance for an application to proceed to contract negotiation confirms the close of the evaluation process.

203. Consistent with the language of the RFP, ICANN announced nearly a year before authorizing any contract negotiations with ICM that contract negotiations *precede* any approval or disapproval of the underlying application: “Upon completion of the technical and commercial negotiations, successful applicants will be presented to the ICANN Board with *all* the associated information, so the Board can independently review the findings along with the information and make their own adjustments. *And then* final decisions will be made by the Board, and they’ll authorize staff to complete or execute the agreements with the sponsoring organizations, thereby designated in the registries.”<sup>316</sup>

204. This approach to contract negotiations was the only logical approach. The Board could not always know whether applications are able to satisfy the sponsorship (or other evaluation) criteria until it was shown how the criteria would be implemented in the contract. As former Chairman of the Board Vinton Cerf notes, in keeping with the plain language of the RFP, “ICANN never intended that this would be a formal ‘two-step’ process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship.”<sup>317</sup>

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<sup>315</sup> See New sTLD application, December 15, 2003, Part A. Explanatory Notes – Selection Criteria, Cl. Ex. 45.

<sup>316</sup> ICANN Meetings in Kuala Lumpur ICANN Public Forum, Thursday, July 22, 2004, Real-Time Captioning, Cl. Ex. 111 (comments of Kurt Pritz, ICANN) (emphasis added).

<sup>317</sup> V. Cerf Witness Statement, ¶ 15.

205. Instead, before the ICANN Board could approve an sTLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including the technical, business/financial, and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff.<sup>318</sup> These were two overlapping phases in the evaluation of the sTLDs. And the established process for evaluating the sTLD applications always gave the ICANN Board the right to vote against a proposed sTLD should the Board find deficiencies in the proposed registry agreement or in the sTLD proposal as a whole.

206. ICANN did employ a two-stage process – insofar as the evaluation of the RFP criteria and technical negotiations involved different functions – but a review of the relevant documents and contemporaneous statements by the Board makes clear that the two phases could (and often did) overlap in time.

207. Dr. Twomey (ICANN’s then and current-President), Alejandro Pisanty (then-Vice Chairman of the Board), and Dr. Cerf (then-Chairman of the Board) unanimously confirm this understanding. Each explains that the ICANN Board retained the authority to review and assess the baseline RFP selection criteria even after some of the applicants were allowed to proceed to contract negotiations.<sup>319</sup> ICM and other applicants were thus permitted to begin contract negotiations despite unresolved RFP issues, in the hope that those concerns might be addressed to the Board’s satisfaction via the contract negotiations.

208. These views are also confirmed by the conduct of the ICANN Board members who were *in favor of* ICM’s .XXX sTLD application in June 2005. During the many discussions of ICM’s sponsorship shortcomings after ICM was allowed to proceed to contract negotiations

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<sup>318</sup> *Id*; see also P. Twomey Witness Statement, ¶ 18.

<sup>319</sup> P. Twomey Witness Statement, ¶¶ 18-22 ; V. Cerf Witness Statement, ¶¶ 15-20; see also Cerf Comments on March 30, 2007 vote, ICANN Meetings in Lisbon, Portugal, Transcript, March 30, 2007, Cl. Ex. 201 (“The record will show that at one point I voted in favor of proceeding to negotiate a contract. Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms, it seemed to me, would put much more meat on the bones of the *initial proposal*.”) (emphasis added); A. Pisanty Witness Statement, ¶ 16 (“As the adopted resolutions made clear, the Board’s vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by this vote to award the .XXX sTLD to ICM because the resolution that the Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal.”).

on June 1, 2005, none of these Board members ever objected that the Board had already approved the .XXX sTLD. Plainly, if the June 1, 2005 resolutions had constituted a final approval of ICM's application, the Board members supporting that application could have argued as much. Notably, two Board members who had originally voted to allow ICM to proceed to contract negotiations ultimately voted against the proposed registry contract.<sup>320</sup>

209. ICM's "evidence" is not to the contrary. Despite the fact that ICM makes this issue the lynchpin of its arguments, ICM cites nothing more than a few comments by ICANN staff and Board Members stating that there were "two major steps" in the evaluation process.<sup>321</sup> These statements were accurate because there *were* two major steps in the evaluation process. The relevant question, however, is whether ICANN's Bylaws required these two steps to be non-overlapping in time, such that contract negotiations could not commence until the satisfaction of the RFP criteria was finally and irrevocably determined, and that consequently any resolution permitting contract negotiations with an applicant would constitute an implicit determination that all of the RFP criteria were, *sub silentio*, deemed satisfied. Nothing in ICM's citations even hints at such an atextual view of the RFP process, and ICM offers no response at all to the foregoing evidence proving that the fundamental underlying premise of its entire claim is wrong.<sup>322</sup>

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<sup>320</sup> The two Board members were Dr. Cerf and Vanda Scartezini.

<sup>321</sup> See, e.g., ICANN Meetings in Rome, ICANN Public Forum, Part 1, Thursday, March 4, 2004, Real-Time Captioning, available at <http://www.icann.org/en/meetings/rome/captioning-forum1-04mar04.htm> (last visited May 5, 2009) (Kurt Pritz provided a summary of the anticipated sTLD evaluation process: "There's two major steps to the process. The first is the application process as you see it now ... the process is to demonstrate involvement in the community, technical competence, financial viability, and a robust business model. After that, as I stated before, we'll enter into this commercial and technical negotiation phase."), attached hereto as ICANN Exhibit AI.

<sup>322</sup> Throughout the evaluation process, ICANN altered the evaluation schedule in order to provide applicants, especially ICM, an opportunity to address problems that had been identified in their applications. For instance, after the Evaluation Panel's initial findings, the ICANN Board instructed the Panel to reconsider their findings as to all applicants. After the Evaluation Panel confirmed its initial findings, the ICANN Board gave each of the applicants an opportunity to respond to the findings in writing to the Board. After ICM responded to the findings of the Evaluation Panel, the ICANN Board offered ICM an opportunity to make an in-person presentation to the Board.

## 2. ICANN's Board Did Not Approve The .XXX sTLD On June 1, 2005.

210. ICM's claims are also premised on the argument that, on June 1, 2005, the ICANN Board voted to give ICM an "unconditional" approval of the .XXX sTLD application.

211. As discussed above, on June 1, 2005, the ICANN Board held a special meeting in which it passed two resolutions authorizing ICANN staff to negotiate contract terms with ICM:

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>323</sup>

212. ICM's claims are predicated on the assumption that these resolutions "by [their] terms" reflect the Board's "unconditional decision that ICM's application satisfied the RFP selection criteria, including the sponsorship criteria," and thus constituted approval of ICM's .XXX sTLD application.<sup>324</sup> But because nothing in the resolutions actually says that, ICM's argument rests on ICM's assumption that the two steps of ICANN's evaluation process were rigidly non-overlapping, so that any authorization to negotiate (irrespective of the language of the agreement that was negotiated) must always be an unconditional approval. Because, as shown above, this premise is demonstrably incorrect, ICM's characterization of the resolutions also fails.

213. In fact, nothing in the resolutions expresses any approval at all, let alone an unconditional approval, of the .XXX sTLD application. To the contrary, the text of the resolutions makes clear that they did *not* constitute "approval and authorization," which could occur only in the future. The resolutions provided that "*if* after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of

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<sup>323</sup> See ICANN Minutes, Special Meeting of the Board, June 1, 2005, Cl. Ex. 120.

<sup>324</sup> ICM Memorial ¶ 186.

proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this Board, *for approval* and authorization to enter into an agreement relating to the delegation of the sTLD.”<sup>325</sup> The plain language of the resolutions makes clear that they did not themselves constitute approval of the .XXX sTLD application.<sup>326</sup> The resolutions thus track the RFP, which makes clear that a “final decision will be made by the Board” only *after* “completion of the technical and commercial negotiations.”<sup>327</sup>

214. As of June 2005, there remained numerous unanswered questions and concerns regarding ICM’s ability to satisfy the *baseline* sponsorship criteria set forth in the RFP.<sup>328</sup> Despite these open questions, some Board members believed that the best way to test whether ICM could satisfy the sponsorship criteria was to determine whether the deficiencies could be addressed in a registry agreement with ICM.<sup>329</sup> Thus, contrary to the views of ICM’s witness Ms. Burr, the Board had good reason “to authorize ICM to proceed to negotiations for the registry agreement [even though] it did not feel that the application met the criteria.”<sup>330</sup> Had the Board not taken this action in order to further test ICM’s proposal, some Board members likely would have voted “no” and ICM’s proposal would have been rejected at that time.<sup>331</sup> One important purpose of the resolutions was to permit ICM to proceed to contract negotiations in an effort to determine whether ICM’s sponsorship shortcomings could be resolved in the contract.<sup>332</sup>

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<sup>325</sup> *Id.* (emphasis added).

<sup>326</sup> ICM’s argument also supposes that the Board intended to confer approval of the controversial .XXX sTLD without even postponing the June 1 vote to allow the four absent Board members to voice their opinions regarding this important matter.

<sup>327</sup> See ICANN Meeting in Kuala Lumpur ICANN Public Forum, Thursday, July 22, 2004, Real-Time Captioning, Cl. Ex. 111 (comments of Kurt Pritz, ICANN) (emphasis added).

<sup>328</sup> See ICANN Minutes, Special Meeting of the Board, June 1, 2005, Cl. Ex. 120 (The Board’s discussion “surrounded the adequacy of the application with particular focus on the ‘sponsored community’ issues.”).

<sup>329</sup> A. Pisanty Witness Statement, ¶ 15; V. Cerf Witness Statement, ¶¶ 17-18.

<sup>330</sup> ICM Memorial, Ms. J. Beckwith Burr Witness Statement, ¶ 32.

<sup>331</sup> P. Twomey Witness Statement, ¶ 27; V. Cerf Witness Statement, ¶ 24.

<sup>332</sup> V. Cerf Witness Statement, ¶ 24 (“Allowing ICM to proceed to contract negotiations allowed us to truly test ICM’s ability to satisfy the sponsorship selection criteria, among other things. Had this not been

215. The Board also permitted other applicants for sTLDs – .jobs and .mobi – to proceed to contract negotiations despite open questions relating to the initial RFP selection criteria. However, ICM was unique among the field of sTLD applicants due to the extremely controversial nature of the proposed TLD, and concerns as to whether ICM had identified a “community” that existed and actually supported the proposed sTLD. Thus, while there was essentially no opposition to .jobs and .mobi from the sTLD communities defined by those applications, there was a significant negative response to ICM’s proposed .XXX sTLD by many adult entertainment providers, the very individuals and entities who logically would be in ICM’s proposed community.<sup>333</sup> There was no doubt that these issues warranted further evaluation and that ICM would have to continue to “prove” the validity of its application at subsequent Board meetings. ICM’s conduct, as discussed below, makes clear that it understood its challenge.

216. ICM’s position is further refuted by the actions taken by the Board after the June 2005 resolutions. At five subsequent Board meetings in which the Board discussed ICM’s application, the Board continued to discuss whether ICM was going to be able to satisfy the baseline sponsorship criteria required under the RFP. Many of these discussions were open to the public, and minutes from every meeting were posted on ICANN’s website.

217. For example, the Board extensively discussed its concerns regarding ICM’s ability to meet the sponsorship criteria at the September 15, 2005 special meeting (“after a lengthy discussion involving nearly all of the directors regarding the sponsorship criteria....”);<sup>334</sup> at the May 10, 2006 special meeting (ICANN Board and staff “entered into a detailed discussion on the following points: agreement terms against the application statements and promises made by ICM in support of their proposal; concerns regarding ICANN’s ability to enforce the promises made by ICM through a contractual framework and the potential harm if such enforcement could not be maintained; the sponsorship criteria in the RFP and materials submitted in support by

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(continued...)

a viable option for testing ICM’s proposal, I likely would have voted ‘no’ and I believe ICM’s proposal would have been turned down at that time.”).

<sup>333</sup> P. Twomey Witness Statement, ¶ 31.

<sup>334</sup> ICANN Minutes, Special Meeting of the Board, September 15, 2005, Cl. Ex. 119.

ICM and others . . . and ICM’s submission and supporting letters and documentation.”);<sup>335</sup> and again at the February 12, 2007 special meeting (where the Board discussed the “splintering” of support for the .XXX sTLD in the online adult entertainment community, a topic that “had been the subject of debate by the Board in earlier discussion in 2006”).<sup>336</sup>

218. Notably, at the February 12, 2007 special meeting, the Board conducted a “straw poll” for Board members to express their individual views with respect to the “serious concerns” expressed by “a majority of Board members” about ICM’s ability to satisfy the baseline sponsorship criteria set out in the RFP. Eight members and three non-voting liaisons expressed “serious concern.”<sup>337</sup> One of those non-voting liaisons also noted that “ALAC did not yet have a final and unanimous view on whether the domain should be created or not, and in any case, as it had said previously, did not support the requirement of the sponsorship for new TLDs in itself.”<sup>338</sup> Only three members stated that they did not have serious concerns.<sup>339</sup>

219. The fact that most Board members expressed significant concerns about ICM’s sponsorship shortcomings *after* the June 1, 2005 resolutions negates any notion that the June 2005 resolutions (which do not say that the Board is approving anything and, to the contrary, state clearly that the Board is *not* doing so) conclusively determined the sponsorship issue.

220. The sponsorship shortcomings in ICM’s application were also raised by Board members who joined the Board after the June 1, 2005 resolutions.<sup>340</sup> ICANN’s Board members are seated in a staggered fashion approximately every six months and the regular term of office for persons other than the President is three years. Thus, over the Board’s nearly two-year consideration of ICM’s application for the .XXX sTLD, the Board’s composition changed, and new members were seated. Several of these new members believed (quite appropriately) that it

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<sup>335</sup> ICANN Minutes, Special Meeting of the Board, May 10, 2006, Cl. Ex. 122.

<sup>336</sup> ICANN Minutes, Special Meeting of the Board, February 12, 2007, Cl. Ex. 199.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> V. Cerf Witness Statement, ¶ 39.

was incumbent on them to make their own evaluations of ICM's application because the issue continued to be addressed.

