

Exhibit 1


[GET STARTED \(/GET-STARTED\)](#)
[NEWS & MEDIA \(/NEWS\)](#)
[POLICY \(/POLICY\)](#)
[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)
[RESOURCES \(/RESOURCES\)](#)
[COMMUNITY \(/COMMUNITY\)](#)
[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

Resources

▶ [About ICANN
\(Internet Corporation
for Assigned Names
and Numbers\)](#)
(/resources/pages/welcome-15
2012-02-25-en)

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

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

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

▶ [Groups](#)
(/resources/pages/groups-
2012-02-06-en)

[Business](#)
(/resources/pages/business)

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

▶ [Complaints Office](#)
(/resources/pages/complaints-
office-2017-04-26-en)

[Contractual
Compliance](#)

Adopted Board Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

1. Consent Agenda:

a. Approval of Board Meeting Minutes

b. Outsource Service Provider Zensar Contract Approval

Rationale for Resolutions 2018.03.15.02 - 2018.03.15.03

c. New GNSO (Generic Names Supporting Organization) Voting Thresholds to address post-transition roles and responsibilities of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community - Proposed Changes to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws

Rationale for Resolution 2018.03.15.04

d. Initiating the Second Review of the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization))

Rationale for Resolutions 2018.03.15.05 - 2018.03.15.06

e. Transfer of the .TD (Chad) top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC)

Rationale for Resolution 2018.03.15.07

f. Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting

g. Thank you to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting

[\(/resources/pages/compliance-2012-02-25-en\)](/resources/pages/compliance-2012-02-25-en)

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

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

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

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

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

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

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

Universal Acceptance Initiative
[\(/resources/pages/universal-acceptance-2012-02-25-en\)](/resources/pages/universal-acceptance-2012-02-25-en)

Policy
[\(/resources/pages/policy-01-2012-02-25-en\)](/resources/pages/policy-01-2012-02-25-en)

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

Root Zone (Root Zone) KSK Rollover

h. **Thank you to Interpreters, ICANN (Internet Corporation for Assigned Names and Numbers) org, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

2. **Main Agenda:**

- a. **Next Steps in Community Priority Evaluation Process Review**
Rationale for Resolutions 2018.03.15.08 - 2018.03.15.11
- b. **Further Consideration of the Gulf Cooperation Council Independent Review Process Final Declarations**
Rationale for Resolutions 2018.03.15.12 - 2018.03.15.14
- c. **Consideration of the Asia Green IT System Independent Review Process Final Declaration**
Rationale for Resolutions 2018.03.15.15 - 2018.03.15.17
- d. **Appointment of the Independent Auditor for the Fiscal Year Ending 30 June 2018**
Rationale for Resolution 2018.03.15.18
- e. **AOB**

1. **Consent Agenda:**

a. **Approval of Board Meeting Minutes**

Resolved (2018.03.15.01), the Board approves the minutes of the 4 February 2018 Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. **Outsource Service Provider Zensar Contract Approval**

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization's Engineering and Information Technology department has a need for continued third-party development, quality assurance and content management support.

Whereas, Zensar has provided good services in software engineering, quality assurance and content management over the last several years.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org conducted a full request for proposal, the results of which led ICANN (Internet Corporation for Assigned Names and Numbers) org to determine that Zensar is still the preferred vendor.

Resolved (2018.03.15.02), the Board authorizes the President and CEO, or his designee(s), to enter into enter into, and make disbursement in furtherance of, a new Zensar contract for a term of 24 months with total cost not to exceed [REDACTED FOR NEGOTIATION PURPOSES]. These costs are based on the current Zensar RFP response and are under negotiation.

[\(/resources/pages/ksk-rollover-2016-05-06-en\)](/resources/pages/ksk-rollover-2016-05-06-en)

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

[Contact \(/contact\)](/contact)

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

Resolved (2018.03.15.03), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, Section 3.5(b) and (d) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2018.03.15.02 - 2018.03.15.03

ICANN (Internet Corporation for Assigned Names and Numbers) org's Engineering & IT (E&IT) department has used Zensar to support development, quality assurance and content management needs since November 2014. This relationship has been beneficial to ICANN (Internet Corporation for Assigned Names and Numbers) org and, overall has been a success.

The current three-year contract expired in November 2017 and was extended through March 2018 to allow ICANN (Internet Corporation for Assigned Names and Numbers) org to perform a full request for proposal (RFP).

Eleven vendors were included in the RFP of which six responded. Of these, two were cheaper and three more expensive than Zensar.

The RFP identified that Zensar rates are on par with others that may be interested in supporting this project.

The RFP team estimated that transition costs to move to another vendor would be at least 25% for a period of six months. More expensive vendors were therefore eliminated.

Zensar and the two less expensive applicants were asked to present their proposals and answer questions from the ICANN (Internet Corporation for Assigned Names and Numbers) org team. During the presentations, it was identified that both other applicants did not have sufficient existing resources to support this project for ICANN (Internet Corporation for Assigned Names and Numbers) org and would need to engage additional staff if they were awarded the contract. Staffing up would take time, causing delays. Quality of new staff would be an unknown.

While the RFP was in progress, ICANN (Internet Corporation for Assigned Names and Numbers) org undertook the FY19 budget process and identified the need for reduction in the services contemplated in the RFP to meet future targets. This resulted in a reduction of 2/3 (43 to 15 people) of the outsource contract. This reduction changes ICANN (Internet Corporation for Assigned Names and Numbers) org's needs and hence the services that would be provided by the outsource provider. While Zensar, being the incumbent would accept these reductions, the changes would require additional negotiation with the other RFP responders.

Zensar has three years of ICANN (Internet Corporation for Assigned Names and Numbers) knowledge. Retaining Zensar as the preferred provider ensures continuity in support.

Taking this step is in the fulfillment of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and in the public interest to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) org is utilizing the right third party providers, and to ensure that it is maximizing available resources in a cost efficient and effective manner.

This action will have a fiscal impact on the organization, but that impact has already been anticipated and is covered in the FY18 and FY19 budget. This action will not impact the security, stability and resiliency of the domain name system.

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

c. **New GNSO (Generic Names Supporting Organization) Voting Thresholds to address post-transition roles and responsibilities of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community - Proposed Changes to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws**

Whereas, during its meeting on 30 January 2018, the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) Council resolved (<https://community.icann.org/display/gnsocouncilmeetings/Motions+30+January+2>) (<https://community.icann.org/display/gnsocouncilmeetings/Motions+30+January+2>) to recommend that the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors adopt proposed changes to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to reflect new GNSO (Generic Names Supporting Organization) voting thresholds which are different from the current threshold of a simple majority vote of each House (see <https://www.icann.org/en/system/files/files/proposed-revisions-bylaws-article-11-gnso-redline-19jun17-en.pdf> ([/en/system/files/files/proposed-revisions-bylaws-article-11-gnso-redline-19jun17-en.pdf](https://www.icann.org/en/system/files/files/proposed-revisions-bylaws-article-11-gnso-redline-19jun17-en.pdf)) [PDF, 39 KB]).

Whereas, the addition of voting thresholds to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws as proposed by the GNSO (Generic Names Supporting Organization) would constitute a "Standard Bylaw Amendment" under Section 25.1 of the Bylaws ([/resources/pages/governance/bylaws-en/#article25](https://www.icann.org/resources/pages/governance/bylaws-en/#article25)).

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws requires that Standard Bylaw Amendments be published for public comment prior to the approval by the Board.

Whereas, after taking public comments into account, the Board will consider the proposed Bylaws changes for adoption.

Resolved (2018.03.15.04), the Board directs the President and CEO, or his designee(s), to post for public comment for a period of at least 40 days the Standard Bylaw Amendment reflecting proposed additions to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to

establish additional GNSO (Generic Names Supporting Organization) voting thresholds. The proposed new voting thresholds are different from the current threshold of a simple majority vote of each House to address all the new or additional rights and responsibilities in relation to participation of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community.

Rationale for Resolution 2018.03.15.04

The action being approved today is to direct the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, or his designee, to initiate a public comment period on proposed changes to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to reflect additional GNSO (Generic Names Supporting Organization) voting thresholds. The revised voting thresholds are different from the current threshold of a simple majority vote of each House, which is the default GNSO (Generic Names Supporting Organization) Council voting threshold. The revisions are made to address the new or additional rights and responsibilities in relation to participation of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community. The Board's action is a first step to consider the unanimous approval by the GNSO (Generic Names Supporting Organization) Council of the proposed changes.

The Board's action to initiate a public comment period on this Standard Bylaw Amendment serves the public interest by helping to fulfill ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to operate through open and transparent processes. In particular, posting Bylaws amendments for public comment is necessary to ensure full transparency and opportunity for the broader community to comment on these proposed changes prior to consideration or adoption by the ICANN (Internet Corporation for Assigned Names and Numbers) Board. If the Board approves this Standard Bylaw Amendment after public comment period, the Empowered Community will have an opportunity to consider rejecting the Amendment in accordance with the Bylaws. This action is also consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it in support of one of the policy development bodies that help ICANN (Internet Corporation for Assigned Names and Numbers) serve its mission.

There is no anticipated fiscal impact from this decision, which would initiate the opening of public comments, and no fiscal impact from the proposed changes to the Bylaws, if adopted. Approval of the resolution will not impact the security, stability and resiliency of the domain name.

The interim action of posting the proposed Bylaws amendments for public comment is an Organizational Administrative Action not requiring public comment.

- d. Initiating the Second Review of the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization))

Whereas, Article 4, Section 4.4. of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws state that "[t]he Board "shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review."

Whereas, as part of the first Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) Review, the ccNSO (Country Code Names Supporting Organization) Review Working Group submitted its Final Report to the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 4 March 2011, and per Resolution 2017.09.23.05, the Board resolved to defer the second ccNSO (Country Code Names Supporting Organization) Review until August 2018.

Resolved (2018.03.15.05), the Board hereby initiates the second ccNSO (Country Code Names Supporting Organization) Review and directs ICANN (Internet Corporation for Assigned Names and Numbers) organization to post a Request for Proposal to procure an independent examiner to begin the review as soon as practically feasible.

Resolved (2018.03.15.06), the Board encourages the ccNSO (Country Code Names Supporting Organization) to prepare for an independent examiner to begin work on the second ccNSO (Country Code Names Supporting Organization) Review in August 2018 by organizing a Review Working Party to serve as a liaison during the preparatory phase and throughout the review, and to conduct a self-assessment prior to August 2018.

Rationale for Resolutions 2018.03.15.05 - 2018.03.15.06

Why the Board is addressing the issue now?

This action is taken to provide a clear and consistent approach towards complying with ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws' mandate to conduct reviews. Moreover, the Board is addressing this issue because the Bylaws stipulate organizational reviews take place every five years. Following an initial deferral due to the IANA (Internet Assigned Numbers Authority) Stewardship Transition, the ICANN (Internet Corporation for Assigned Names and Numbers) Board had deferred the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) Review in 2017 to commence in 2018. The Board is now initiating the second Review of the ccNSO (Country Code Names Supporting Organization) to prepare for an independent examiner to begin work in August 2018.

Which stakeholders or others were consulted?

No consultation took place as this action is in line with the guidelines and provisions contained in Article 4, Section 4.4 of the ICANN (Internet

Corporation for Assigned Names and Numbers) Bylaws, and Resolution 2017.09.23.05.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) org (strategic plan, operating plan, and budget); the community; and/or the public?

Timely conduct of organizational reviews is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic and operating plans. The budget for the second ccNSO (Country Code Names Supporting Organization) Review has been approved as part of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual budget cycle and the funds allocated to the ccNSO (Country Code Names Supporting Organization) Review are managed by the ICANN (Internet Corporation for Assigned Names and Numbers) organization team responsible for these reviews. No additional budgetary requirements are foreseen at this time and separate consideration will be given to the budget impact of the implementation of recommendations that may result from the review.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

There are no security, stability or resiliency issues relating to the DNS (Domain Name System) as the result of this action.

This action is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and serves the public interest by supporting the effectiveness and ongoing improvement of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability and governance structures.

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

e. **Transfer of the .TD (Chad) top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC)**

Resolved (2018.03.15.07), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Naming Function Contract with ICANN (Internet Corporation for Assigned Names and Numbers), Public Technical Identifiers (PTI) has reviewed and evaluated the request to transfer the .TD country-code top-level domain (ccTLD (Country Code Top Level Domain)) to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Rationale for Resolution 2018.03.15.07

Why is the Board addressing this issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Naming Function Contract, PTI has evaluated a request for ccTLD (Country Code Top Level Domain) transfer and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

What is the proposal being considered?

The proposal is to approve a request to transfer the country-code top-level domain .TD and assign the role of manager to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC).

Which stakeholders or others were consulted?

In the course of evaluating this transfer application, PTI consulted with the applicant and other significantly interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

The Board reviewed the following evaluations:

- The domain is eligible for transfer, as the string under consideration represents Chad that is listed in the ISO (International Organization for Standardization) 3166-1 standard;
- The relevant government has been consulted and does not object;
- The incumbent manager consents to the transfer;
- The proposed manager and its contacts agree to their responsibilities for managing these domains;
- The proposal has demonstrated appropriate significantly interested parties' consultation and support;
- The proposal does not contravene any known laws or regulations;
- The proposal ensures the domains are managed locally in the country, and are bound under local law;
- The proposed manager has confirmed they will manage the domains in a fair and equitable manner;
- The proposed manager has demonstrated appropriate operational and technical skills and plans to operate the domains;

- The proposed technical configuration meets the technical conformance requirements;
- No specific risks or concerns relating to Internet stability have been identified; and
- ICANN (Internet Corporation for Assigned Names and Numbers) org has provided a recommendation that this request be implemented based on the factors considered.

These evaluations are responsive to the appropriate criteria and policy frameworks, such as "Domain Name (Domain Name) System Structure and Delegation" (RFC (Request for Comments) 1591) and "GAC (Governmental Advisory Committee) Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains".

As part of the process, Delegation and Transfer reports are posted at <http://www.iana.org/reports> (<http://www.iana.org/reports>).

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which ccTLDs are designated to serve, and responsive to obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of ccTLDs within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

f. **Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

The Board wishes to extend its thanks to the Hon. Ricardo Roselló Nevares, Governor of Puerto Rico; Oscar R. Moreno de Ayala, President of Puerto Rico Top Level Domain; Pablo Rodriguez, Vice President of Puerto Rico Top Level Domain; Carla Campos Vidal, Director of Puerto Rico Tourism Company; and the local host organizer, Puerto Rico Top Level Domain (.PR).

g. **Thank you to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

The Board wishes to thank the following sponsors: Verisign, Claro, Liberty, Canadian Internet Registration Authority (CIRA), Afiliac plc, Public Interest Registry and Uniregistry.

h. **Thank you to Interpreters, ICANN (Internet Corporation for Assigned Names and Numbers) org, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

The Board expresses its deepest appreciation to the scribes, interpreters, audiovisual team, technical teams, and the entire ICANN (Internet Corporation for Assigned Names and Numbers) org team for their efforts in facilitating the smooth operation of the meeting. The Board would also like to thank the management and staff of Puerto Rico Convention Center for providing a wonderful facility to hold this event. Special thanks are extended to Margaret Colon, Director of Sales & Marketing; Vivian E. Santana, Director of Events; Gianni Agostini Santiago, Senior Catering Sales Manager; Carlos Rosas, IT Manager; and Wilson Alers from Media Stage Inc.

2. **Main Agenda:**

a. **Next Steps in Community Priority Evaluation Process Review**

Whereas, the Board directed the President and CEO or his designees to undertake a review of the "process by which ICANN (Internet Corporation for Assigned Names and Numbers) [organization] interacted with the [Community Priority Evaluation (CPE)] Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider".

Whereas, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report; and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (collectively, the CPE Process Review). (See <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en> (/resources/board-material/minutes-bgc-2016-10-18-en).)

Whereas, the BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30,¹ 14-32,² 14-33,³ 16-3, 16-5, 16-8, 16-11, and 16-12. (See <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (</en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>) [PDF, 405 KB].)

Whereas, the CPE Process Review was conducted by FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice.