221. Contrary to ICM's odd assertion, it was not "impossible for the new Board members to absorb the relevant information before [each] vote."<sup>341</sup> Members of corporate boards routinely change over time, and those board members "get up-to-speed" on issues facing the board. In this circumstance, new Board members endeavored in good faith to review the pertinent materials and bring themselves up to speed.<sup>342</sup>

222. ICM's speculative assertion that a particular Board member (whether new or not) did not "fully grasp" the issues is hardly a basis to conclude that the Board violated ICANN's Bylaws, as ICM contends.<sup>343</sup> The statement of Ms. Burr that "it is a fact that most Board members lacked the legal training necessary to question the legitimacy of, or to identify legal inadequacies in, the tactics employed by ICANN's management" in rejecting ICM's registry agreement and application, not only improperly denigrates the credentials of the ICANN Board, but more importantly, confuses the issue. No member of the ICANN Board is required to have legal training, and whether any member does or does not have legal training is utterly irrelevant in determining whether ICANN violated its Bylaws by voting to reject ICM's sTLD application. (ICM's argument is also self-defeating because, if correct, it would show that a vote *in favor* of ICM's application would have been equally unsupportable.)

223. The addition of new Board members provided further opportunities for the Board to confirm that ICM's application satisfied the RFP specifications (if, as ICM contends, that is what the Board had decided in June 2005). Between the June 2005 and February 2007 Board meetings, there were a total of six new voting Board members (out of a total of fifteen) considering ICM's application. One such Board member was Rita Rodin Johnston (formerly Rita Rodin, who is a partner in the Intellectual Property and Technology practice at the Skadden Arps law firm and in fact does have substantial legal training). Ms. Rodin Johnston was

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<sup>341</sup> ICM Memorial ¶ 262.

<sup>342</sup> V. Cerf Witness Statement, ¶ 39.

<sup>343</sup> ICM Memorial ¶ 263.



appointed to the Board by the GNSO in May 2006, and thus did not participate in the June 2005 and May 2006 votes. Ms. Rodin Johnston stated at the February 12, 2007 special meeting that “in preparation for the meeting [she] had reviewed the materials prepared by staff and other information available about the proposed domain.”<sup>344</sup> Based on her review, she expressed “some concerns about whether the proposal met the criteria set forth in the RFP. For example, [Ms. Rodin Johnston] noted that it was not clear to her whether the sponsoring community seeking to run the domain genuinely could be said to represent the adult on-line community.”<sup>345</sup>

224. The minutes further note that, in expressing these concerns, Ms. Rodin Johnston requested that John Jeffrey (ICANN’s General Counsel and Secretary) and Dr. Twomey “confirm that this sort of discussion should take place during this meeting. She said that she did not want to reopen issues if they had already had been decided by the Board.”<sup>346</sup> In response to Ms. Rodin Johnston’s query, *no one stated that the sponsorship issue had already been decided by the Board.* To the contrary, Dr. Cerf “noted that [it] had been the subject of debate by the Board in earlier discussions in 2006” and opined that “in recent times (over the last six months) there seemed to have been a more negative reaction from members of the adult online community to the proposal.”<sup>347</sup> Ms. Rodin Johnston agreed, saying that “a review of the materials indicates that there seems to be a ‘splintering’ of support in the adult on-line community” and that “this splintering suggested there may not be widespread support within the adult online community.”<sup>348</sup>

225. Contemporaneous correspondence from the ICANN Board to interested third-parties further confirms that the June 1, 2005 vote did not constitute unconditional approval of the .XXX sTLD. After the June 1, 2005 vote, the ICANN Board received correspondence from numerous governments and entities around the world expressing concerns about the proposed .XXX sTLD. On January 17, 2006, Dr. Cerf responded to concerns expressed by Peter Zangl

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<sup>344</sup> ICANN Minutes, Special Meeting of the Board, February 12, 2007, Cl. Ex. 199.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

(Deputy Director General of the Information Society and Media DG for the European Commission) regarding ICM's application. In describing the June 1, 2005 resolutions, Dr. Cerf stated that the Board had merely "voted to begin discussion of proposed commercial and technical terms with ICM" and "also requested the President to present any such negotiated agreement to the Board *for approval and authorization.*"<sup>349</sup>

226. Dr. Twomey also confirmed ICANN's position that the June 1, 2005 resolutions did not constitute approval of ICM's application. In a May 4, 2006 letter from Dr. Twomey to Mohamed Sharil Tarmizi, then-Chairman of the GAC, Dr. Twomey noted that:

it is important to note that the Board decision as to *the .XXX application is still pending*. The decision by the ICANN Board at its June 1, 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. *After consultation with ICM, the board voted to authorize staff to enter into contractual negotiations without prejudicing the Board's right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC.* The final conclusion on the Board's decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejected the registry agreement relating to the .XXX application.<sup>350</sup>

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<sup>349</sup> Letter from Vinton Cerf to Peter Zangl, January 17, 2006, *available at* <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf> (emphasis added) (last visited May 5, 2009), attached hereto as ICANN Exhibit AJ.

<sup>350</sup> Letter from Paul Twomey, ICANN, to Mohamed Sharil Tarmizi, GAC Chairman, May 4, 2006, Cl. Ex. 188 (emphasis added).

Contrary to Ms. Burr's assertion, Dr. Twomey's May 4, 2006 letter was not the "first indication of a new strategy to re-open the selection criteria question." See ICM Memorial, Ms. J. Beckwith Burr Witness Statement, ¶ 63. As previously noted, it was known since the "proof of concept" round in 2000 that Board approval was required before delegation of a new TLD, and that the authorization to enter contract negotiations with a proposed registry operator or sponsoring organization would not, on its own, signify final approval of any proposed TLD. In the context of the sTLD round, Dr. Twomey confirmed the same position in an earlier letter to the GAC. See Letter from Paul Twomey, ICANN, to Mohamed Sharil Tarmizi, GAC Chairman, February 11, 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf> (last visited May 5, 2009) ("It should be noted that, consistent with Article II, section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD. Such decisions are not made by outside evaluators or by ICANN Staff. Indeed, the sTLD RFP made it clear that the evaluators would make 'recommendations' to ICANN. Responsibility for resolving issues

227. Dr. Cerf reconfirmed this view in another letter to Mr. Tarmizi in March 2007. Dr. Cerf wrote that “the ICANN Board *has not made a final decision* on the .XXX application.”<sup>351</sup>

228. Contrary to ICM’s position that “ICANN never gave ICM any reason to doubt that the application had been approved,”<sup>352</sup> ICM was aware of all of the Board’s discussions and correspondence subsequent to June 1, 2005. Likewise, ICM was aware that members of the Board continued to express significant concerns about sponsorship issues associated with the proposed sTLD, and were noting objections of governments and the GAC to the sTLD. The Board minutes and correspondence discussed above were all publicly posted on ICANN’s website throughout the process.

229. Finally, the witness statements of ICANN Board members Dr. Cerf, Dr. Twomey, and Mr. Pisanty also confirm that the June 1, 2005 resolutions were not an “unconditional” or final approval of ICM’s .XXX sTLD application.<sup>353</sup>

230. Mr. Pisanty explains: “As the adopted resolutions made clear, the Board’s vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by this vote to award the .XXX sTLD to ICM because the resolution that the Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the

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(continued...)

relating to an applicant’s readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.”), attached hereto as ICANN Exhibit AK.

<sup>351</sup> Letter from Vint Cerf, ICANN, to Mohamed Sharil Tarmizi, GAC Chairman, March 14, 2007, available at <http://www.icann.org/correspondence/cerf-to-tarmizi-karklins-14Mar07.pdf> (last visited May 5, 2009) (emphasis added), attached hereto as ICANN Exhibit AL.

<sup>352</sup> ICM Memorial ¶ 194.

<sup>353</sup> P. Twomey Witness Statement, ¶ 28; V. Cerf Witness Statement, ¶ 25; A. Pisanty Witness Statement, ¶ 16. The sworn testimony of ICANN Board members who actually participated in the decision and voted at the June 1, 2005 Board meeting is more persuasive than ICM’s reliance on the “understanding” of Dr. Williams and various unidentified third parties who had simply “monitor[ed] the process.” See ICM Memorial ¶ 193.

Request for Proposal. There were simply too many open questions concerning sponsorship in June 2005 for the Board to find that ICM had fulfilled the sponsorship selection criteria.”<sup>354</sup>

231. Dr. Cerf similarly notes: “The Resolutions did not constitute approval of ICM’s .XXX application. First, the Resolutions make no mention of any decision (final or otherwise) by the Board that the .XXX sTLD application satisfied the selection criteria (including the sponsorship criteria) set forth in the RFP. As is clear on the face of the Resolutions, the Board’s action was intended only to permit ICM to proceed with contract negotiations, nothing more. The alternative was simply to reject the .XXX sTLD application at that time, without giving ICM the opportunity to demonstrate that the concerns that had been raised could be addressed adequately by negotiated contractual provisions. Second, as of June 1, 2005, there were a number of unanswered questions and concerns regarding ICM’s ability to satisfy the requisite sponsorship criteria, including concerns relating to ICM’s definition of Sponsored Community and the level of support from the community.”<sup>355</sup>

232. And Dr. Twomey confirms: “There can be no doubt that these Resolutions did not constitute approval of ICM’s .XXX application, despite ICM’s argument in this proceeding to the contrary.”<sup>356</sup>

233. Thus, ICM’s baffling contention that “nothing in any Board minutes, transcripts or other ICANN pronouncements suggest that the Board’s approval to proceed to the registry agreement negotiation stage was subject to any residual concerns as to whether ICM’s application satisfied all of the RFP selection criteria”<sup>357</sup> is refuted by mountains of evidence that ICM simply ignores.

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<sup>354</sup> A. Pisanty Witness Statement, ¶ 16.

<sup>355</sup> V. Cerf Witness Statement, ¶¶ 25-26.

<sup>356</sup> P. Twomey Witness Statement, ¶ 28.

<sup>357</sup> ICM Memorial ¶ 230.

### **3. ICM Could Not Cure Its Sponsorship Shortcomings, Along With Other Deficiencies, During Contract Negotiations.**

234. ICM claims that it addressed all relevant concerns regarding the .XXX sTLD through the registry contract negotiations and discussions with ICANN staff. ICM is wrong. Further, throughout 2005 and up to the Board's denial of the .XXX sTLD on March 30, 2007, a number of additional concerns and issues appeared beyond those originally voiced by the Evaluation Panel at the beginning of the review process. Despite the best efforts of many, ICM could not satisfy these additional concerns, and most importantly, could not cure the continuing sponsorship defects.

#### **a. Concerns Raised By The GAC.**

235. Following the Board's June 1, 2005 resolution, ICANN staff, as directed by the ICANN Board, entered into contract discussions with ICM for a proposed registry agreement. By August 9, 2005, ICM's first draft .XXX sTLD registry agreement was posted on ICANN's website and submitted to the Board for approval. ICANN's next Board meeting was scheduled for August 16, 2005, at which time the Board had planned on discussing the proposed agreement.<sup>358</sup>

236. Within days of ICANN posting the proposed registry agreement, GAC Chairman Mr. Tarmizi wrote Dr. Cerf a letter expressing the GAC's "diverse and wide ranging" concerns with the .XXX sTLD (concerns that echoed those of the Board) and requesting that the Board provide additional time for governments to express their public policy concerns before the Board reached a final decision on the proposed registry agreement.<sup>359</sup> Because contract negotiations were still pending, an immediate written response to the GAC was premature.<sup>360</sup>

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<sup>358</sup> See ICM Draft, August 1, 2005, Sponsored TLD Registry Agreement, *available at* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf> (last visited May 5, 2009), attached hereto as ICANN Exhibit R.

<sup>359</sup> The GAC's statements in August 2005 disprove ICM's contention that the GAC had made in April 2005 "an affirmative statement that the GAC was declining to take a position on the .XXX, or any other, application." ICM Memorial ¶ 204. The GAC clearly took a position, and it was one of concern over ICM's .XXX application. And even if the GAC had declined to take a position in April 2005 – which it did not – ICANN was required under its Bylaws to consider the GAC's views, whether they were expressed in August 2005 or at any other time.

<sup>360</sup> V. Cerf Witness Statement, ¶ 32.

237. The GAC's input was significant because the ICANN Bylaws *require* the Board to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies.<sup>361</sup> Where the Board seeks to take actions that are inconsistent with the GAC's advice, the Board must tell the GAC why.<sup>362</sup> Thus, it was perfectly appropriate, and fully consistent with the Bylaws and Articles, for the Board to consider and try to address the GAC's (and others') concerns.<sup>363</sup>

238. ICM's expert, Dr. Mueller, had already concluded (long before these proceedings began) that ICANN's treatment of the .XXX sTLD application had "proved conclusively" that the U.S. Government would influence the outcome "when domestic political pressures make it politically profitable to do so."<sup>364</sup> Dr. Mueller's opinions appear to be based largely on a suspicion of government involvement on issues of public policy, particularly by the United States, and by his personal view that such involvement, even as authorized through the GAC under the Bylaws, should be avoided. Thus, Dr. Mueller disagrees with ICANN's Bylaws, a disagreement that, of course, has nothing to do with whether ICANN's Board violated those Bylaws.

239. Dr. Mueller claims that, in raising its policy concerns through the GAC, the U.S. Government acted beyond the "oversight role contemplated" by the documents establishing the U.S. Government's relationship with ICANN.<sup>365</sup> But without regard to the merits of

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<sup>361</sup> ICANN Bylaws, *supra* note 2, Article XI, § 2.1(j) ("The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.").

<sup>362</sup> *Id.*

<sup>363</sup> V. Cerf Witness Statement, ¶ 30. In any event, the GAC's concerns were consistent with the ICANN Board's concerns regarding ICM's ability to satisfy the sponsorship criteria.