Whereas, on 13 December 2017 (</news/announcement-2017-12-13-en>), ICANN (Internet Corporation for Assigned Names and Numbers) organization published the three reports on the CPE Process Review (the CPE Process Review Reports).

Whereas, the Board Accountability Mechanisms Committee (BAMC) has considered the CPE Process Review Reports (the conclusions of which are set forth in the rationale below) and has provided recommendations to the Board of next steps in the CPE Process Review.

Whereas, the Board has considered the three CPE Process Review Reports and agrees with the BAMC's recommendations.

Resolved (2018.03.15.08), the Board acknowledges and accepts the findings set forth in the three CPE Process Review Reports.

Resolved (2018.03.15.09), the Board concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD (generic Top Level Domain) Program is necessary.

Resolved (2018.03.15.10), the Board declares that the CPE Process Review has been completed.

Resolved (2018.03.15.11), the Board directs the Board Accountability Mechanisms Committee to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (</en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>) [PDF, 42 KB] document.

Rationale for Resolutions 2018.03.15.08 - 2018.03.15.11

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.⁴ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.⁵ CPE will occur

only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD (generic Top Level Domain) evaluation process. CPE is performed by an independent provider (CPE Provider).

The Board directed the President and CEO or his designees to undertake a review of the "process by which ICANN (Internet Corporation for Assigned Names and Numbers) [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD (generic Top Level Domain) Program (Scope 1).⁶ The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).⁷ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),⁸ 14-32 (.INC),⁹ 14-33¹⁰ (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCCK).

On 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) organization published three reports on the CPE Process Review.

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN (Internet Corporation for Assigned Names and Numbers) organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.... While FTI understands that many communications between ICANN (Internet Corporation for Assigned Names and Numbers) organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN (Internet Corporation for Assigned Names and Numbers) organization." ([Scope 1 Report \(/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf\)](/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf) [PDF, 160 KB], Pg. 4)

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner." ([Scope 2 Report \(/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf\)](/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf) [PDF, 313 KB], Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI's investigation, FTI finds that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider's working papers associated with the first .GAY evaluation." ([Scope 3 Report \(/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf) [PDF, 309 KB], Pg. 4.)

The Board notes that FTI's findings are based upon its review of the written communications and documents described in the three Reports. The Board Accountability Mechanisms Committee (BAMC) considered the CPE Process Review Reports as part of its oversight of accountability mechanisms and recommended that the Board take the foregoing actions related to the CPE Process Review. The Board agrees. In particular, the BAMC is ready to restart its review of the remaining reconsideration requests that were put on hold. To ensure that the review of these pending Reconsideration Requests are conducted in an efficient manner and in accordance with the "[Transition Process of Reconsideration Responsibilities from the BGC to the BAMC \(/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf\)](/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf)" [PDF, 42 KB], the BAMC has developed a [Roadmap \(/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf\)](/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf) [PDF, 30 KB] for the review of the pending Reconsideration Requests.

The Board acknowledges receipt of the letters to the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) from dotgay LLC on [15 \(/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf\)](/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf) [PDF, 238 KB] and [20 January 2018 \(/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf\)](/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf) [PDF, 130 KB], and from DotMusic Limited on [16 January 2018 \(/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf\)](/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf) [PDF, 49 KB], regarding the CPE Process Review Reports. Both dotgay LLC and DotMusic Limited claim that the CPE Process Review lacked transparency

or independence, and was not sufficiently thorough, and ask that the ICANN (Internet Corporation for Assigned Names and Numbers) Board take no action with respect to the conclusions reached by FTI, until the parties have had an opportunity to respond to the FTI Report and to be heard as it relates to their pending reconsideration requests. (See <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf> (/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf) [PDF, 238 KB]; <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf> (/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf) [PDF, 130 KB]; and <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf> (/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf) [PDF, 49 KB].) The Board has considered the arguments raised in the letters. The Board notes that dotgay LLC and DotMusic Limited (among other requestors) each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.

The Board also acknowledges receipt of the letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board from dotgay LLC on 31 January 2018 ([/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf](https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf)) [PDF, 2.32 MB], which attached the Second Expert Opinion of Professor William N. Eskridge, Jr., addressing FTI's Scope 2 Report and Scope 3 Report on the CPE Process Review. (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf> (/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf) [PDF, 2.32 MB].) The Board has considered the arguments raised in the letter and accompanying Second Expert Opinion, and finds that they do not impact this Resolution, but instead will be addressed in connection with dotgay LLC's pending Reconsideration Request 16-3.

First, and as an initial matter, the Board does not accept dotgay LLC's assertion that "a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind." (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf> (/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf) [PDF, 2.32 MB], at Pg. 1.) Neither dotgay LLC nor Professor Eskridge offers any support for this baseless claim, and there is none. (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf> (/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf) [PDF, 2.32 MB].) Second, dotgay LLC urges the Board to entirely "reject the findings made by FTI in the FTI Reports", but dotgay LLC has submitted no basis for this outcome. All dotgay LLC offers is Professor Eskridge's Second Expert Opinion, which, at its core, challenges the merits of the report issued by the CPE Provider in connection with dotgay LLC's community application for the .GAY gTLD (generic Top Level Domain). (See

Response to dotgay LLC at

<https://www.icann.org/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf> ([/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf](https://www.icann.org/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf)) [PDF, 122 KB]; see also Response from dotgay LLC at <https://www.icann.org/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf> ([/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf](https://www.icann.org/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf)) [PDF, 226 KB].) Dotgay LLC will have the opportunity to include such claims in that regard and if it does, the claims will be addressed in connection with their reconsideration request that is currently pending.

The Board also acknowledges the 1 February 2018 letter

[/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf)) [PDF, 537 KB] from applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding "Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11).") These applicants that submitted Request 16-11 claim that the CPE Process Review lacked transparency or independence, and ask that the Board address the inconsistencies to "ensure a meaningful review of the CPE regarding .hotel." (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf> ([/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf)) [PDF, 537 KB].), Pg. 4.) The Board understands the arguments raised in the letter, and again reiterates that the individual requestors with reconsideration requests that were placed on hold pending completion of the CPE Process Review will have the opportunity to submit additional information in support of those reconsideration requests, including the requestors that filed Reconsideration Request 16-11.

The Board acknowledges receipt of DotMusic Limited's submission to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, on 2 February 2018 ([/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf](https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf)) [PDF, 1.02 MB], regarding the CPE Process Review Reports. First, and as an initial matter, the Board does not accept DotMusic Limited's assertions that FTI's "objective was to exonerate ICANN (Internet Corporation for Assigned Names and Numbers) and the CPE panel", that "the intent of the investigation was to advocate in favor of ICANN (Internet Corporation for Assigned Names and Numbers) and [the CPE Provider]", and that "ICANN (Internet Corporation for Assigned Names and Numbers) carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself." (<https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf> ([/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf](https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf)) [PDF, 1.02 MB], ¶ 109, Pg. 65, ¶ 69, Pg. 48, ¶ 74, Pg. 49, ¶ 76, Pg. 49.) DotMusic Limited offers no support for these baseless claims, and there is none. (See Response to DotMusic Limited, <https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf> ([/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf](https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf)) [PDF, 126 KB]; see also Responses from DotMusic Limited, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-jones-day-07mar18-en.pdf> ([<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>](https://www.icann.org/en/system/files/correspondence/ali-</p></div><div data-bbox=)

[to-icann-board-jones-day-07mar18-en.pdf](#)) [PDF, 227 KB].) DotMusic Limited otherwise reiterates the claims made in its [16 January 2018 \(/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf\)](#) [PDF, 49 KB] letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, namely that the CPE Process Review lacked transparency and was too narrow. DotMusic Limited asserts that it would be unreasonable for the ICANN (Internet Corporation for Assigned Names and Numbers) Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. The Board has considered the arguments raised in DotMusic Limited's submission, and finds that they do not impact this Resolution. As noted above, DotMusic Limited (among other Requestors) will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to its pending Reconsideration Request 16-5, such that any claims DotMusic Limited might have related to the FTI Reports can be addressed then, and then ultimately will be considered in connection with the determination on Reconsideration Request 16-5.

The Board also acknowledges the [22 February 2018 letter \(/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf\)](#) [PDF, 516 KB] from applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding "Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11).") These applicants that submitted Request 16-11 reiterate their claim that the CPE Process Review lacked transparency, and further assert that ICANN (Internet Corporation for Assigned Names and Numbers) organization continues to be "non-transparent about the CPE deliberately" insofar as ICANN (Internet Corporation for Assigned Names and Numbers) organization has not published a preliminary report of the BAMC's 2 February 2018 meeting, which these applicants claim is required pursuant to Article 3, Section 3.5(c) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. ([after the conclusion a Board meeting, not Board Committees meetings. In either case, the minutes of the BAMC's 2 February 2018 meeting have been published and reflect that the BAMC considered the recent letters to the ICANN \(Internet Corporation for Assigned Names and Numbers\) Board regarding the CPE Process Review. \(See](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf (/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf) [PDF, 516 KB], Pg. 2.) First, the Board notes that Article 3, Section 3.5 relates to Minutes and Preliminary Reports of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations). (See Article 3, Section 3.5(a).) In this regard, the timing requirements relative to the publication of preliminary reports provided by Article 3, Section 3.5(c) of the Bylaws relates to the publication of)

the CPE Process Review, including the fact that "the Board has received letters from a number of applicants ... [, that] the BAMC [has] taken the letters and reports into consideration as part of its recommendation to the Board, [and that] the proposed resolution has been continued to the Board's next meeting in Puerto Rico to allow the Board members additional time to consider the new documents." (Preliminary Report | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, *available at*: <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en> ([/resources/board-material/prelim-report-2018-02-04-en](https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en))). Third, the Board understands the arguments raised in the letter, and again reiterates that the individual requestors with reconsideration requests that were placed on hold pending completion of the CPE Process Review will have the opportunity to submit additional information in support of those reconsideration requests, including the requestors that filed Reconsideration Request 16-11.

The Board acknowledges receipt of a letter from the Head of Institutional Relations at the European Broadcasting Union (EBU) to dotgay LLC, with a copy to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding its "disappointing experience with the Community Priority Evaluation (CPE) process." (<https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf> ([/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf](https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf)) [PDF, 154 KB], Pg. 1.) The EBU raised very generalized concerns about the CPE process but did not provide any level of specificity about those concerns. Because the letter lacks specificity and does not detail the EBU's precise concerns, the Board regards the letter as support for the positions expressed by dotgay LLC and will be considered as part of the Board's evaluation of dotgay LLC's pending Reconsideration Request.

The Board also acknowledges receipt of letters from SERO and the National LGBT Chamber of Commerce on 18 February 2018 ([/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf](https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf)) [PDF, 371 KB] and 1 March 2018 ([/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf](https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf)) [PDF, 1.16 MB], respectively, expressing support for dotgay LLC's community application. These letters will be considered as part of the Board's evaluation of dotgay LLC's pending Reconsideration Request.

Taking this action is in the public interest and consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments and Core Values as it will provide transparency and accountability regarding the CPE process and the CPE Process Review. This action also ensures that ICANN (Internet Corporation for Assigned Names and Numbers) operates in a manner consistent with the Bylaws by making decisions that apply documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.

This action has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

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

b. Further Consideration of the Gulf Cooperation Council Independent Review Process Final Declarations

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization received the Final Declaration in the Gulf Cooperation Council (GCC) v. ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP) and the Final Declaration As To Costs (Costs Declaration) in the IRP.

Whereas, among other things, the IRP Panel declared that "the GCC is the prevailing Party," and ICANN (Internet Corporation for Assigned Names and Numbers) "shall reimburse the GCC the sum of \$107,924.16 upon demonstration by [the] GCC that these incurred costs have been paid." (Final Declaration at pg. 45; Costs Declaration at pg. 6, V.2.)

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

Whereas, in accordance with Article IV, section 3.21 of the applicable version of the Bylaws, the Board considered the Final Declaration and the Costs Declaration at its meeting on 16 March 2017, and determined that further consideration and analysis was needed.

Whereas, the Board Accountability Mechanisms Committee (BAMC) conducted the requested further consideration and analysis, and has recommended that: (i) the Board treat the statement in the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) Durban Communiqué regarding .PERSIANGULF as if it were non-consensus advice pursuant to the second advice option in Module 3.1 (subparagraph II) of the Applicant Guidebook; and (ii) the Board direct the BAMC to review and consider the materials related to the .PERSIANGULF matter, including the materials identified by the Panel in the Final Declaration, and to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

Resolved (2018.03.15.12), the Board accepts that the Panel declared the following: (i) the GCC is the prevailing party in the *Gulf Cooperation Council v. ICANN (Internet Corporation for Assigned Names and Numbers)* IRP; and (ii) ICANN (Internet Corporation for Assigned Names and Numbers) "shall reimburse the GCC the sum of \$107,924.16 upon demonstration by [the] GCC that these incurred costs have been paid."

Resolved (2018.03.15.13), the Board directs the President and CEO, or his designee(s), to take all steps necessary to reimburse the GCC in the amount of US\$107,924.16 in furtherance of the IRP Panel's Costs Declaration upon demonstration by the GCC that these incurred costs have been paid.

Resolved (2018.03.15.14), the Board directs the BAMC: (i) to follow the steps required as if the GAC (Governmental Advisory Committee) provided non-

consensus advice to the Board pursuant to Module 3.1 (subparagraph II) of the Applicant Guidebook regarding .PERSIANGULF; (ii) to review and consider the relevant materials related to the .PERSIANGULF matter; and (iii) to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

Rationale for Resolutions 2018.03.15.12 - 2018.03.15.14

The Gulf Cooperation Council (GCC) initiated Independent Review Process (IRP) proceedings challenging the New gTLD (generic Top Level Domain) Program Committee's (NGPC's) decision on 10 September 2013 that "ICANN (Internet Corporation for Assigned Names and Numbers) will continue to process [the .PERSIANGULF] application in accordance with the established procedures in the [Guidebook.]" (See Resolution 2013.09.10.NG03 (Annex 1), available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c> (/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c).) The GCC objected to the application for .PERSIANGULF submitted by Asia Green IT System Ltd. (Asia Green) due to what the GCC described as a long-standing naming dispute in which the "Arab nations that border the Gulf prefer the name 'Arabian Gulf' instead of the name 'Persian Gulf.'" (See IRP Request, ¶ 3, available at <https://www.icann.org/en/system/files/files/gcc-irp-request-05dec14-en.pdf> (/en/system/files/files/gcc-irp-request-05dec14-en.pdf) [PDF, 2.44 MB].)

IRP Panel Final Declaration:

On 19 October 2016, the three-member IRP Panel (Panel) issued its Final Declaration as to the merits (Final Declaration) (<https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf> (/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf) [PDF, 2.52 MB]). On 15 December 2016, the Panel issued its Final Declaration As To Costs (Costs Declaration) (<https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-costs-15dec16-en.pdf> (/en/system/files/files/irp-gcc-final-declaration-costs-15dec16-en.pdf) [PDF, 91 KB]). The Panel's findings and recommendation are summarized below, and available in full at <https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en> (/resources/pages/gcc-v-icann-2014-12-06-en).

The Panel declared the GCC to be the prevailing party, and declared that the "action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board with respect to the application of Asia Green relating to the '.persiangulf' gTLD (generic Top Level Domain) was inconsistent with the Articles of Incorporation and Bylaws of ICANN (Internet Corporation for Assigned Names and Numbers)." (Final Declaration at pgs. 44-45, X.1, X.3.) Specifically, the Panel stated that: (i) "we have no evidence or indication of what, if anything, the Board did assess in taking its decision. Our role is to review the decision-making process of the Board, which here was virtually non-existent. By definition, core ICANN (Internet Corporation for Assigned Names and Numbers) values of transparency and fairness were ignored." (emphasis omitted); (ii) "we conclude that the ICANN (Internet Corporation for Assigned Names and Numbers) Board failed to 'exercise due diligence and care in having a reasonable amount of facts in front of them' before deciding, on 10

September 2013, to allow the '.persiangulf' application to proceed"; and (iii) "[u]nder the circumstances, and by definition, the Board members could not have *'exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company'*, as they did not have the benefit of proper due diligence and all the necessary facts."