<sup>364</sup> *See, e.g.,* Milton Mueller, *Triple X, Internet Content Regulation and the ICANN Regime*, available at [www.internetgovernance.org/pdf/new-xxx-contract.pdf](http://www.internetgovernance.org/pdf/new-xxx-contract.pdf) (January 16, 2007) (last visited May 5, 2009), attached hereto as ICANN Exhibit AM. On April 5, 2005, Dr. Mueller co-authored a concept paper proposing structural reforms to address a perception of "unilateralism by the US Government in its control of the DNS root and its supervision of ICANN." Milton Mueller & Hans Klein, *What to Do About ICANN: A Proposal for Structural Reform*, Concept Paper by the Internet Governance Project, at p. 1, available at <http://internetgovernance.org/pdf/igp-icannreform.pdf> (Apr. 5, 2005) (last visited May 5, 2009), attached hereto as ICANN Exhibit AN.

<sup>365</sup> ICM Memorial, Expert Report of Dr. Milton Mueller at p. 39.

Dr. Mueller’s views about U.S. Government involvement with ICANN, the GAC does not exercise any “oversight” over ICANN but rather acts in an advisory role. When the U.S. Government requested additional time to allow opinions to be voiced about the .XXX application – the event Dr. Mueller describes as having reversed “the fate” of .XXX – the Board undoubtedly was justified in taking those opinions into consideration, just as the GAC had requested in a prior communication.<sup>366</sup>

240. The notion that the ICANN Board actually violated its Bylaws or Articles by taking those views into consideration is illogical. The fact that the Board did not follow the process that Dr. Mueller (and ICM) wish were required under the Bylaws is not relevant in this proceeding. Further, ICM has presented no facts (or legal argument) that would support its view that the Board violated its Bylaws or Articles by listening to and considering the GAC’s position on the .XXX sTLD application.

241. Dr. Mueller has acknowledged that the GAC has only an advisory role under the Bylaws.<sup>367</sup> Nevertheless, in his report, he reaches the contradictory conclusion that the ICANN Board’s rejection of ICM’s application “impl[ies] that the Board must defer indiscriminately to any claim of public policy concerns raised by any member of the GAC at any time.”<sup>368</sup> He now takes issue even with the GAC’s limited advisory role as it relates to matters of public policy

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<sup>366</sup> See *id.* at p. 42. Contrary to ICM’s assertion, Suzanne Sene, the representative from the U.S. Department of Commerce on the GAC, did not “tr[y] to prevent GAC from expressing negative views about .xxx” as Dr. Mueller now claims. See ICM Memorial, Expert Report of Dr. Milton Mueller at p. 41. While it is true that Ms. Sene believed “the matter could have been raised before at Plenary or Working group level,” she did not try to stop other GAC representatives from expressing their views. More importantly, the minutes of the same meeting make clear that “[t]he Chair [of the GAC] confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the .xxx proposal, should it decide to do so.” Minutes of GAC Meeting XXII, held in Luxembourg from July 11-12, 2005, dated November 23, 2005, Cl. Ex. 139.

<sup>367</sup> ICM Memorial, Expert Report of Dr. Milton Mueller at p. 26 (“[T]he GAC is institutionalized as simply a committee that advises the Board of Directors.”); Milton Mueller & Hans Klein, *What to Do About ICANN: A Proposal for Structural Reform*, Concept Paper by the Internet Governance Project, at p. 1, available at <http://internetgovernance.org/pdf/igp-icannreform.pdf> (Apr. 5, 2005) (last visited May 5, 2009) (expressing “[d]issatisfaction” that the GAC “ha[s] only advisory powers”), attached hereto as ICANN Exhibit AN.

<sup>368</sup> ICM Memorial, Expert Report of Dr. Milton Mueller at p. 50.

because “governments do not speak with one voice on public policy.”<sup>369</sup> When many governments actually did agree on policy concerns raised by the .XXX proposal, Dr. Mueller could only surmise that “something is terribly wrong with governments – with governments as governments – when Brazil, France and the Bush administration agree on something this silly and arbitrary.”<sup>370</sup> At odds with his fear of “unilateralism by the US Government,”<sup>371</sup> he seems not willing to consider that other governments should be heard, believing that all policy matters should instead be handled by the GNSO.<sup>372</sup>

242. The bottom line, however, is that Dr. Mueller’s preferred processes for ICANN, including his preference that ICANN completely ignore the views expressed by governments, are not at issue in this proceeding because they are inconsistent with the processes actually required by ICANN’s Bylaws.

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<sup>369</sup> ICM Memorial, Expert Report of Dr. Milton Mueller at p. 26.

<sup>370</sup> Milton Mueller, *Milton Mueller on governmental flap over .xxx domains*, POLITECH: Politics & Tech. Blog, available at <http://www.politechbot.com/2005/08/16/milton-mueller-on/> (August 16, 2005) (last visited May 5, 2009), attached hereto as ICANN Exhibit AO.

<sup>371</sup> Milton Mueller & Hans Klein, *What to Do About ICANN: A Proposal for Structural Reform*, Concept Paper by the Internet Governance Project, at p. 1, available at <http://internetgovernance.org/pdf/igp-icannreform.pdf> (Apr. 5, 2005) (last visited *date*), attached hereto as ICANN Exhibit AN.

<sup>372</sup> ICM Memorial, Expert Report of Dr. Milton Mueller at p. 25. In an article drafted for the Internet Governance Project (“IGP”) (an academic consortium composed of many members from the Syracuse University of Information Studies where Dr. Mueller is employed, *see* IGP, *Scientific Committee/Organizational Information*, available at <http://www.internetgovernance.org/people.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit AP), Dr. Mueller did not appear to support .XXX based on ICM’s ability to satisfy the sponsorship criteria actually under consideration, but instead on his opinion that, “[i]f there are problems here, they are not problems with the .xxx gTLD application. *They are problems inherent in ICANN’s institutional structure.*” Milton Mueller, *Triple X, Internet Content Regulation and the ICANN Regime*, available at [www.internetgovernance.org/pdf/new-xxx-contract.pdf](http://www.internetgovernance.org/pdf/new-xxx-contract.pdf) (January 16, 2007) (emphasis added) (last visited May 5, 2009), attached hereto as ICANN Exhibit AM. Thus, his views with respect to ICM’s .XXX sTLD application, as expressed *prior* to these proceedings, had nothing to do with the claims ICM has asserted. Instead, Dr. Mueller believes the entire ICANN structure needs to be changed, changes that the ICANN community has thus far rejected. For example, Dr. Mueller has argued that the GAC should be abolished. *See* ICM Memorial, Expert Report of Dr. Milton Mueller at p. 22-23; Milton Mueller & Hans Klein, *What to Do About ICANN: A Proposal for Structural Reform*, Concept Paper by the Internet Governance Project, at p. 1, available at <http://internetgovernance.org/pdf/igp-icannreform.pdf> (Apr. 5, 2005) (last visited May 5, 2009), attached hereto as ICANN Exhibit AN.



243. Notwithstanding Dr. Mueller's views, ICM understood that it was necessary for ICANN to include the GAC and other interested parties in the process.<sup>373</sup> ICM – recognizing, in its own words, the “need for all stakeholders to feel that they have had an adequate and meaningful opportunity to express their views,” and in order to “preserve the integrity of the ICANN process” – even requested, on August 15, 2005, that the ICANN Board defer a vote on the pending draft registry agreement in order to allow ICM to respond to the GAC's concerns (and the ICANN Board agreed to do so).<sup>374</sup> ICM knew that it was critical to try to address the GAC's concerns because ICM's application was very much at risk.

244. ICM blames the Bush Administration for expressing opinions about the .XXX application and for prompting the GAC to come forward with concerns.<sup>375</sup> ICM complains that the U.S. Government requested that the ICANN Board “provide a proper process and adequate additional time for concerns to be voiced and addressed before any additional action takes place.”<sup>376</sup> But ICM does not explain why ICANN should have ignored the fact that governments (including the U.S. government) wanted more of a “process” in the evaluation of sTLDs. Moreover, even if the U.S. Government did change its mind, as ICM alleges, it could not possibly be improper for ICANN to consider the government's new views (and certainly could not constitute a violation of ICANN's Bylaws or Articles of Incorporation).<sup>377</sup> Even ICM recognizes that ICANN could not and should not have simply “ignore[d] the demands of the U.S.

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<sup>373</sup> Letter from Stuart Lawley, ICM, to Paul Twomey, ICANN, August 15, 2005, *available at* <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf> (last visited May 5, 2009), attached hereto as ICANN Exhibit S.

<sup>374</sup> *Id.* Notably, if ICM truly believed that the Board already had approved the sTLD in June 2005, this would have been a good opportunity for ICM to say so. Instead, ICM asked for extra time to address the concerns that surfaced immediately *after* the Board's June 2005 vote. Special Meeting of the Board, Preliminary Report, August 16, 2005, *available at* <http://www.icann.org/minutes/resolutions-16aug05.htm> (last visited *date*) (“XXX was deferred in response to requests from the applicant ICM, as well as the ICANN Government Advisory Committee Chairman's and the US Department of Commerce's request to allow for additional time for comments by interested parties.”), attached hereto as ICANN Exhibit AQ.

<sup>375</sup> ICM Memorial, ¶¶ 206-12.

<sup>376</sup> *Id.* at ¶ 207.

<sup>377</sup> *See* ICM Memorial ¶ 208.

government.”<sup>378</sup> And ICM never explains how listening to the views of the U.S. Government possibly could amount to a violation of ICANN’s Bylaws or Articles.

**b. Concerns Raised During ICANN’s September 15, 2005 Board Meeting.**

245. By the time of the Board’s September 2005 meeting, although there remained unresolved concerns dealing with, among other things, sponsorship and content issues relating to child pornography, ICM’s counsel Ms. Burr requested that the Board put the existing draft of the proposed .XXX sTLD registry agreement to a vote of the Board.<sup>379</sup> At the September 15, 2005 meeting, the Board agreed to vote on ICM’s application, doing so after a “lengthy discussion” regarding the sponsorship criteria, the application and additional supplemental materials, and the specific terms of ICM’s proposed registry agreement.<sup>380</sup> The primary concern of many Board members was that the proposed registry agreement did not match up to the promises made in ICM’s application. The Board therefore did not approve the contract, but instead voted, 11-0, to authorize further negotiations:

Resolved (05.75), that the ICANN President and General Counsel are directed to discuss possible additional contractual provisions or modifications for inclusion in the .XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice.<sup>381</sup>

246. Although ICM now claims that ICANN “made no mention of any concern that the application had not met the sponsorship or other RFP criteria” in its September 15, 2005 resolution,<sup>382</sup> the evidence is to the contrary. The resolution reflected the concerns expressed

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<sup>378</sup> ICM Memorial ¶ 211.

<sup>379</sup> See Letter from Stuart Lawley, ICM, to Vinton Cerf, ICANN, September 15, 2005, attached as Confidential Exhibit I to ICANN’s First Brief: Hours before the September 15, 2005 Board Meeting, ICM “request[ed] that the ICANN Board take the next step and approve the registry agreement without further delay.” See also P. Twomey Witness Statement, ¶ 43.

<sup>380</sup> See ICANN Minutes, Special Meeting of the Board, September 15, 2005, Cl. Ex. 119 (“after a lengthy discussion involving nearly all of the directors regarding the sponsorship criteria....”).

<sup>381</sup> *Id.*

<sup>382</sup> ICM Memorial ¶ 217.

during the September 15 Board meeting, namely “the lengthy discussion involving nearly all of the directors regarding the sponsorship issue.”<sup>383</sup> Moreover, as the resolution makes clear, contract language had to be negotiated that satisfied the Board’s concerns regarding sponsorship for “development and implementation of policies [for .XXX]” (and other principles in the ICM application”) before ICM’s sTLD .XXX application could be approved.

**c. At The Vancouver Meeting, ICM Made A Presentation To The GAC Promising Public Interest Benefits Of The Proposed .XXX sTLD.**

247. The GAC and ICANN met in Vancouver, Canada, on November 29, 2005, to discuss Mr. Tarmizi’s July 2005 statement that the “GAC could still advise ICANN about the .XXX proposal, should it decide to do so. However, no member [of the GAC] ha[d] yet raised this as an issue for formal comments to be given to ICANN in the Communiqué.”<sup>384</sup> The day before the Vancouver meeting, ICANN posted on its website a status report on the sTLD evaluation process.<sup>385</sup> With respect to ICM’s proposal for the .XXX sTLD, the status report noted that “[t]he sponsorship/community value team found that the relevant selection criteria had not been met,” and the report cited: (1) “[t]he extreme variability in definitions of what constitutes the [adult] content which defines this community,” (2) uncertainty as to the interests of the proposed community, and (3) a lack of support among users and members of the community, including those outside North America.<sup>386</sup>

248. At the conclusion of the November 29, 2005 meeting between the GAC and ICANN, ICM made a presentation to the GAC in which ICM promised “a range of public interest benefits” in support of its .XXX sTLD application.<sup>387</sup>

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<sup>383</sup> See ICANN Minutes, Special Meeting of the Board, September 15, 2005, Cl. Ex. 119 (“after a lengthy discussion involving nearly all of the directors regarding the sponsorship criteria....”).

<sup>384</sup> Minutes of GAC Meeting 22, held in Luxembourg from July 11-12, 2005, dated November 23, 2005, Cl. Ex. 139).

<sup>385</sup> See Status Report on the sTLD Evaluation Process, November 28, 2005, *available at* <http://icann.org/tlds/stld-apps-19mar04/stld-status-report.pdf> (last visited May 5, 2009), attached hereto as ICANN Exhibit AR.