The Panel further declared that "ICANN (Internet Corporation for Assigned Names and Numbers) is to bear the totality of the GCC's costs in relation to the IRP process," and "shall reimburse the GCC the sum of \$107,924.16 upon demonstration by GCC that these incurred costs have been paid." (Costs Declaration at pg. 6, V.2.)

The Panel premised its declaration on its conclusion that the Board's reliance upon the explicit language of Module 3.1 of the Guidebook was "unduly formalistic and simplistic" (Final Declaration at ¶ 126), and that the Board should have conducted a further inquiry into and beyond the Durban Communiqué as it related to the application even though the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) "advice" provided in the Durban Communiqué indicated that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the application and "does not object" to the application proceeding. In effect, the GAC (Governmental Advisory Committee)'s communication to the ICANN (Internet Corporation for Assigned Names and Numbers) Board provided no advice regarding the processing of .PERSIANGULF. The Panel, however, disagreed, stating that: "As we see it, the GAC (Governmental Advisory Committee) sent a missive [in the Durban Communiqué] to the ICANN (Internet Corporation for Assigned Names and Numbers) Board that fell outside all three permissible forms for its advice. The GAC (Governmental Advisory Committee)'s statement in the Durban Communiqué that the GAC (Governmental Advisory Committee) *'does not object'* to the application reads like consensus GAC (Governmental Advisory Committee) advice that the application should proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3.1 of the Guidelines." (Final Declaration at ¶ 127.) The Panel further stated that: "Some of the fault for the outcome falls on the GAC (Governmental Advisory Committee), for not following its own principles. In particular, GAC (Governmental Advisory Committee) Operating Principle 47 provides that the GAC (Governmental Advisory Committee) is to work on the basis of consensus, and *'[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN (Internet Corporation for Assigned Names and Numbers) Board.'* The GAC (Governmental Advisory Committee) chair clearly did not do so." (Final Declaration at ¶ 128.) According to the Panel, "[i]f the GAC (Governmental Advisory Committee) had properly relayed [the] serious concerns [expressed by certain GAC (Governmental Advisory Committee) members] as formal advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board." (Final Declaration at ¶ 129.) "It is difficult to accept that ICANN (Internet Corporation for Assigned Names and Numbers)'s core values of transparency and fairness are met, where one GAC (Governmental Advisory Committee) member can not only

block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue." (Final Declaration at ¶ 130.)

In sum, the Panel stated that it "is not convinced that just because the GAC (Governmental Advisory Committee) failed to express the GCC's concerns (made in their role as GAC (Governmental Advisory Committee) members) in the Durban Communiqué that the Board did not need to consider these concerns." (Final Declaration at ¶ 131.) The Panel further stated that the Board should have reviewed and considered the GAC (Governmental Advisory Committee) member concerns expressed in the GAC (Governmental Advisory Committee) Durban Meeting Minutes (which, it should be noted, were posted by the GAC (Governmental Advisory Committee) in November 2013 – one month after the NGPC's 10 September 2013 Resolution to continue processing the .PERSIANGULF application), the "pending Community Objection, the public awareness of the sensitivities of the 'Persian Gulf'-'Arabian Gulf' naming dispute, [and] the Durban Communiqué itself[, which] contained an express recommendation that '*ICANN (Internet Corporation for Assigned Names and Numbers) collaborate with the GAC (Governmental Advisory Committee) in refining, for future rounds, the Applicant Guidebook with regard to the protection of terms with national, cultural, geographic and religious significance.*'" (Final Declaration at ¶ 131.)

In addition, the Panel concluded that "the GCC's due process rights" were "harmed" by the Board's decision to proceed with the application because, according to the Panel, such decision was "taken without even basic due diligence despite known controversy." (Final Declaration at ¶ 148.) And, according to the Panel, the "basic flaws underlying the Board's decision cannot be undone with future dialogue." (Final Declaration at ¶ 148.) The Panel therefore recommended that "the ICANN (Internet Corporation for Assigned Names and Numbers) Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." (Final Declaration at pg. 44, X.2.)

Prior Board Consideration:

The Board considered the Final Declaration and the Costs Declaration at its 16 March 2017 meeting. After thorough review and consideration of the Panel's findings and recommendation, the Board noted that the Panel may have based its findings and recommendation on what may be unsupported conclusions and/or incorrect factual premises.

The Board determined that further consideration and analysis of the Final Declaration was needed, and directed the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, or his designee(s), to conduct or cause to be conducted a further analysis of the Panel's factual premises and conclusions, and of the Board's ability to accept certain aspects of the Final Declaration while potentially rejecting other aspects of the Final Declaration. (See Resolution 2017.03.16.08, available at [https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.b \(/resources/board-material/resolutions-2017-03-16-en#2.b.\)](https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.b (/resources/board-material/resolutions-2017-03-16-en#2.b.)))

Board Accountability Mechanisms Committee Review and Recommendation:

Pursuant to the Board's directive, the Board Accountability Mechanisms Committee (BAMC) reviewed the Final Declaration, conducted an analysis regarding the Board's ability to accept certain aspects of the Final Declaration while rejecting other aspects, and considered various options regarding the Panel's recommendation that the "Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign a registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." After extensive analysis and discussion, the BAMC has recommended that the Board refute certain of the Panel's underlying factual findings and conclusions, and that the Board treat the statement in the GAC (Governmental Advisory Committee) Durban Communiqué regarding .PERSIANGULF as if it were non-consensus advice pursuant to Module 3.1 (subparagraph II) of the Guidebook. Among other things, the BAMC understands that this would require the Board (or its designees) to enter into a dialogue with the relevant members of the GAC (Governmental Advisory Committee) to understand the scope of their expressed concerns regarding the .PERSIANGULF application. The BAMC further recommends that the Board direct the BAMC to review and consider the materials related to the .PERSIANGULF matter, including the materials identified by the Panel in the Final Declaration, and provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

Board Consideration:

The Board agrees with the BAMC's recommendations. The Board notes that it does not agree with or accept all of the Panel's underlying factual findings and conclusions. For instance:

- The Panel concluded that the statement in the GAC (Governmental Advisory Committee) Durban Communiqué that the GAC (Governmental Advisory Committee) "does not object" to the .PERSIANGULF application was, in effect, "consensus GAC (Governmental Advisory Committee) advice that the application should proceed, or at the very least non-consensus advice that the application should proceed." (Final Declaration at ¶ 127.) The Board, however, considers the statement in the Durban Communiqué, indicating that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the application and "does not object" to the application proceeding, as effectively providing no advice to the Board regarding the processing of .PERSIANGULF. The Board, nevertheless, can appreciate that the Panel, given all of the information before it, thought that the GAC (Governmental Advisory Committee) should have provided non-consensus advice pursuant to Module 3.1 (subparagraph II) in order to convey the concerns expressed by certain GAC (Governmental Advisory Committee) members.
- The Panel concluded that the Board should have but did not consider "the Durban Minutes, the pending Community Objection, and public

awareness of the sensitivities of the 'Persian Gulf'-'Arabian Gulf' naming dispute," along with the "express recommendation" in the Durban Communiqué "that ICANN (Internet Corporation for Assigned Names and Numbers) collaborate with the GAC (Governmental Advisory Committee) in refining, for future rounds, the Applicant Guidebook with regard to the protection of terms with national, cultural, geographic and religious significance." (Final Declaration at ¶ 131.) The Board takes issue with the Panel's conclusion. The Panel appears to not have given proper recognition to, among other things, the Board's awareness of and sensitivity to the GCC's concerns.