<sup>386</sup> *Id.*

<sup>387</sup> GAC Communiqué – Wellington, New Zealand, March 28, 2006, Cl. Ex. 181 (“In its application, supporting materials and presentation to the GAC in November 2005, ICM Registry promised a range of

249. After the meeting, the GAC requested from the ICANN Board an explanation of the process used in the sTLD round of applications and in particular the .XXX application. On February 11, 2006, Dr. Twomey wrote to Mr. Tarmizi in response to this request. Dr. Twomey explained the difference between the “proof of concept” round of applications in 2000 and the sTLD round of applications and emphasized that the passing over of ICM and other applicants in favor of the seven gTLDs chosen in the “proof of concept” round did not constitute a permanent rejection of those TLDs by the ICANN Board.<sup>388</sup> The letter also underscored that, notwithstanding the decision to proceed to contract negotiations with any applicant, “it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD.”<sup>389</sup>

**d. Concerns Raised In The Wellington Communiqué.**

250. As the time approached for the ICANN Board’s March 31, 2006 meeting in Wellington, New Zealand, several GAC member countries had raised concerns regarding the public policy issues implicated by the .XXX sTLD application. Sweden, Brazil, the European Commission, and the United States were among those member countries raising concerns.<sup>390</sup>

251. After extensive meetings and discussions among 33 members over the course of several days, the GAC issued its “Wellington Communiqué” on March 28, 2006, stating the “emphatic[] oppos[ition]” of several of its members to the .XXX sTLD from a public policy

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(continued...)

public interest benefits as part of its bid to operate the .xxx domain.”); *See also* GAC Meeting Agenda, Vancouver, Canada, November 27 to December 1, 2005, *available at* [http://old.gac.icann.org/web/meetings/mtg23/VANCOUVER\\_AGENDA.doc](http://old.gac.icann.org/web/meetings/mtg23/VANCOUVER_AGENDA.doc) (Presentation of ICM (.xxx) Registry on November 29, 2005) (last visited May 5, 2009), attached hereto as ICANN Exhibit AS.

<sup>388</sup> Letter from Paul Twomey, ICANN, to Mohamed Sharil Tarmizi, GAC Chairman, May 4, 2006, Cl. Ex. 188.

<sup>389</sup> *Id.*

<sup>390</sup> *See, e.g.*, Letter from Marcelo de Carvalho Lopes to Mohamed Sharil Tarmizi, September 6, 2005, Cl. Ex. 167; *see also* Letter from Peter Zangl to Vinton Cerf, September 16, 2005, Cl. Ex. 172; Letter from Jonas Bjelfvenstam to Paul Twomey, November 23, 2005, Cl. Ex. 168; Letter from Michael D. Gallagher to Vinton Cerf, August 11, 2005, Cl. Ex. 162.

perspective.<sup>391</sup> Those concerns included: (1) “appropriate measures to restrict access to illegal and offensive content,” (2) “the development of tools and programs to protect vulnerable members of the community,” (3) the means to “[m]aintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites,” and (4) “[a]ct[ions] to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers . . . .”<sup>392</sup>

252. In addition, some countries were concerned that, because the .XXX application would not require all pornography to be located within the .XXX domain, a new .XXX sTLD would simply result in the expansion of the number of domain names that involved pornography.<sup>393</sup> Indeed, ICM had confirmed that it could not require migration of pornography sites from .com and other TLDs to .XXX, which created a concern that a new TLD devoted exclusively to pornographic sites would do little more than expand the number of pornography websites available on the Internet without imposing any restrictions on the sites that were maintained at .com and other TLDs.

253. The GAC also requested a written explanation from the Board on how the .XXX sTLD application could satisfy the sponsored community and public interest criteria, noting that ICM’s proposed draft registry agreement had not, to date, addressed the “range of public interest benefits” that had been promised in its application and November 29, 2005 presentation to the GAC.<sup>394</sup>

254. On May 4, 2006, Dr. Twomey wrote again to Mr. Tarmizi in response to the GAC’s request in the Wellington Communiqué for information about the Board’s decision to proceed with several sTLD applications, notwithstanding negative reports from the independent

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<sup>391</sup> GAC Communiqué – Wellington, New Zealand, March 28, 2006, Cl. Ex. 181.

<sup>392</sup> *Id.*

<sup>393</sup> P. Twomey Witness Statement, ¶ 50.

<sup>394</sup> GAC Communiqué – Wellington, New Zealand, March 28, 2006, Cl. Ex. 181.

evaluation teams. As the letter explained, “the Board decision as to the .XXX application [wa]s still pending.”

The decision by the ICANN Board during its June 1, 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. After additional consultation with ICM, the board voted to authorize staff to enter into contractual negotiations without prejudicing the Board’s right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC. ***The final conclusion on the Board’s decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application.*** In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.<sup>395</sup>

255. Dr. Twomey also explained that the Board allowed those applicants (such as ICM) that the Evaluation Panel had not viewed as having satisfied the sponsorship criteria to present additional supporting documentation directly to the Board for review and consideration. Although in the case of .XXX, as well as others, “the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.”<sup>396</sup>

256. In revising its proposed registry agreement to address the GAC’s concerns regarding the “range of public interest benefits” that had been promised in its application and presentation, as ICM knew it must, ICM took the position that it would install “appropriate measures to restrict access to illegal and offensive content,” including monitoring such content globally.<sup>397</sup> This was immediately controversial among many ICANN Board members because complaints about ICM’s “monitoring” would inevitably be sent to ICANN, which is neither

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<sup>395</sup> Letter from Paul Twomey, ICANN, to Mohamed Sharil Tarmizi, GAC Chairman, May 4, 2006, Cl. Ex. 188 (emphasis added).

<sup>396</sup> *Id.*

<sup>397</sup> GAC Communiqué – Wellington, New Zealand, March 28, 2006, Cl. Ex. 181; *see also* V. Cerf Witness Statement, ¶ 37.

equipped nor authorized to monitor (much less resolve) “content-based” objections to Internet sites.<sup>398</sup>

257. ICM did not do anything to address the sponsorship concerns raised in the Wellington Communiqué or the monitoring issues created by ICM in the draft registry agreement. Instead, ICM insisted that the Board vote on the draft agreement as it existed at that time without making further changes to accommodate the concerns that had been expressed.<sup>399</sup>

**e. Concerns Raised During The May 10, 2006 And February 12, 2007 Board Meetings.**

258. During the ICANN May 10, 2006 Board meeting, the Board conducted a lengthy discussion concerning the sponsorship issue for the .XXX sTLD and then voted 9-5 against ICM’s then-current draft of the proposed .XXX sTLD registry agreement.<sup>400</sup>

259. By this time, some Board members had concluded that ICM’s registry agreement would not be able to yield the results that ICM had predicted and that the Board had requested. For instance, Board member Hagen Hultzsch voted against the proposed agreement because “the negotiations didn’t produce the required and expected results.”<sup>401</sup> Board member Alejandro Pisanty asserted that he did not believe “the agreement as stated [had] built-in structural guarantees that the conditions and representations made by ICM can be fulfilled. Many of them are not so because of any fault of ICM itself, but because of the complexities of developing them further in an international, multilingual, and multicultural environment.”<sup>402</sup> Dr. Cerf commented

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<sup>398</sup> V. Cerf Witness Statement, ¶ 37; *see also* ICANN Meeting Minutes for Special Meeting of the Board, April 18, 2006, Cl. Ex. 186 (The ICANN Board discussed their concerns about the manner in which ICM guaranteed compliance by the registry operator and whether the right level of policy enforcement processes were in place within the proposed agreement to respond to a community as complex as the adult entertainment community. Concerns were also expressed about how to implement the proposed compliance process and whether ICANN was structured to respond to the proposed process.).

<sup>399</sup> ICANN Minutes, Special Meeting of the Board, April 18, 2006, Cl. Ex. 186 (Dr. Cerf noting “the desire of ICM to have an up or down vote” at the May 10, 2006 meeting).

<sup>400</sup> ICANN Minutes, Special Meeting of the Board, May 10, 2006, *available at* <http://www.icann.org/en/minutes/minutes-10may06.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit T.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

that he was voting against the agreement because he “no longer believe[d] it’s possible for ICM to achieve the conditions and recommendations that the GAC has placed before [the Board] as a matter of public policy and that the terms of the contract do not assure any of those – the ability of ICM to provide the protections that are requested.”<sup>403</sup> And Board member Vanda Scartezini, who had voted in favor of authorizing staff to enter contract negotiations with ICM in June 2005, now voted against the proposed agreement because “the contract language did not come with the guarantee that [she had] expected.”<sup>404</sup>

260. ICM criticizes these views of individual members of the Board, but there is no doubt that the members took their responsibilities seriously and analyzed the issues with care. And more importantly, whether or not the Board members “got it right” is irrelevant for purposes of determining whether the Board violated its Bylaws or Articles in rejecting ICM’s application.

261. Moreover, prominent members of the online adult entertainment industry, including Larry Flynt Publications and Wicked Pictures, had begun to voice opposition to ICM’s application, and tension between these firms and IFFOR, ICM’s proposed Sponsoring Organization, was growing.<sup>405</sup> This growing opposition led many Board members to conclude that ICM could not satisfy the sponsorship criteria and in fact did not even have a “community” that supported the application, which was one of the original concerns of the Evaluation Panel two years earlier.<sup>406</sup>

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<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> See Letter from Larry Flynt to ICANN Board, April 30, 2006, *available at* <http://www.icann.org/correspondence/flynt-to-board-30apr06.jpg> (last visited May 5, 2009), attached hereto as ICANN Exhibit AT; *see also* Letter from Steve Orenstein, Wicked Pictures, to ICANN, April 10, 2006, *available at* <http://www.icann.org/correspondence/orenstein-to-board-10apr06.jpg> (last visited May 5, 2009) (expressing Wicked Pictures’ “profound opposition to the establishment of a .XXX” sTLD), attached hereto as ICANN Exhibit AU; *see also* Letter from Johan Gillborg, Private Media Group, to ICANN, March 22, 2006, *available at* <http://www.icann.org/correspondence/gillborg-to-board-22mar06.pdf> (last visited May 5, 2009) (expressing Private Media Group’s opposition to the creation of the .XXX sTLD and its belief that there is no compelling reason to establish such TLD), attached hereto as ICANN Exhibit AV.

<sup>406</sup> P. Twomey Witness Statement, ¶ 56.



262. Indeed, ICM's application unnaturally described the Sponsored TLD Community only using the future tense. Unlike with the other sTLD applicants, it was clear that a community did not yet exist separate and apart from the proposed .XXX sTLD itself. Instead, ICM asserted that the sponsoring community would emerge once the .XXX sTLD was approved, but this circular approach to the sponsorship requirement was fundamentally at odds with the RFP.<sup>407</sup>

263. The Board's May 10, 2006 vote rejected ICM's then-current draft of the proposed .XXX sTLD registry agreement. Nonetheless, the Board did not deny ICM's application in its entirety at that time, but instead provided ICM yet another opportunity to attempt to revise the agreement to conform to the RFP specifications. Notably, the Board's decision to allow ICM to continue to work the problem is directly at odds with ICM's position that the Board had decided "for political reasons" to reject ICM's application; if so, it would have been much easier for the Board to reject ICM's application in its entirety in 2006. And giving ICM another opportunity obviously does not constitute a violation of ICANN's Bylaws.

264. Throughout the rest of 2006, ICANN staff and ICM worked on additional revisions to the draft registry agreement in an attempt to address the concerns regarding the sponsorship requirements, among others. On January 5, 2007, a revised agreement was posted for public comment.

265. After the agreement was posted, ICANN staff and ICM negotiated additional clarifying language to Appendix S of the revised agreement, which was critical to the sponsorship analysis.<sup>408</sup> Appendix S, *inter alia*, identified the purpose for which .XXX would be

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<sup>407</sup> Compare New sTLD application, Part A. Explanatory Notes – Sponsorship Information – Definition of Sponsored TLD Community, December 15, 2003, Cl. Ex. 45 ("Applicants must demonstrate that the Sponsored TLD Community is precisely defined, so it can readily be determined which persons or entities make up that community.") with New sTLD RFP application, .XXX, Part B. Application Form, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm> (last visited May 5, 2009) (defining the .XXX Sponsored TLD Community as self-selecting and "intended primarily to serve the needs of the global online adult-entertainment community"), attached hereto as ICANN Exhibit O.

<sup>408</sup> ICM argues incorrectly that Appendix S provided only "slight revisions." See ICM Memorial ¶ 257. In fact, Appendix S provided key clarifying language to the registry agreement, particularly with respect to sponsorship issues.

delegated and the community to be served by its delegation, a description of the sTLD community, and relevant information regarding how the .XXX Registry would be operated. Appendix S was thereafter posted for public comment.

266. After the public comment period closed, the Board's next meeting was held on February 12, 2007. During this meeting, the Board reviewed the recently posted public comments on the revised agreement, including Appendix S. The vast majority of comments were opposed to the introduction of the .XXX sTLD, prompting many Board members to reiterate the concern that ICM's proposed .XXX sTLD lacked the broad-based support of the community ICM intended to represent. Indeed, *77% of the comments posted to the public forum were opposed to ICM's .XXX sTLD.*<sup>409</sup> Only 16% expressed support.<sup>410</sup>

267. Despite such evidence of splintering community support, the Board did not deny ICM's application in February 2007. Instead, the Board unanimously approved a resolution directing ICANN staff to further consult with ICM in an effort to facilitate the Board's upcoming decision of whether the sponsorship criteria could be met for the creation of a new .XXX sTLD.<sup>411</sup>

**f. ICM Failed To Address The Board's Concerns, As Made Clear In The Board's March 30, 2007 Denial Of The Proposed .XXX sTLD.**

268. On March 30, 2007, the Board voted 9-5 (with one abstention and one absent Board member) to reject ICM's revised agreement and deny ICM's application for the .XXX sTLD. This vote came after extensive review, analysis, and debate among ICANN Board members, and followed a public presentation and debate during the March 29, 2007 ICANN

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<sup>409</sup> ICANN Minutes, Special Meeting of the Board, February 12, 2007, Cl. Ex. 199.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* (The Board passed a Resolution directing "ICANN staff [to] consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is met for the creation of a new .XXX sTLD.").

Public Forum among representatives of the adult entertainment industry who opposed the application and those who were in favor.<sup>412</sup>

269. The primary factors that influenced the nine members who voted against ICM's application can be summarized in five respects.

270. *First*, the RFP required applicants to “demonstrate that the Sponsored TLD Community is: Precisely defined, so it can readily be determined which persons or entities make up that community....”<sup>413</sup> Several Board members determined that ICM could not satisfy this criterion, despite having had ample opportunity to do so throughout the contract negotiations. Ultimately, ICM's proposed sponsored community definitions were circularly defined to include only those members of the online adult entertainment industry who *supported* the creation of the .XXX sTLD, and thus by definition excluded all online adult entertainment industry members who opposed ICM's application. Such self-selection and extreme subjectivity regarding what constituted the content that defined the .XXX community made it nearly impossible to determine which persons or services would be in or out of the community.<sup>414</sup> Moreover, the definition of “adult entertainment” varies considerably from region to region and culture to culture, depending on one's moral, religious, national, or cultural perspective, such that there was not a global definition that could be applied to the .XXX sTLD community.

271. ICM was first apprised of this concern by the Evaluation Panel in its rejection of ICM's .XXX application on August 27, 2004.<sup>415</sup> Despite its efforts, ICM was unable to cure this critical defect. Several Board members, in adhering to the RFP criteria – obviously not a

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<sup>412</sup> ICANN Meetings in Lisbon, Portugal, Transcript of ICANN Public Forum, March 29, 2007, *available at* <http://www.icann.org/en/meetings/lisbon/transcript-public-forum-29mar07.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AW; *See also* Meeting of the Board, Transcript, March 30, 2007, Cl. Ex. 201.

<sup>413</sup> New sTLD application, December 15, 2003, Part A. Explanatory Notes – Sponsorship Information – Definition of Sponsored TLD Community, Cl. Ex. 45.

<sup>414</sup> ICM admits as much in its Memorial: “Since membership in the [.XXX] community would be voluntary, registrants would only become members after affirmatively identifying themselves as responsible providers of adult content....” ICM Memorial ¶ 148.

<sup>415</sup> ICANN, New sTLD applications, Appendix D: Evaluation Reports, August 27, 2004, p. 95, Cl. Ex. 110.

violation of ICANN’s Bylaws or Articles – ultimately voted against ICM’s application because ICM failed to satisfy this fundamental sponsorship requirement.<sup>416</sup> In short, without a precisely defined Sponsored TLD Community, the Board could not approve ICM’s sTLD application.

272. *Second*, the RFP required that the Sponsored TLD Community be “[c]omprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community.”<sup>417</sup> While on its face ICM’s sponsored community appeared to have common needs and interests, some Board members deemed that the revised agreement posted in 2007 failed to meet this portion of the RFP specification because of its selective membership. The sponsored community as defined by ICM was simply a subset of all online adult entertainment providers, and ICM never provided any documentation or information that the excluded providers had separate needs or interests from the sponsored community it sought to represent. Online adult entertainment providers, whether they seek the type of self-regulation proffered by ICM or not, all face issues of privacy, free expression and child protection, among others. Thus, as contract negotiations progressed, it became increasingly evident that ICM was simply proposing an *unsponsored* TLD for adult entertainment – a uTLD, disguised as an sTLD, just as ICM had proposed in 2000.

273. *Third*, the RFP required ICM to “demonstrate broad-based support from the community it is intended to represent.”<sup>418</sup> The RFP was phrased in the present tense, such that to satisfy the RFP criteria, ICM had to show “evidence of broad-based support from the Sponsored TLD Community for the sTLD, for the Sponsoring Organization, and for the proposed policy-formulation process,” *at all times*.<sup>419</sup>

274. Whatever community support ICM may have had at one time, however, had fallen apart by early 2007. As noted above, during the final public comment period from January 5,

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<sup>416</sup> P. Twomey Witness Statement, ¶¶ 57, 63; V. Cerf Witness Statement, ¶ 38; A. Pisanty Witness Statement, ¶ 23.

<sup>417</sup> New sTLD application, December 15, 2003, Part A. Explanatory Notes – Sponsorship Information – Definition of Sponsored TLD Community, Cl. Ex. 45.

<sup>418</sup> *Id.* at Part A. Explanatory Notes – Sponsorship Information – Level of Support from the Community, Cl. Ex. 45.

<sup>419</sup> *Id.*

2007 to February 5, 2007, a vast majority of the comments posted to the public forum and sent to ICANN staff opposed ICM's .XXX sTLD. ICM was not able to provide evidence that the larger online adult entertainment provider community supported the .XXX sTLD, ICM, or the policy-formation process. Even those who had initially supported the sTLD began to change their minds.

275. For example, support from major child advocacy organizations and major law enforcement organizations was absent. There was also insufficient support from the freedom of expression community, which ICM had initially hoped to include as a supporting organization. Indeed, the free expression advocates came out *against* the .XXX sTLD out of fear that it would provide a mechanism either to over-define the realm of adult entertainment and/or to force all adult-related content to the .XXX sTLD.<sup>420</sup> For example, at the March 29, 2007 ICANN public forum, Ms. Diane Duke, the executive director for the Free Speech Coalition, a U.S. based trade association for the adult entertainment industry with membership worldwide, stated:

First of all, I would like to thank the ICANN board for allowing us this time to speak, and to speak of our concerns of the dot xxx sponsored top-level domain.

Let me be clear. As the only trade association for the adult entertainment industry, we represent the sponsorship community. It is our organization that sued the United States government on behalf of the industry and won in the U.S. Supreme Court.

It was our organization that ICM itself came to five years ago offering a portion of the proceeds from the sTLD in return for our support of their proposed domain.

ICM recognized us as the representative for the sponsorship community even then.

Today, we are here because the adult entertainment community believes that the views of the industry are being misrepresented on the issue of the dot xxx sponsored top-level domain.

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<sup>420</sup> See, e.g., Comments at <http://forum.icann.org/lists/xxx-icm-agreement/msg00526.html> (last visited May 5, 2009) (.XXX sTLD poses serious free speech challenges), attached hereto as ICANN Exhibit AX; <http://forum.icann.org/lists/xxx-icm-agreement/msg00453.html> (last visited May 5, 2009) (same), attached hereto as ICANN Exhibit AY; <http://forum.icann.org/lists/xxx-icm-agreement/msg00609.html> (last visited May 5, 2009) (Free Speech Coalition opposes creation of .XXX sTLD), attached hereto as ICANN Exhibit AZ.

Let me be clear. The adult entertainment industry, the sponsorship community, not only does not support ICM's proposal but it actively opposes the creation of a dot xxx top-level domain.

Five years ago when ICM approached the free speech coalition with a proposal that could increase our income by tenfold, we turned down that, recognizing the negative ramification that dot xxx [TLD] would have for the industry.

Today industry leaders as well as small webmasters have joined together not only to publicly oppose the creation of a dot xxx TLD but also to fund our trip to this conference, ensuring that their opposition is clearly communicated to the people who will be making this critical decision.

ICM will tell you that it already has met the obligation of sponsorship. Through interest received early in the process before some of the details and dangers had been made apparent and when financial wind falls were promised to many, ICM claimed to have industry support.

Support no longer exists.<sup>421</sup>

276. While there was some (mixed) support for a .XXX sTLD from North American representatives of the adult industry, there did not appear to be much, if any, support from the Internet community (adult entertainment or otherwise) outside of the United States. ICM admits that community support outside of North America was limited to “members from the United Kingdom, Australia, Netherland Antilles, Spain and the Caribbean.”<sup>422</sup> This hardly constitutes “broad-based support” as required by the RFP.<sup>423</sup>

277. With inadequate evidence that the relevant community (even assuming it was clearly defined, which it was not) actually sought, much less supported, the services that ICM

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<sup>421</sup> ICANN Meetings in Lisbon, Portugal, Transcript of ICANN Public Forum, March 29, 2007, *available at* <http://www.icann.org/en/meetings/lisbon/transcript-public-forum-29mar07.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AW.

<sup>422</sup> Confidential Exhibit – Formal Response to ICANN’s Independent Evaluation Report on .XXX sTLD, from Stuart Lawley, ICM, to Kurt Pritz, ICANN, October 9, 2004, attached to ICANN’s Opening Brief as Confidential Exhibit F; *See also* ICANN, New sTLD applications, Appendix D: Evaluation Reports, August 27, 2004, p. 95, Cl. Ex. 110 (“There was considerable support from North American representatives of the adult industry. However, virtual[ly] no support was available from the rest of the world, or from users or other members of this community.”).

<sup>423</sup> New sTLD application, December 15, 2003, Part A. Explanatory Notes – Sponsorship Information – Level of Support from the Community, Cl. Ex. 45.

proposed to offer, the Board plainly was justified in denying ICM's application for failure to satisfy the RFP sponsorship selection criteria. And, with due apologies to the Panel for the repetition of the point, there truly is no basis for a finding that the Board violated its Bylaws or Articles in rejecting the .XXX application after finding that there was no "community" that supported the sponsored TLD.

278. *Fourth*, ICM could not demonstrate that it was adding new and valuable space to the Internet name space, as required by the RFP. To the extent that online adult service providers chose not to register within the .XXX sTLD (and the opposition to the sTLD made clear that there would be many), the .XXX sTLD would represent merely a duplicate space on the Internet. In fact, the existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met via existing TLDs without any need for a new sTLD. Further, the increasing governmental opposition suggested that there might be massive blocking of the .XXX sTLD by individual nations, which further demonstrated a lack of broad geographic scope as the RFP required.<sup>424</sup>

279. *Fifth and finally*, in the February 2007 revised draft agreement, ICM undertook certain commitments regarding policy development and stakeholder protection, including the delegation of issues of "Best Business Practices." Specifically, ICM provided that it will establish "policy development procedures and mechanisms" that include "sufficient opportunity for public comment and input from concerned and affected groups," including procedures that "support informed participation reflecting the functional, geographic, and cultural diversity of the responsible online adult entertainment community and the broader Internet stakeholders at all levels of policy development and decision making."<sup>425</sup> As part of its commitment to resolve global concerns, ICM and its supporting organization, IFFOR, proposed to "proactively reach

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<sup>424</sup> New sTLD application, December 15, 2003, Part A. Explanatory Notes – Community Value – Enrichment of Broad Global Communities, Cl. Ex. 45.

<sup>425</sup> ICM Registry LLC, Appendix S, February 8, 2007, *available at* <http://www.icann.org/en/tlds/agreements/xxx/appendix-S-rev-16feb07.pdf> (last visited May 5, 2009), attached hereto as ICANN Exhibit BA.

out to governments and international organizations to provide information about IFFOR’s activities and solicit input and participation.”<sup>426</sup>

280. Such measures diluted the possibility that the policies would be “primarily in the interests of the Sponsored TLD Community,” as required by the sponsorship selection criteria, because the measures specifically obligated ICM to seek input from multiple governments and organizations on local concerns, which added yet another non-community voice to the policy formulation aspect. And with the inclusion of multiple governments in the policy-making process, ICM ran the specific risk of needing to tailor its policies to conform to the varying legal requirements of the countries, some of which may run counter to the interests of the sponsored community. Moreover, the process by which ICM proposed to address “geography and cultural diversity” and seek foreign input was not clearly defined in the revised registry agreement, which abrogated the RFP requirement for clear definition of the policy-setting mechanisms.<sup>427</sup>

281. In short, despite the good-faith efforts of both ICANN and ICM over a lengthy period of time, the majority of the Board determined that ICM could not satisfy, among other things, the sponsorship requirements of the RFP. The sTLD was controversial worldwide, and no consensus had emerged as to how ICM could address the concerns of the many who had questioned the value of the sTLD. ICANN gave ICM numerous opportunities to demonstrate that the .XXX sTLD could satisfy the criteria set forth in the RFP, but in the end, the majority of the Board was not satisfied that the problems had been adequately addressed. Reasonable people might disagree – including the five members of ICANN’s Board who voted in favor of ICM’s application at the March 2007 Board meeting – but that disagreement does not even approach a violation of a Bylaw or Article of Incorporation. Instead, ICM simply challenges the ultimate outcome, but disagreement with a Board vote does not translate into a “lack of transparency” or “unequal treatment.” It simply means ICM and a majority of the ICANN Board disagreed – nothing more complicated or nefarious than that.

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<sup>426</sup> *Id.*

<sup>427</sup> New sTLD application, December 15, 2003, Part A. Explanatory Notes – Sponsorship Information – Appropriateness of the Sponsoring Organization and the Policy Formulation Environment, Cl. Ex. 45.



**4. ICANN Ultimately Rejected ICM’s Application Due To Its Failure To Satisfy The Sponsorship Criteria, Not Because Of “Vague And Previously Unannounced” Notions Of Public Policy.**

282. ICM claims that ICANN ultimately rejected ICM’s application because of “vague and previously unannounced” public policy concerns and based on a “different definition of the sponsorship criteria.”<sup>428</sup> There is no question that a number of Internet stakeholders raised public policy issues with respect to the overall implications of a .XXX sTLD. There also is no question that ICANN considered the concerns of the GAC, the U.S. Department of Commerce, and the European Commission, among others. Public policy concerns may have played a role in the overall context of the debate, but those concerns were appropriately considered by the Board because it was required under the Bylaws to consider the GAC’s advice. Although the Board’s decision is entitled to substantial deference in view of ICANN’s good faith and robust debate on the issue, ICANN nevertheless has demonstrated in this Response that the Board’s decision was prudent and consistent with its obligations, including its Bylaws and Articles of Incorporation.

**a. The Sponsorship Criteria Were Consistently Applied.**

283. ICM claims that ICANN changed the definition of a sponsored community to require that ICM have the full support of everyone who might possibly be a community member,<sup>429</sup> and that this amounted to a “new and different definition of the sponsorship criteria.”<sup>430</sup> ICM is wrong, as detailed above in Section III.B.3: the ICANN Board carefully applied the RFP’s sponsorship criteria and ultimately determined that ICM failed to satisfy the fundamental sponsorship requirements.

284. The original RFP called for a “[e]vidence of *broad-based support* from the Sponsored TLD Community for the sTLD.”<sup>431</sup> ICM did not come close to satisfying this requirement. Although support for the .XXX sTLD seemed to ebb and flow, by February 2007,

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<sup>428</sup> ICM Memorial ¶¶ 369-77.

<sup>429</sup> *Id.* at ¶ 375.

<sup>430</sup> *Id.*

<sup>431</sup> New sTLD application, December 15, 2003, Part A. Explanatory Notes – Sponsorship Information – Definition of Sponsored TLD Community, Cl. Ex. 45 (emphasis added).