- The Panel concluded that the Board was required to request and review the minutes of the GAC (Governmental Advisory Committee) Durban meeting in making its determination regarding the .PERSIANGULF application. According to the Panel, "[i]t is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board - as part of basic due diligence - would not have asked for draft Minutes concerning GAC (Governmental Advisory Committee) discussions of such a geo-politically charged application." (Final Declaration at ¶ 134.) The Board disagrees. First, the GAC (Governmental Advisory Committee) Durban meeting minutes were not available when the NGPC passed its resolution regarding the .PERSIANGULF application – the GAC (Governmental Advisory Committee) Durban Communiqué was issued on 18 July 2013; the NGPC passed its Resolution on 10 September 2013; and the GAC (Governmental Advisory Committee) Durban meeting minutes were posted by the GAC (Governmental Advisory Committee) in November 2013. Second, GAC (Governmental Advisory Committee) meeting minutes do not constitute a communication from the GAC (Governmental Advisory Committee) to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, and do not constitute GAC (Governmental Advisory Committee) advice.
- In making its recommendation, the Panel concluded that: "Here, given the harm caused to the GCC's due process rights by the Board's decision - taken without even basic due diligence despite known controversy - to allow Asia Green's '.persiangulf' gTLD (generic Top Level Domain) application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green's application but the termination of any consideration of '.persiangulf' as a gTLD (generic Top Level Domain). The basic flaws underlying the Board's decision cannot be undone with future dialogue. In recognition of ICANN (Internet Corporation for Assigned Names and Numbers)'s core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN (Internet Corporation for Assigned Names and Numbers) to keep Asia Green's application open despite the history. If issues surrounding '.persiangulf' were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense." (Final Declaration at ¶ 148.) The Board disagrees and takes issue with the Panel's conclusion that further dialogue would be futile. If,

as the Panel has stated, the advice provided by the GAC (Governmental Advisory Committee) should have included "the full range of views expressed by members" of the GAC (Governmental Advisory Committee) and thereby "necessarily" triggered "further inquiry by and dialogue with the Board" pursuant to the non-consensus advice option in Module 3.1 (subparagraph II) of the Guidebook, then such further dialogue should occur before a determination is made regarding the current .PERSIANGULF application.

Notwithstanding the refuted points noted above, the Board has determined that it should treat the GAC (Governmental Advisory Committee) statement in the Durban Communiqué regarding .PERSIANGULF as if it were non-consensus advice pursuant to the second advice option in Module 3.1 (subparagraph II) of the Guidebook. The Board is taking this action for primarily two reasons. First, as the Panel noted, and the Board agrees, the GAC (Governmental Advisory Committee) "sent a missive [in the Durban Communiqué] that fell outside all three permissible forms for its advice." The Board appreciates how the Panel thought that the GAC (Governmental Advisory Committee) advice should have been provided pursuant to the second advice option in Module 3.1 (subparagraph II) of the Guidebook. Specifically, the Panel noted, among other things, that: (i) the .PERSIANGULF application was the subject of a GAC (Governmental Advisory Committee) Early Warning; (ii) the GAC (Governmental Advisory Committee)'s Beijing Communiqué (in April 2013) indicated that "further consideration may be warranted" at the GAC (Governmental Advisory Committee)'s Durban meeting (in July 2013) regarding the .PERSIANGULF string; and (iii) certain GAC (Governmental Advisory Committee) members expressed concerns about .PERSIANGULF during the GAC (Governmental Advisory Committee) Durban meeting. While the Board was aware of the GAC (Governmental Advisory Committee) Early Warning and the Beijing Communiqué, it did not have access to the GAC (Governmental Advisory Committee) Durban meeting minutes when it passed the 10 September 2013 Resolution to continue processing .PERSIANGULF, unlike the Panel, which did have access to those minutes when it issued its Final Declaration.

Second, and in the light of the Final Declaration in this matter, the Board notes inconsistencies in the GAC (Governmental Advisory Committee)'s handling and communications regarding the .PERSIANGULF and the .HALAL/.ISLAM applications. Both were the subject of GAC (Governmental Advisory Committee) Early Warnings and both were the subject of concerns expressed by members of the GAC (Governmental Advisory Committee) during a GAC (Governmental Advisory Committee) meeting. However, how the GAC (Governmental Advisory Committee) ultimately treated these two matters and how the GAC (Governmental Advisory Committee) articulated them to the Board was decidedly different in each case: (a) with respect to the .HALAL/.ISLAM strings, the GAC (Governmental Advisory Committee) provided non-consensus advice to the Board explicitly pursuant to Section 3.1 (subparagraph II) of the Guidebook, indicating that: "The GAC (Governmental Advisory Committee) recognizes that Religious terms are sensitive issues. Some GAC (Governmental Advisory Committee) members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam

and .halal. The GAC (Governmental Advisory Committee) members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC (Governmental Advisory Committee) members that these applications should not proceed." (Beijing Communiqué, available at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf> (/en/system/files/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB]); whereas (b) with respect to the .PERSIANGULF string, the GAC (Governmental Advisory Committee) provided no advice but rather stated that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the .PERSIANGULF string and "does not object" to the application proceeding (Durban Communiqué, available at [http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20\(Governmental Advisory Committee\)%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf](http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20(Governmental%20Advisory%20Committee)%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf) (<http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf>) [PDF, 110 KB]).

Based upon the foregoing, and in order to address the Panel's concerns, the Board believes that treating the statement in the GAC (Governmental Advisory Committee) Durban Communiqué regarding .PERISANGULF as if it were non-consensus advice pursuant to Module 3.1 (subparagraph II) of the Guidebook and entering into a dialogue with the relevant members of the GAC (Governmental Advisory Committee) to understand the scope of their concerns regarding the .PERSIANGULF application is the best course of action and consistent with the way a similar circumstance (in the .HALAL/.ISLAM matter) has been handled. In addition, conducting a further review and consideration of the materials related to the .PERSIANGULF matter, including the materials identified by the Panel in the Final Declaration (those available both before and after the NGPC's 10 September 2013 Resolution to continue processing the .PERSIANGULF application), would assist the Board in conducting an evaluation of the current .PERSIANGULF application as well as provide the GCC with the due process that the Panel considered was not previously adequate.

Taking this decision is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the ultimate result of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of this matter is a key aspect of coordinating the allocation and assignment of names in the root zone of the domain name system (DNS (Domain Name System)). Further, the Board's decision is in the public interest, taking into consideration and balancing the goals of resolving outstanding new gTLD (generic Top Level Domain) disputes, respecting ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms and advisory committees, and abiding by the policies and procedures set forth in the Applicant Guidebook, which were developed through a bottom-up consensus-based multistakeholder process over numerous years of community efforts and input.

Taking this decision is expected to have a direct financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) organization in the

amount that the Panel declared ICANN (Internet Corporation for Assigned Names and Numbers) should reimburse the prevailing party. Entering into a dialogue with the relevant GAC (Governmental Advisory Committee) members and conducting a further review of the materials regarding the .PERSIANGULF matter will not have any direct impact on the security, stability or resiliency of the domain name system.

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

c. **Consideration of the Asia Green IT System Independent Review Process Final Declaration**

Whereas, the Final Declaration in the Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (AGIT) v. ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP) was issued on 30 November 2017.

Whereas, among other things, the IRP Panel declared that AGIT is the prevailing party, and ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT the sum of US\$93,918.83. (Final Declaration at ¶¶ 151, 156.)

Whereas, in the Final Declaration, the Panel recommended that, in order to be consistent with Core Value 8, "the Board needs to promptly make a decision on the application[s] (one way or another) with integrity and fairness," and noted that "nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for [the ICANN (Internet Corporation for Assigned Names and Numbers) Board]." (Final Declaration at ¶ 149.)

Whereas, the Board Accountability Mechanisms Committee (BAMC) has recommended that the Board direct the BAMC to re-review the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.

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

Resolved (2018.03.15.15), the Board accepts that the Panel declared the following: (i) AGIT is the prevailing party in the Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP; and (ii) ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT the sum of US\$93,918.83.

Resolved (2018.03.15.16), the Board directs the President and CEO, or his designee(s), to take all steps necessary to reimburse AGIT in the amount of US\$93,918.83 in furtherance of the Panel's Final Declaration.

Resolved (2018.03.15.17), the Board directs the BAMC to re-review the GAC (Governmental Advisory Committee) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.

Rationale for Resolutions 2018.03.15.15 - 2018.03.15.17

Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (AGIT) initiated Independent Review Process (IRP) proceedings challenging the decision of the ICANN (Internet Corporation for Assigned Names and Numbers) Board (acting through the New gTLD (generic Top Level Domain) Program Committee (NGPC)) to accept the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) non-consensus advice against AGIT's applications for .HALAL and .ISLAM (Resolution 2013.06.04.NG01, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en> (/resources/board-material/resolutions-new-gtld-2013-06-04-en)), and to place AGIT's applications on hold until AGIT resolved the concerns raised by the objecting countries and the Organisation of Islamic Cooperation (OIC) (Resolution 2014.02.05.NG01, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a> (/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a)).

After reviewing and considering the Final Declaration and all relevant materials, the Board Accountability Mechanisms Committee (BAMC) concluded that re-reviewing the GAC (Governmental Advisory Committee) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) as well as the positions advanced by both supporting and opposing parties would afford the Board a fuller understanding of the sensitivities regarding the .HALAL and .ISLAM gTLDs and would assist the Board in making its determination as to whether or not AGIT's applications should proceed. The BAMC therefore has recommended that the Board direct the BAMC to re-review the GAC (Governmental Advisory Committee) non-consensus advice as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.

AGIT applied for .HALAL and .ISLAM. The Guidebook allows for the GAC (Governmental Advisory Committee) to provide a GAC (Governmental Advisory Committee) Early Warning, which is a notice to an applicant that "the application is seen as potentially sensitive or problematic by one or more governments." On 20 November 2012, the United Arab Emirates (UAE) and India submitted Early Warning notices through the GAC (Governmental Advisory Committee) against both applications, expressing serious concerns regarding a perceived lack of community involvement in, and support for, the AGIT applications. (Early Warnings, available at <https://gacweb.icann.org/display/gacweb/GAC> (Governmental Advisory

Committee)+Early+Warnings

(<https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>.) On 13 March 2013, the Telecommunications Regulatory Authority of the UAE filed community objections with the International Centre for Expertise of the International Chamber of Commerce (ICC (International Chamber of Commerce)) against AGIT's applications (Community Objections).

After a regularly-scheduled meeting, on 11 April 2013, the GAC (Governmental Advisory Committee) issued its Beijing Communiqué, wherein it provided non-consensus advice to the Board pursuant to Section 3.1 subparagraph II of the Guidebook, indicating that: "The GAC (Governmental Advisory Committee) recognizes that Religious terms are sensitive issues. Some GAC (Governmental Advisory Committee) members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC (Governmental Advisory Committee) members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC (Governmental Advisory Committee) members that these applications should not proceed." (Beijing Communiqué, available at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf> (/en/system/files/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB].)

On 4 June 2013, the NGPC adopted the NGPC Scorecard setting forth the NGPC's response to the portion of the GAC (Governmental Advisory Committee)'s Beijing Communiqué regarding .ISLAM and .HALAL, stating: "The NGPC accepts [the GAC (Governmental Advisory Committee)] advice. [...] Pursuant to Section 3.1ii of the [Guidebook], the NGPC stands ready to enter into dialogue with the GAC (Governmental Advisory Committee) on this matter. We look forward to liaising with the GAC (Governmental Advisory Committee) as to how such dialogue should be conducted." (NGPC Scorecard, available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf> (/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf) [PDF, 563 KB].) On 18 July 2013, Board members and the relevant GAC (Governmental Advisory Committee) members attended a meeting in Durban, South Africa to understand the scope of the GAC (Governmental Advisory Committee)'s concerns regarding the Applications.

Subsequently, several additional entities expressed concern regarding AGIT's applications:

- The State of Kuwait sent a letter to ICANN (Internet Corporation for Assigned Names and Numbers) expressing its support for the UAE's Community Objections and identifying concerns that AGIT did not receive the support of the community, that the applications are not in the best interest of the Islamic community, and that the strings "should be managed and operated by the community itself through a neutral body that truly represents the Islamic community such as the Organization of Islamic Cooperation." (25 July 2013 letter, available at <https://www.icann.org/en/system/files/correspondence/al-qattan-to-icann->

[icc-25jul13-en.pdf \(/en/system/files/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf\)](#) [PDF, 103 KB].)

- The Lebanese [GAC \(Governmental Advisory Committee\)](#) representative wrote to the NGPC Chair objecting to the AGIT applications, stating that the "operation of these TLDs must be conducted by a neutral non-governmental multi-stakeholder group representing, at least, the larger Muslim community." (4 September 2013 letter, available at [GAC \(Governmental Advisory Committee\)](https://www.icann.org/en/system/files/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf (/en/system/files/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf) [PDF, 586 KB].)▪ The Secretary General of the Organisation of Islamic Cooperation (OIC) wrote to the <a href=) Chair that, as an "intergovernmental organization with 57 Member States spread across four continents" and the "sole official representative of 1.6 billion Muslims," the OIC opposed the operation of the .ISLAM and .HALAL strings "by any entity not representing the collective voice of the Muslim people." (4 November 2013 letter, available at [On 24 October 2013, the \[ICC \\(International Chamber of Commerce\\)\]\(#\) panel considering the UAE's Community Objections rendered two Expert Determinations denying the UAE's Community Objections against AGIT's applications. On 11 November 2013, the \[ICANN \\(Internet Corporation for Assigned Names and Numbers\\)\]\(#\) Board Chair sent a letter to the \[GAC \\(Governmental Advisory Committee\\)\]\(#\) Chair referencing the OIC's 4 November 2013 letter and stating, "\[n\]ow that the objection proceedings have concluded, the NGPC must decide what action to take on these \[.ISLAM and .HALAL\] strings. Before it does so, it will wait for any additional \[GAC \\(Governmental Advisory Committee\\)\]\(#\) input during the Buenos Aires meeting or resulting \[GAC \\(Governmental Advisory Committee\\)\]\(#\) Communiqué. The NGPC stands ready to discuss this matter further if additional dialog would be helpful."](https://www.icann.org/en/system/files/correspondence/iskandar-to-chalaby-24dec13-en.pdf (/en/system/files/correspondence/iskandar-to-chalaby-24dec13-en.pdf) [PDF, 463 KB].)</div><div data-bbox=)

On 21 November 2013, the [GAC \(Governmental Advisory Committee\)](#) issued its Buenos Aires Communiqué, stating: "[The] [GAC \(Governmental Advisory Committee\)](#) took note of letters sent by the OIC and the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Chairman in relation to the strings .islam and .halal. The [GAC \(Governmental Advisory Committee\)](#) has previously provided advice in its Beijing Communiqué, when it concluded its discussions on these strings. The [GAC \(Governmental Advisory Committee\)](#) Chair will respond to the OIC correspondence accordingly, noting the OIC's

plans to hold a meeting in early December. The GAC (Governmental Advisory Committee) chair will also respond to the ICANN (Internet Corporation for Assigned Names and Numbers) Chair's correspondence in similar terms." (GAC (Governmental Advisory Committee) Buenos Aires Communiqué, available at <https://www.icann.org/en/system/files/correspondence/gac-to-board-20nov13-en.pdf> (/en/system/files/correspondence/gac-to-board-20nov13-en.pdf) [PDF, 97 KB].) On 29 November 2013, the GAC (Governmental Advisory Committee) Chair responded to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, confirming that the GAC (Governmental Advisory Committee) has concluded its discussion on AGIT's applications and stating that "no further GAC (Governmental Advisory Committee) input on this matter can be expected." (29 November 2013 letter, available at <https://www.icann.org/en/system/files/correspondence/dryden-to-crocker-29nov13-en.pdf> (/en/system/files/correspondence/dryden-to-crocker-29nov13-en.pdf) [PDF, 73 KB].)

On 4 December 2013, AGIT wrote to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, proposing certain governance mechanisms for the .ISLAM and .HALAL strings, noting: "At the core of this governance mechanism is the Policy Advisory Council (PAC) contemplated for each TLD (Top Level Domain). PACs will be deployed for both .ISLAM and .HALAL. They will serve as non-profit governing boards made up of leaders from many of the world's various Muslim communities, governments, and organizations. The PACs will oversee policy development for the TLDs, to ensure they are coherent and consistent with Muslim interests. AGIT has invited the leading Muslim organisations, including the Organization for Islamic Cooperation (OIC), to become members of the PACs." (4 December 2013 letter, available at <https://www.icann.org/en/system/files/correspondence/abbasnia-to-crocker-04dec13-en.pdf> (/en/system/files/correspondence/abbasnia-to-crocker-04dec13-en.pdf) [PDF, 140 KB].)