77% of the comments posted on ICANN's public forum were opposed to ICM's .XXX sTLD.<sup>432</sup> Of the various commentators, 88 identified themselves as "webmasters of adult content, of whom 74% were opposed to the creation of ICM's .XXX sTLD."<sup>433</sup> Further, prominent members of the adult entertainment industry, including Larry Flynt Publications and AVN Media Network, were adamantly opposed to the creation of the .XXX sTLD.<sup>434</sup>

285. ICM argues that it had support from the proposed community because ICM received 75,000 pre-registrations for .XXX.<sup>435</sup> Out of the over 4.2 million adult content websites in operation,<sup>436</sup> this tiny number (less than 2%) hardly represents the "broad based support" required under the sponsorship criteria.

286. Further, the view of ICM's expert, Dr. Mueller, that the sponsorship criteria were somehow inconsistently applied is impossible to reconcile with the facts.<sup>437</sup> There is no doubt that the majority of the Board determined, among other things, that ICM failed to meet the baseline sponsorship criteria laid out in the original RFP. Notwithstanding Dr. Mueller's unhappiness with the "institutional structure" of ICANN, the Board consistently applied the sponsorship criteria and did not violate its Bylaws in so doing. ICM simply second-guesses the

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<sup>432</sup> ICANN Minutes, Special Meeting of the Board, February 12, 2007, Cl. Ex. 199.

<sup>433</sup> *Id.*

<sup>434</sup> See, e.g., Letter from L. Flynt, Flynt Management Group, LLC, to ICANN, April 30, 2006, available at <http://www.icann.org/correspondence/flynt-to-board-30apr06.jpg> (last visited May 5, 2009), attached hereto as ICANN Exhibit AT; see also Letter from Steve Orenstein, Wicked Pictures, to ICANN, April 10, 2006, available at <http://www.icann.org/correspondence/orenstein-to-board-10apr06.jpg> (last visited May 5, 2009) (expressing Wicked Pictures' "profound opposition to the establishment of a .XXX" sTLD), attached hereto as ICANN Exhibit AU; see also Letter from Johan Gillborg, Private Media Group, to ICANN, March 22, 2006, available at <http://www.icann.org/correspondence/gillborg-to-board-22mar06.pdf> (last visited May 5, 2009) (expressing Private Media Group's opposition to the creation of the .XXX sTLD and its belief that there is no compelling reason to establish such TLD), attached hereto as ICANN Exhibit AV.

<sup>435</sup> ICM Memorial ¶ 247.

<sup>436</sup> ICM's President "Mr. Lawley estimates there are four million adult websites, owned by 100,000 webmasters." Tom Pullar-Strecker, The Age, *Once again, US blocks porno domain*, available at <http://www.theage.com.au/articles/2006/03/28/1143441122717.html?from=rss> (last visited May 5, 2009), attached hereto as ICANN Exhibit BB; see also BYU Women's Services and Resources, *National Pornography Statistics*, available at <http://wsr.byu.edu/content/view/2591/> (last visited May 5, 2009), attached hereto as ICANN Exhibit BC.

<sup>437</sup> ICM Memorial, Expert Report of Dr. Milton Mueller § 6.3.

Board's judgment as to whether ICM's .XXX application conformed with the RFP. But even if that judgment were flawed (which it was not), there is no evidence that the Board's decision amounted to a violation of ICANN's Bylaws.

**b. ICANN Ultimately Denied ICM's Application Because It Failed To Satisfy The Sponsorship Criteria.**

287. The Board's rejection of ICM's proposed sTLD application on March 30, 2007 was based largely on ICM's inability to meet the sponsored community requirement, which was the key problem identified in ICM's application from the outset.<sup>438</sup> As then-ICANN Board member Ms. Rodin Johnston (who was not a member of the Board during the earlier discussions concerning ICM's application) noted:

[M]y obligation as a board member is to take a look at this application, this applicant, to look at the sponsorship criteria and the content that has been proposed, when I do that myself, I believe that I am compelled to vote no for this application.

As others have said, I don't believe that this is an appropriate sponsored community. I think it's inappropriate to allow an applicant in any sTLD to simply define out what could potentially be any people that are not in favor of a TLD, and particularly in this case where you define those that aren't in favor of this TLD that are part of the adult webmaster community as irresponsible.

288. The reasoning for additional Board members' votes to deny the .XXX sTLD are presented in Section III.B.3.f, above. As the transcripts made clear, these Board members voted to reject the .XXX sTLD because of ICM's sponsorship shortcomings.

289. Even if "public policy" issues had influenced the Board, ICM could hardly have been surprised by that. The original proposal in 2000 for .XXX had been rejected, in part, because the "controversy surrounding .XXX was great."<sup>439</sup> As events unfolded, the Board's ultimate decision was in accord with the views of ICANN's Evaluation Panel, which noted

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<sup>438</sup> P. Twomey Witness Statement, ¶¶ 57, 63; V. Cerf Witness Statement, ¶ 38; A. Pisanty Witness Statement, ¶ 23.

<sup>439</sup> ICANN Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group, November 9, 2000, *available at* <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit E; *see also* ICM Memorial, Dr. Elizabeth Williams Witness Statement, ¶ 7 ("It was also obvious from the 2000 'proof of concept' round that an application for an adult content string would be controversial from a public relations standpoint.").

potential public policy issues in its early communications with ICM. For example, the Evaluation Panel asked ICM to explain how it would deal with “various culturally-based definitions” of the relevant content (*i.e.*, pornography).<sup>440</sup> To that end, the Panel ultimately found that “[t]here can be no disagreement about the fact that the definition of such content and the scope of this content category varies considerably depending on one’s moral, religious, national or cultural perspective.”<sup>441</sup>

290. ICM itself recognized the “need for all stakeholders to feel that they have had an adequate and meaningful opportunity to express their views” and in order to “preserve the integrity of the ICANN process.”<sup>442</sup> Thus, in November 2005, ICM made presentations to the GAC in an effort to satisfy the GAC’s public policy concerns by promising, among other things, “public interest benefits” that would flow from the .XXX sTLD.<sup>443</sup> But, as noted in the GAC’s Wellington Communiqué, the public interest benefits promised by ICM during its November 2005 presentation had not yet been included as ICM’s obligations in the proposed .XXX registry agreement. ICM knew, early on, that it had to satisfy the public policy concerns raised in the GAC’s Wellington Communiqué and live up to its own promises of public interest benefits.<sup>444</sup>

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<sup>440</sup> Confidential Exhibit – Evaluation Team Questions for ICM and IFFOR, attached to ICANN’s First Brief as Confidential Ex. A.

<sup>441</sup> ICANN, New sTLD applications, Appendix D: Evaluation Reports, August 27, 2004, p. 95, Cl. Ex. 110.

<sup>442</sup> Letter from Stuart Lawley, ICM, to Paul Twomey, ICANN, August 15, 2005, *available at* <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf> (last visited May 5, 2009), attached hereto as ICANN Exhibit S.

<sup>443</sup> *See* Confidential Exhibit - ICM Slide Presentation, attached to ICANN’s First Brief as Confidential Ex. H.

<sup>444</sup> GAC Communiqué – Wellington, New Zealand, March 28, 2006, Cl. Ex. 181 (“ICM Registry promised a range of public interest benefits as part of its bid to operate the .xxx domain. To the GAC’s knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement negotiated with ICANN.”).

**c. The Fact That the GAC’s Comments Regarding The .XXX sTLD Came After ICM Had Submitted Its Proposal To ICANN Was Not A Basis To Ignore Those Comments.**

291. ICANN rejected ICM’s application due to its failure to satisfy the sponsorship criteria,<sup>445</sup> which were clearly defined and previously announced in the RFP and were known by ICM to be of concern at the outset of and throughout the negotiation of the registry agreement.<sup>446</sup> The fact that those negotiations continued as the GAC expressed its concerns does not alter the fact that the sponsorship concerns were a principal issue.

292. That the GAC did not express views prior to June 2005 certainly was not a basis to ignore the GAC’s views once they were expressed. There appear to have been at least two reasons the GAC did not comment on the .XXX sTLD prior to the June 1, 2005 ICANN Board vote. First, some countries believed (erroneously) that, because ICM’s .XXX *unsponsored* TLD had been rejected in the 2000 “proof of concept” round, it would not be considered in the new sTLD round. Second, because the Evaluation Panel had rejected the .XXX sTLD application for failure to satisfy the sponsorship selection criteria, many countries likely believed that the application would not be allowed to proceed.

293. Whatever the reason for the timing of the GAC’s statements, ICM’s position that ICANN should have disregarded the GAC’s concerns because they were articulated during the so-called “second step” of the process cannot possibly amount to a violation of ICANN’s Bylaws because the Bylaws expressly require the Board to consider the GAC’s opinions, whenever expressed. ICM’s position also depends on a finding that the ICANN Board “finally” approved the .XXX sTLD in June 2005, which did not occur.

294. In addition to expressing public policy concerns, the GAC also noted the sponsorship deficiencies in ICM’s application and proposed registry agreements in each of its communications to ICANN.<sup>447</sup> Amid the GAC’s concerns regarding the sponsorship

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<sup>445</sup> Meeting of the Board, Transcript, March 30, 2007, Cl. Ex. 201.

<sup>446</sup> See New sTLD application, December 15, 2003, Part A. Explanatory Notes – Sponsorship Information, Cl. Ex. 45.

<sup>447</sup> See GAC Communiqué – Vancouver, Canada, December 1, 2005, available at <http://old.gac.icann.org/web/communiques/gac23com.pdf> (last visited May 5, 2009) (“[T]he GAC

deficiencies of ICM's application, and the atmosphere of disintegrating support and opposition among prominent members of the community ICM purported to represent, ICM's speculation that its application was rejected solely due to "vague and previously unannounced" notions of public policy is unfounded. ICM's application was rejected for its failure to satisfy the sponsorship criteria.<sup>448</sup> In addition to its failure to satisfy those baseline criteria, the Board's consideration of public policy concerns raised by the GAC was not only appropriate but required under the Bylaws.

**C. AT EVERY STAGE OF THE EVALUATION PROCESS, ICANN COMPLIED WITH ITS BYLAWS AND ARTICLES IN CONSIDERING AND DENYING ICM'S STLD APPLICATION.**

295. The facts simply do not support ICM's claims that ICANN violated its Bylaws and Articles of Incorporation. The Board's discussions concerning ICM's .XXX sTLD application were open and transparent; its decisions, which are entitled to substantial deference, were made in good faith; the Board did not apply its procedures in a discriminatory manner; and ICM was at all times given substantial opportunities to be heard.

**1. At All Times, ICANN Operated In An Open, Transparent, And Procedurally Fair Manner.**

296. ICM claims that ICANN failed to act openly and transparently and in a procedurally fair manner. ICM's misguided perceptions notwithstanding, all of ICANN's actions were open, transparent, and procedurally fair.

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(continued...)

welcome[s] the decision to postpone the Board's consideration of the .XXX application . . . until such time as the GAC has been able to review the Evaluation Report . . ."), attached hereto as ICANN Exhibit BD; GAC Communiqué – Wellington, New Zealand, March 28, 2006, Cl. Ex. 181 ("The GAC would request a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria."); GAC Communiqué – Lisbon, Portugal, March 28, 2007, Cl. Ex. 200 ("The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria.").

<sup>448</sup> Meeting of the Board, Transcript, March 30, 2007, Cl. Ex. 201.

**a. ICANN Operated With Openness And Transparency.**

297. ICM alleges that ICANN failed to act openly and transparently by failing to adhere to the selection criteria established in the RFP.<sup>449</sup> Specifically, ICM asserts that (i) “despite the erroneous conclusions of the” Review Panel, ICM’s application clearly satisfied the sponsorship criteria”; (ii) the ICANN Board “specifically determined that ICM’s application met the criteria when it approved the resolutions allowing ICM to proceed to registry agreement negotiations” on June 1, 2005; (iii) the ICANN Board “reversed” this decision because of “sponsorship issues” and “vague and previously unannounced criteria such as ‘public policy issues’”; and (iv) that the ultimate rejection of the .XXX sTLD was based on a “different definition of the sponsorship criteria, one that apparently required the applicant to have the full support of everyone who might possible be a community member.”<sup>450</sup> All of this, according to ICM, “are clear violations of the obligation to be open and transparent.”<sup>451</sup> ICM’s disagreement with the Board’s honest judgments and carefully crafted decision does not support a conclusion that the ICANN Board violated its Bylaws. In any event, ICM is wrong in each instance.

298. *First*, ICM did not satisfy the sponsorship criteria, as ICM contends. As explained above, a majority of the Board determined that ICM failed to set forth a precisely defined community, proposed language that would require ICANN to monitor (outside of its technical mandate) illegal and offensive content according to all law globally, could not identify a community that was comprised of persons with needs and interests in common but which are differentiated from those of the general global Internet community, and ultimately failed to garner support from the larger online adult entertainment provider community. Each of these facts placed ICM directly at odds with the requirements set forth in the RFP at the outset of the sTLD process.

299. *Second*, the ICANN Board did not approve the .XXX sTLD application on June 1, 2005. All of the evidence identified throughout this Response proves that the Board’s

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<sup>449</sup> ICM Memorial ¶¶ 369-377.

<sup>450</sup> *Id.* at ¶¶ 372-375.

<sup>451</sup> *Id.* at ¶ 377.

June 1, 2005 vote did *not* determine that ICM had satisfied the RFP selection criteria, including sponsorship.

300. *Third*, ICANN never “reversed” its decision because ICANN never found that ICM satisfied the RFP requirements in the first place. ICANN’s final decision to deny ICM’s application was based on ICM’s inability to satisfy the sponsorship selection criteria as set forth clearly in the RFP.

301. *Fourth and finally*, the ultimate rejection of the .XXX sTLD was not based on a “different definition of the sponsorship criteria, one that apparently required the applicant to have the full support of everyone who might possibly be a community member.”<sup>452</sup> The RFP explicitly required the proposed sTLD to address the needs and interests of a “clearly defined community” that can benefit from the establishment of the sTLD. The RFP further required that applicants demonstrate that the sTLD community was “precisely defined, so it can be determined which persons or entities make up that community.” ICM defined the sponsoring community as the “responsible online adult-entertainment community.” The Board’s vote made clear that ICM’s defined community was based on self-selection and was not capable of objective definition. Moreover, unlike other sTLD applicants, ICM’s proposed community did not yet exist. As a result, ICM was asking ICANN to evaluate a proposed hypothetical community that ICM believed would coalesce around the .XXX TLD. In short, ICM did not propose a “clearly defined community” as required by the RFP.

302. ICM was never in the dark on any of these issues. Instead, ICM was apprised of all relevant procedures, standards, and decisions throughout the process. ICM was provided with copies of all materials used in the evaluation process, and minutes of the Board’s meetings were posted on ICANN’s website. Indeed, nearly all of documents ICM relies upon to establish the factual record in its brief are publicly available documents.

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<sup>452</sup> ICM Memorial ¶ 375.



**b. ICANN's Review Was Procedurally Fair.**

303. ICM argues that ICANN failed to provide procedural fairness because, ICM believes: (1) the RFP process called for a rigid two-step evaluation wherein, if an applicant cleared the “first step” by entering contract negotiations, it necessarily satisfied all RFP criteria and ICANN could not subsequently revisit the RFP criteria – even if it appeared that the applicant’s intractable problems with respect to those criteria could not be addressed through any number of proposed registry agreements; (2) ICANN allegedly added new, substantive criteria by considering the GAC’s public policy comments with respect to ICM’s application; and (3) ironically, given ICM’s claims that ICANN did not act openly and transparently, ICM believes that ICANN should *not* have published the Evaluation Panel’s reports because they contained negative comments with respect to ICM’s application.<sup>453</sup>

304. As discussed above, the ICANN Board’s process for evaluating ICM’s sTLD application was both consistent with ICANN’s Bylaws and procedurally fair under California law. First, there was never an inflexible two-step sequential process. The Board could not know if an sTLD application would be able to satisfy the RFP criteria, including sponsorship, until it was shown how the applicant’s ideas would be implemented in the registry agreement. Thus, an evaluation process divided into two concrete and inflexible “steps” would be unworkable in practice, at least with respect to proposed sTLDs that had “sponsorship issues,” because it would have been impractical for the Board to commit to a new sTLD without knowing the details of the registry that would operate it. While there is no doubt that ICANN employed a two-staged process – insofar as the evaluation of the RFP criteria and contractual negotiations involved different functions – both of these phases needed to be completed before a sTLD application could be submitted to the Board for approval, and the evaluation process and contract negotiations could overlap in time. This was absolutely consistent with how ICANN managed the earlier TLD expansion in 2000 as well.

305. ICM was not the only sTLD applicant that ICANN permitted to move on to contract negotiations before satisfying the selection criteria. Applications for .jobs and .mobi were also allowed to proceed to contract negotiations despite open questions relating to the RFP

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<sup>453</sup> *Id.* ¶¶ 386-93.

selection criteria.<sup>454</sup> This negates any notion put forth by ICM that ICANN somehow applied “new substantive criteria in evaluating ICM’s application.”<sup>455</sup> ICM was treated in a non-discriminatory manner.

306. It is ironic that ICM complains of being treated “unfairly” in this process given that ICM was permitted numerous additional opportunities – opportunities that were not called for in the RFP – to prove to ICANN that it could satisfy the sponsorship criteria. For instance, after the Evaluation Panel’s initial findings, the ICANN Board instructed the Evaluation Panel to reconsider its findings as to all applicants; this was not called for in the ICANN evaluation schedule. After the Evaluation Panel confirmed its initial findings, ICANN gave each of the applicants an opportunity to respond in writing to the findings; this also was not called for in the ICANN evaluation schedule. After ICM responded to the findings of the Evaluation Panel, ICANN offered ICM an opportunity to make an oral presentation to the Board; this also was not called for in the ICANN evaluation schedule. Then, the Board voted to proceed to contract negotiations, despite significant concerns on the critical sponsorship issues. There is no conceivable basis that any of this could be viewed as “unfair,” much less in derogation of ICANN’s Bylaws.

307. The Board’s authorization to ICANN staff to commence negotiations on a registry agreement did not reflect an unconditional approval of ICM’s .XXX sTLD.<sup>456</sup> Therefore, ICANN did not “approve” the .XXX sTLD on June 1, 2005, and subsequently “reverse” that decision, as ICM contends.

308. ICANN made its ultimate decision to reject ICM’s application and proposed registry agreement by applying documented policies neutrally and objectively, with integrity and fairness. ICM was provided with every opportunity to address the concerns of the Board and the GAC, and ICM provided numerous memoranda to the Board and the GAC. Multiple drafts of

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<sup>454</sup> See, e.g., ICANN Minutes, Special Meeting of the Board, December 13, 2004, Cl. Ex. 116.

<sup>455</sup> ICM Memorial ¶ 390.

<sup>456</sup> See P. Twomey Witness Statement ¶ 28.

the proposed registry agreement were presented to the Board for its consideration, and the Board devoted countless hours evaluating and debating the merits of ICM's application.

309. Finally, ICM takes the position that ICANN should not have published the Evaluation Panel's reports because they reflected negatively on ICM's application.<sup>457</sup> ICM, which also alleges that ICANN did not act in an open and transparent manner, asks the Panel to find that ICANN violated its Bylaws because it publicly disclosed information about the status of ICM's sTLD application during the selection process. ICM appears not to recognize the irony of its position. While ICM may have preferred that the negative conclusions of the Evaluation Panel not be published, there can be no credible argument that ICANN's Articles and Bylaws required their suppression.

## **2. ICANN Did Not Apply Its Procedures In A Discriminatory Fashion.**

310. ICM maintains that ICANN applied its procedures in a discriminatory fashion by considering public policy issues that were unique to ICM's application, defining the sTLD community and requirement of "broad-based support" differently with respect to ICM's application, and allowing different contract terms to be used during negotiations of the proposed registry agreement.<sup>458</sup> Here, again, ICM is wrong.

311. As discussed above, ICANN did not reject ICM's application based only on issues of public policy (although these were important and well-reasoned concerns). ICM's sTLD application was rejected because of ICM's inability to show how the sTLD would satisfy the sponsorship criteria. The definitions relevant to those criteria never changed during the contract negotiations, nor were they applied any differently with respect to ICM's application. This much is clear from the consistency of the Board's ultimate decision to reject ICM's application for many of the same sponsorship concerns noted in the initial recommendation of the Evaluation Panel.

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<sup>457</sup> ICM Memorial ¶ 393.

<sup>458</sup> *Id.* ¶¶ 399-404.

312. ICM has no basis to argue that it was treated differently than other sTLD applicants. ICANN applied its standards, policies, procedures, and practices equitably, without singling out any particular party for disparate treatment. The fact that ICM's application ultimately was rejected obviously does not, by itself, lead to the conclusion that ICM was treated differently. Any applicant presenting an application having the infirmities of ICM's .XXX application would have been rejected. And the length of time that ICANN devoted to the ICM application hardly reflects a breach of ICANN's Bylaws or Articles (much less "bad faith" on ICANN's part).

313. Similarly, the fact that certain contract terms for ICM may have been different from those proposed for the registry agreements for other sTLDs is not a manifestation of a discriminatory intent, but simply reflects the inherent differences among the needs of the proposed Sponsored TLD communities.

314. ICM's application was (by far) the most controversial and complicated application. The fact that some Board members disagreed with the Board's final vote in March 2007 shows that ICM's application was the subject of legitimate debate among the members of the Board, and that ICM was able to persuade some, but ultimately not a majority, of Board members that its .XXX sTLD application met the criteria set forth in the RFP. Such disagreement is not evidence of discriminatory treatment of ICM's application.<sup>459</sup>

315. In sum, the fact that ICANN's Board ultimately turned down this sTLD application obviously does not mean that the Board must have "mistreated" the applicant. The facts demonstrate that ICM was treated fairly.

### **3. ICANN Did Not Act In Excess Of Its Mission.**

316. ICM argues that ICANN acted in excess of its purpose and mission, which is to protect the stability, integrity, and utility of the Internet domain name system. ICM contends that the Board's rejection of ICM's application was premised on a "substantive judgment of Internet

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<sup>459</sup> ICM Memorial, ¶¶ 239- 242.

content,” which was beyond ICANN’s technical mandate.<sup>460</sup> But no such rationale was ever articulated by the Board or could be inferred from the process.

317. To the contrary, ICANN did not reject ICM’s application based on a “substantive judgment of Internet content,” but because ICM could not satisfy the sponsorship criteria, and also because ICM’s proposed registry agreement would have required ICANN to manage the content of the .XXX sTLD – exactly the type of content-based function that ICM now complains is improper. Under these circumstances, the fact that Board decided that ICANN’s mission was best served by denial of ICM’s application does not demonstrate any objective error in judgment or lack of good faith on the part of the Board. Certainly, it cannot be said that the Board acted in excess of its mission.

**4. The Board Reached Its Decision Independently, Giving Due Consideration, As It Was Required Under the Bylaws, To The GAC’s Comments.**

318. ICM alleges that ICANN violated the Bylaws provisions with respect to the GAC. Recognizing that the Board is required under the Bylaws to consider the GAC’s advice on issues of public policy, ICM claims that the Board was “overly deferential” to the GAC’s concerns.<sup>461</sup>

319. The Bylaws do not limit the extent to which the Board can consider the GAC’s views. Although ICANN did take into account the opinion of the GAC as well as other Internet stakeholders, as it was required to do under the Bylaws, the Board reached its decision independently and rejected ICM’s proposal based on the RFP selection criteria. Had the ICANN Board taken the view that the GAC’s views must in every case be followed without independent judgment, the Board presumably would have rejected ICM’s application in late 2005 or early 2006, rather than waiting another full year for the parties to try to identify a resolution that would have allowed the sTLD to proceed.

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<sup>460</sup> *Id.* ¶¶ 405-11.

<sup>461</sup> *Id.* ¶¶ 412-14.

## 5. ICANN Did Not Violate International Law.

320. The same facts foreclose ICM's international law claims. As shown above, *see supra* section III.A.3, the principles of international law that ICM cites are inapplicable to this proceeding for a variety of reasons. The Panel should therefore disregard such claims.

321. Further, each of ICM's international law principles – the duty of good faith (and related applications), abuse of rights, legitimate expectations, and estoppel – depends upon the same assumptions of wrongdoing on the part of ICANN that never actually occurred. Thus, ICM's international law claims, unsupportable as they are as a matter of law, fail even to provide an alternative basis to support claims against ICANN, but rather merely repackage the same erroneous factual arguments in a different guise.<sup>462</sup>

## IV. CONCLUSION AND PROPOSED FORMAT FOR THE HEARING

322. For all of the reasons set forth above, the Panel should declare, pursuant to Article IV, Section 12 of the Bylaws, that the ICANN Board did not act inconsistently with ICANN's Articles and Bylaws. At every stage of ICANN's comprehensive review and ultimate denial of ICM's .XXX sTLD application, the ICANN Board fully complied with the provisions in the Articles and Bylaws raised by ICM – providing an open, transparent, and procedurally fair process; applying its procedures in a non-discriminatory fashion; adhering to ICANN's purpose and mission; and reaching its decision independently based on the RFP selection criteria. ICM is simply trying to second-guess the well-reasoned and careful judgment of the ICANN Board, which is not the proper subject of an independent review proceeding.

323. The Panel should further declare, again pursuant to Article IV, Section 12 of the Bylaws, that ICANN is the prevailing party; that ICM is the party not prevailing; and that ICM is responsible for bearing all costs of the independent review process provider (*i.e.*, the ICDR).

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<sup>462</sup> *See, e.g.*, Caron Opinion ¶ 99 (noting that the principle of good faith is “an analog to the business judgment rule”). ICANN further notes that Article 4 does not require “perfect compliance” with any international legal principles that may apply. Caron Opinion ¶¶ 41-44; *id.* ¶ 41 (noting that “in conformity with” is “not a precise standard”). Because Article 4 requires only that ICANN act “in conformity with” such principles, ICANN's consistency with its other Bylaws and Articles *a fortiori* satisfies Article 4.

The Panel should also declare that, as the party not prevailing, ICM is not entitled to any of the relief it seeks.

324. ICANN looks forward to the hearing that is scheduled to begin on September 21, 2009. ICANN respectfully submits that this hearing should be limited to the equivalent of a closing argument. The parties have provided the Panel with a substantial amount of briefing, and counsel should be prepared to address these issues, perhaps in a sequenced manner, during the course of the hearing.

325. ICANN does not believe, however, that the hearing should involve live testimony from the witnesses who have submitted statements in conjunction with these proceedings. The parties already have submitted considerable evidence by way of witness statements as well as documentation. While live testimony might (or might not) supplement the factual record in some way, the Panel has ample facts on which to determine whether the Board violated its Bylaws or Articles of Incorporation. It is hard to imagine that further development of the factual record would be useful in facilitating the Panel's work. ICM's counsel even told the Panel that ICM would be satisfied to present a response in a reply brief instead of holding any live hearing.<sup>463</sup>

326. Although a hearing with live witnesses is not forbidden by the Bylaws that created this independent review process, the procedures that apply to this unique process of independent review certainly support a hearing limited to attorney presentation, without live witnesses. The Bylaws provide that this independent review proceeding be conducted in a manner "to keep the costs and burdens of independent review as low as possible,"<sup>464</sup> and encourage resolution of disputes "on the papers" using email and conference calls as necessary.<sup>465</sup> Nowhere do the procedures contemplate the presentation of live witnesses.

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<sup>463</sup> See Email Correspondence from Arif Hyder Ali to the Panel (Apr. 16, 2009) (stating that ICM would be satisfied responding to ICANN's submission "*either* at a hearing on the merits *or* through a written response") (emphasis added), attached hereto as ICANN Exhibit BE.

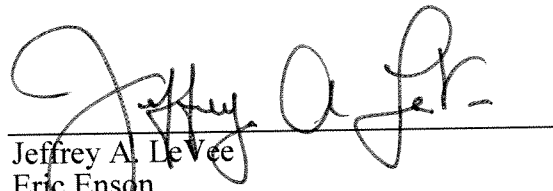
<sup>464</sup> ICANN Bylaws, *supra* note 2, Article IV, § 3.10.

<sup>465</sup> See *id.* at Article IV, § 3.10 ("In order to keep the costs and burdens of independent review as low as possible, the [Panel] should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone."); see also

Indeed, the procedures specify that the Panel “shall make its declaration based solely on the documentation, supporting materials, and arguments *submitted* by the parties.”<sup>466</sup>

327. For all of these reasons, ICANN proposes that the hearing that the Panel has scheduled to begin September 21, 2009 consist of detailed closing arguments by counsel, but not provide for live witness testimony. The closing argument could, for example, be structured according to the various legal and factual issues that the parties have addressed in ICM’s Memorial and ICANN’s Response.

Respectfully submitted,



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(continued...)

Supplementary Procedures, *supra* note 151, Supplementary Procedure 4 (“The IRP should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP may conduct telephone conferences.”).

<sup>466</sup> ICANN Bylaws, *supra* note 2, Article IV, § 3.12 (emphasis added).



## APPENDIX A

## Appendix A: Chronology of Key Events

DATE	EVENT
<b>1998</b>	
<b>September 30, 1998</b>	<ul style="list-style-type: none"> <li>Articles of Incorporation filed and ICANN formed</li> </ul>
<b>November 6, 1998</b>	<ul style="list-style-type: none"> <li>Bylaws (original version) adopted</li> </ul>
<b>November 21, 1998</b>	<ul style="list-style-type: none"> <li>Bylaws modified to provide for independent third-party review of Board actions alleged by an affected party to have “violated the Corporation’s articles of incorporation or bylaws.”</li> </ul>
<b>2000</b>	
<b>July 16, 2000</b>	<ul style="list-style-type: none"> <li>ICANN Board adopts policy for the introduction of new TLDs</li> </ul>
<b>August 15, 2000</b>	<ul style="list-style-type: none"> <li>ICANN posts criteria to be used in the “proof of concept” round for assessing gTLD applications.</li> <li>ICM Registry’s unsponsored .XXX TLD application is one of 47 proposals submitted to ICANN</li> </ul>
<b>November 9, 2000</b>	<ul style="list-style-type: none"> <li>Report issued by ICANN staff evaluating each TLD proposal.</li> <li>ICM’s .XXX unsponsored TLD proposal is not selected for 3 reasons: (1) “it did not appear to meet unmet needs;” (2) “the controversy surrounding .XXX was great;” and (3) the application included a “poor definition of the hoped-for benefits of [] .XXX.”</li> </ul>
<b>2002</b>	
<b>June 20, 2002</b>	<ul style="list-style-type: none"> <li>ICANN Board adopts recommendation from the Committee on ICANN Evolution and Reform (“ERC”) that would “create a process to require <i>non-binding</i> arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN’s Bylaws.”</li> </ul>
<b>August 1, 2002</b>	<ul style="list-style-type: none"> <li>ERC states: “We do not believe that ICANN should have either a Supreme Court or a ‘Super Board’ with the ability to nullify decisions reached by the ICANN Board, which will be the most broadly representative body within the ICANN structure.”</li> </ul>
<b>October 2, 2002</b>	<ul style="list-style-type: none"> <li>ERC states that “a ‘Supreme Court,’ with the power to revisit and potentially reverse or vacate decisions of the ICANN Board, would itself raise many difficult questions” and thus is not the process recommended by the ERC.</li> </ul>
<b>October 18, 2002</b>	<ul style="list-style-type: none"> <li>ICANN President Stuart Lynn issues “A Plan for Action Regarding New gTLDs”</li> </ul>
<b>December 15, 2002</b>	<ul style="list-style-type: none"> <li>ICANN contemplates draft Request for Proposal (RFP) for purpose of soliciting proposals for a limited number of additional new sponsored TLDs.</li> </ul>
<b>December 15, 2002</b>	<ul style="list-style-type: none"> <li>ICANN Board adopts ERC’s proposed Bylaws, but replaces the ERC’s reference to IRP “decisions” with the term “declarations.”</li> </ul>
<b>2003</b>	
<b>December 15, 2003</b>	<ul style="list-style-type: none"> <li>ICANN launches round for sTLDs and posts final RFP.</li> <li>The final RFP requests information on: (1) Sponsorship; (2) Business Plan; (3) Technical Standards; and (4) Community Value.</li> </ul>

## Appendix A: Chronology of Key Events

DATE	EVENT
<b>2004</b>	
<b>March 19, 2004</b>	<ul style="list-style-type: none"> <li>ICANN receives 10 applications for sTLDs, including one from ICM Registry for the introduction of .XXX.</li> </ul>
<b>April 7, 2004</b>	<ul style="list-style-type: none"> <li>Independent Evaluation Panel is appointed to review sTLD applications.</li> </ul>
<b>August 27, 2004</b>	<ul style="list-style-type: none"> <li>Independent Evaluation Panel submits its reports on each sTLD application. ICM's application is found to meet both the technical and business selection criteria but not the sponsorship selection criteria.</li> <li>Evaluation Panel recommends that ICANN not consider ICM's application further.</li> </ul>
<b>August 31, 2004</b>	<ul style="list-style-type: none"> <li>ICANN Board encourages ICM to review the Evaluation Panel's report and suggest how the Evaluation Panel's concerns could be addressed.</li> </ul>
<b>October 9, 2004</b>	<ul style="list-style-type: none"> <li>ICM provides list of reasons why Evaluation Panel was mistaken as to sponsorship.</li> </ul>
<b>2005</b>	
<b>May 3, 2005</b>	<ul style="list-style-type: none"> <li>Special Meeting of the ICANN Board. Detailed discussion regarding .XXX and whether or not the application meets the "sponsored community" criteria of the RFP</li> </ul>
<b>June 1, 2005</b>	<ul style="list-style-type: none"> <li>Special Meeting of the ICANN Board. Board adopts two resolutions: (1) authorizing the President and General Counsel to enter negotiations with ICM relating to the proposed commercial and technical terms; and (2) requesting the President to present a negotiated agreement to the Board for approval and authorization.</li> </ul>
<b>July 11-12, 2005</b>	<ul style="list-style-type: none"> <li>GAC Meeting in Luxembourg. Concerns expressed about .XXX sTLD</li> <li>GAC Communiqué asks ICANN to hold consultations on new TLDs and looks forward to providing advice on the process.</li> </ul>
<b>August 9, 2005</b>	<ul style="list-style-type: none"> <li>First draft .XXX sTLD registry agreement posted and submitted to the ICANN Board.</li> </ul>
<b>August 15, 2005</b>	<ul style="list-style-type: none"> <li>ICM requests that ICANN Board "defer final approval of the ICM Registry Agreement until its September call."</li> </ul>
<b>August 16, 2005</b>	<ul style="list-style-type: none"> <li>Special Meeting of the ICANN Board. Review of the .XXX sTLD Registry Agreement deferred until Board's September 15, 2005 Meeting.</li> </ul>
<b>August – Sept. 2005</b>	<ul style="list-style-type: none"> <li>"Strong opposition to the creation of a .XXX TLD" expressed by numerous governments and entities.</li> </ul>
<b>September 15, 2005</b>	<ul style="list-style-type: none"> <li>Special Meeting of the ICANN Board. Board expresses concerns about proceeding with the .XXX sTLD domain name</li> <li>ICANN President and General Counsel directed to discuss possible contract modifications to ensure compliance with RFP specifications</li> </ul>
<b>November 29, 2005</b>	<ul style="list-style-type: none"> <li>GAC meeting in Vancouver.</li> <li>Presentation by ICANN Board to the GAC on .XXX; consideration of the .XXX Application will be postponed as requested.</li> <li>Presentation by ICM to the GAC; ICM promises a range of public interest</li> </ul>

## Appendix A: Chronology of Key Events

DATE	EVENT
	benefits.
<b>2006</b>	
<b>March 30, 2006</b>	<ul style="list-style-type: none"> <li>• GAC’s “Wellington Communiqué ” published.</li> <li>• Several GAC members are “emphatically opposed from a public policy perspective to the introduction of a .XXX sTLD.”</li> </ul>
<b>March 31, 2006</b>	<ul style="list-style-type: none"> <li>• ICANN Board Meeting. Board directs President and General Counsel to “analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD Registry Agreement.”</li> </ul>
<b>April 18, 2006</b>	<ul style="list-style-type: none"> <li>• ICM submits – and ICANN posts – revised draft .XXX Registry Agreement.</li> <li>• ICM requests a vote on the Agreement at the Board’s May 10, 2006 meeting.</li> </ul>
<b>May, 10 2006</b>	<ul style="list-style-type: none"> <li>• ICANN’s Board Meeting. Board votes 9-5 against ICM’s then-current draft of the proposed .XXX Registry Agreement, but does not reject ICM’s application outright.</li> </ul>
<b>2007</b>	
<b>January 5, 2007</b>	<ul style="list-style-type: none"> <li>• Revised Proposed Registry Agreement for the .XXX sTLD is posted.</li> </ul>
<b>February 12, 2007</b>	<ul style="list-style-type: none"> <li>• Special meeting of the Board.</li> <li>• Majority expresses concerns about whether .XXX has the support of a clearly-defined sponsored community.</li> <li>• ICANN Staff directed to consult with ICM to provide further information at the Board’s next meeting.</li> </ul>
<b>March 28, 2007</b>	<ul style="list-style-type: none"> <li>• ICM gives presentation to ICANN Board on support in the Sponsored Community.</li> </ul>
<b>March 30, 2007</b>	<ul style="list-style-type: none"> <li>• The GAC Lisbon Communiqué published.</li> </ul>
<b>March 30, 2007</b>	<ul style="list-style-type: none"> <li>• ICANN Board approves a resolution rejecting the Revised Agreement with ICM and denying ICM’s application for the .XXX sTLD.</li> </ul>
<b>2008</b>	
<b>June 6, 2008</b>	<ul style="list-style-type: none"> <li>• ICM files a Request for Independent Review with the International Centre for Dispute Resolution.</li> </ul>

## APPENDIX B

**Appendix B: Comparison of the RFP and How ICM Failed to Meet the RFP Criteria**

RFP Criteria	How ICM Failed to Meet RFP Criteria
<ul style="list-style-type: none"> <li>• <b><u>Sponsorship Information</u></b> <ol style="list-style-type: none"> <li>1. <b>Definition of a sponsored community</b> (The RFP required that the proposed sTLD address the needs and interests of a “<b>clearly defined community</b>” that can benefit from the establishment of the sTLD, and required that the community be “<b>comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community.</b>”);</li> <li>2. Support by a Sponsoring Organization</li> <li>3. <b>The appropriateness of the Sponsoring Organization (including that it operate primarily in the interests of the sTLD Community); and</b></li> <li>4. <b>“Broad-Based Support from the Community” is a “Key Requirement”</b></li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>ICM failed to set forth a precisely defined community.</b> <ul style="list-style-type: none"> <li>○ ICM defined the sponsoring community as the “responsible online adult-entertainment community.” ICM’s defined community was based on self-selection and was not capable of objective definition. ICM’s proposed community did not yet exist. As a result, ICM was asking ICANN to evaluate a hypothetical community that ICM believed would coalesce around the .XXX TLD. In short, the community was not “clearly defined.”</li> </ul> </li> <li>• <b>ICM failed to identify a community that was “comprised of persons with needs and interests in common but which are differentiated from those of the general global Internal community.”</b> <ul style="list-style-type: none"> <li>○ ICM failed to meet this portion of the RFP specification because of its selective membership. The sponsored community as defined by ICM was but a subset of all online adult entertainment providers (i.e., those that supported the sTLD), and ICM never provided any documentation or information that the excluded providers had separate needs or interests from the sponsored community it sought to represent.</li> </ul> </li> <li>• <b>ICM failed to propose policies “primarily in the interests of the Sponsored TLD Community.”</b> <ul style="list-style-type: none"> <li>○ ICM undertook to delegate issues of “Best Business Practices” in the proposed registry agreement. Such measures diluted the possibility that the policies would be “primarily in the interests of the Sponsored TLD Community” because the measures specifically obligated ICM to seek input from foreign governments and organizations on local concerns, which added yet another non-community voice to the policy formulation aspect.</li> </ul> </li> <li>• <b>ICM ultimately failed to garner support from the larger online adult entertainment provider community.</b> <ul style="list-style-type: none"> <li>○ During the final public comment period, the majority of the comments posted to the public forum and sent to ICANN staff opposed ICM’s .XXX sTLD. ICM was not able to provide evidence to the contrary.</li> </ul> </li> </ul>

<ul style="list-style-type: none"> <li>• <b><u>Community Value</u></b> <ol style="list-style-type: none"> <li>1. <b>Addition of new value to the Internet name space;</b></li> <li>2. Protecting the rights of others;</li> <li>3. Assurance of charter-compliant registrations and avoidance of abusive registration tactics;</li> <li>4. Assurance of adequate dispute-resolution mechanisms; and</li> <li>5. Provision of ICANN-policy compliant WHOIS service</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>ICM failed to demonstrate that it was adding new and valuable space to the Internet Name Space.</b> <ul style="list-style-type: none"> <li>○ To the extent that online adult service providers chose not to register within the .XXX sTLD (and the opposition to the sTLD made clear that there would be many), the .XXX sTLD would represent merely duplicate space on the Internet.</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• <b><u>Technical Standards</u></b> <ol style="list-style-type: none"> <li>1. Ability to ensure stable registry operation;</li> <li>2. Ability to ensure best practices;</li> <li>3. A full range of registry services; and</li> <li>4. Assurance of continuity of registry operation in the event of business failure of the proposed registry</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>ICM proposed language that would require ICANN to monitor illegal and offensive content according to all law globally. This requirement fell outside of ICANN’s mandate.</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b><u>Business Plan Information</u></b> <ol style="list-style-type: none"> <li>1. Business Plan; and</li> <li>2. Financial Plan</li> </ol> </li> </ul>	