Nevertheless, on 19 December 2013, the OIC sent a letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, stating that the foreign ministers of the OIC's 57 Muslim member states had unanimously adopted a resolution officially objecting to the operation of the .ISLAM and .HALAL TLDs "by any entity not reflecting the collective voice of the Muslim People[.]" (19 December 2013 letter, available at <https://www.icann.org/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf> (/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf) [PDF, 1.06 MB].) On 30 December 2013, AGIT submitted a letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair challenging the nature and extent of the OIC's opposition to AGIT's applications, reiterating its commitment to the proposed multistakeholder governance model of .ISLAM and .HALAL described in its 4 December 2013 letter, and requesting to proceed to the contracting phase. (30 December 2013 letter, available at <https://www.icann.org/en/system/files/correspondence/abbasnia-to-crocker-30dec13-en.pdf> (/en/system/files/correspondence/abbasnia-to-crocker-30dec13-en.pdf) [PDF, 1.9 MB].)

On 5 February 2014, the NGPC adopted a scorecard stating: "The NGPC takes note of the significant concerns expressed during the dialogue, and additional opposition raised, including by the OIC, which represents 1.6 billion members of the Muslim community." (5 February 2014 Scorecard, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a> (/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a).) In addition, the NGPC directed the transmission of a letter from the NGPC, via the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, to AGIT acknowledging AGIT's stated commitment to a multistakeholder governance model, but also noting the substantial opposition to AGIT's applications (7 February 2014 Letter): "Despite these commitments, a substantial body of opposition urges ICANN (Internet Corporation for Assigned Names and Numbers) not to delegate the strings .HALAL and .ISLAM.... There seems to be a conflict between the commitments made in your letters and the concerns raised in letters to ICANN (Internet Corporation for Assigned Names and Numbers) urging ICANN (Internet Corporation for Assigned Names and Numbers) not to delegate the strings. Given these circumstances, the NGPC will not address the applications further until such time as the noted conflicts have been resolved." (7 February 2014 Letter, available at <https://www.icann.org/en/system/files/correspondence/crocker-to-abbasnia-07feb14-en.pdf> (/en/system/files/correspondence/crocker-to-abbasnia-07feb14-en.pdf) [PDF, 540 KB].) The 7 February 2014 Letter listed the Gulf Cooperation Council, the OIC, the Republic of Lebanon, and the government of Indonesia as four parties that "all voiced opposition to the AGIT applications," and provided some detail as to the concerns of each.

In December 2015, AGIT initiated an independent review of the ICANN (Internet Corporation for Assigned Names and Numbers) Board's decision to accept the GAC (Governmental Advisory Committee)'s non-consensus advice against AGIT's applications for .HALAL and .ISLAM and to place AGIT's applications on hold until AGIT resolved the concerns raised by the objecting countries and the OIC.

On 30 November 2017, the IRP Panel (Panel) issued its Final Declaration in the AGIT IRP (<https://www.icann.org/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf> (/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf) [PDF, 1.31 MB]). The Panel's findings are summarized below, and available in full at <https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en> (/resources/pages/irp-agit-v-icann-2015-12-23-en).

The Panel declared AGIT to be the prevailing party, and that ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT for its IRP fees and costs in the sum of US\$93,918.83. (Final Declaration at ¶¶ 151, 156.) The Panel declared that the ICANN (Internet Corporation for Assigned Names and Numbers) Board (through the NGPC) acted in a manner inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation (Articles) and Bylaws. Specifically, the Panel declared that the "closed nature and limited record of the [GAC (Governmental Advisory Committee)] Beijing meeting provides little in the way of 'facts' to the Board. Of the 6 pages [Communiqué] produced by the GAC

(Governmental Advisory Committee) to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilizing vague and non-descript terms [such as "religious sensitivities"]." "[T]his manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7." Therefore, "any reliance on the Beijing Communiqué by the Board in making their decision would necessarily be to do so without a reasonable amount of facts." "[T]o be consistent with Core Value 7 requires ICANN (Internet Corporation for Assigned Names and Numbers) to act in an open and transparent manner." (Final Declaration at ¶¶ 81, 83, 148.) The Panel further declared that the Board "acted inconsistently with Core Value 8" by placing AGIT's applications "on hold" – "to be consistent with Core Value 8 requires [ICANN (Internet Corporation for Assigned Names and Numbers)] to make, rather than defer (for practical purposes, indefinitely), a decision...as to the outcome of [AGIT's] applications." (Final Declaration at ¶ 149.) In the view of the Panel, "the 'On Hold' status is neither clear nor prescribed" in the Guidebook, Articles or Bylaws. The Panel declared that by placing the applications "on hold," ICANN (Internet Corporation for Assigned Names and Numbers) "created a new policy" "without notice or authority" and "failed to follow the procedure detailed in Article III (S3 (b)), which is required when a new policy is developed." (Final Declaration at ¶¶ 113, 119, 150.)

While not describing it as a "recommendation," the Panel recommended that, in order to be consistent with Core Value 8, "the Board needs to promptly make a decision on the application[s] (one way or another) with integrity and fairness." The Panel noted, however, that "nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for [the ICANN (Internet Corporation for Assigned Names and Numbers) Board]." (Final Declaration at ¶ 149.)

The Panel further concluded that, with regard to whether the Board had a reasonable amount of facts before it: "The lack of detailed content obtained from the meetings held with concerned GAC (Governmental Advisory Committee) members, along with insufficient information on the revisions needed by [AGIT] for their Governance model, coupled with the significant reliance placed on the views of the objectors leads this Panel to the view that the Board" did not have a reasonable amount of facts in front of it and, therefore, "did not exercise appropriate due diligence and care" and "did not exercise independent judgment." (Final Declaration at ¶¶ 106-107.)

Regarding whether or not sufficient guidance was provided as to how AGIT was to resolve the conflicts with the objectors, the Panel stated that: "[T]he manner in which [AGIT] and objectors were to resolve such conflicts, ascertain whether this had been successfully completed, upon which timescale and adjudged by whom was not and is not clear. Whilst it is clear that the Board required conflicts to be resolved, [AGIT] was left with little guidance or structure as to how to resolve the conflicts, and no information as to steps needed to proceed should the conflicts be resolved." (Final Declaration at ¶ 109.) The Panel further stated that "[t]he Panel accepts the contention made by ICANN (Internet Corporation for Assigned Names and Numbers) that it is not ICANN (Internet Corporation for Assigned Names and Numbers)'s

responsibility to act as intermediary, however it is the opinion of this Panel that insufficient guidance is currently available as to the means and methods by which an 'On Hold' applicant should proceed and the manner in which these efforts will be assessed. Without such guidance, and lacking detailed criteria, the applicant is left, at no doubt significant expense, to make attempts at resolution without any benchmark or guidance with which to work." (Final Declaration at ¶ 110.)

In coming to its conclusions, the Panel also rejected many of AGIT's other assertions that the Board violated ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and Bylaws. For instance:

- Pursuant to the Guidebook, members of the NGPC engaged in a dialogue with relevant members of the GAC (Governmental Advisory Committee) at a meeting in Durban to understand the scope of the GAC (Governmental Advisory Committee)'s concerns regarding the applications. The Panel disagreed with AGIT that all GAC (Governmental Advisory Committee) members and all Board members were required to meet in Durban to discuss the GAC (Governmental Advisory Committee) non-consensus advice because "there is no reference to quorum requirements in [the Guidebook] and it is practical that relevant and concerned members be in attendance," and "neither the Bylaws nor the Guidebook mandate full Board attendance." (Final Declaration at ¶¶ 89, 92.)
- The Panel rejected AGIT's argument that the Board acted with a conflict of interest because ICANN (Internet Corporation for Assigned Names and Numbers) staff members were communicating with the OIC when the Board was considering the applications; the Panel noted that the ICANN (Internet Corporation for Assigned Names and Numbers) staff members were tasked with "outreach" and they did not have "decision making authority." (Final Declaration at ¶ 101.)
- Despite AGIT's arguments to the contrary, the Panel stated that the Board was not required to follow the findings of expert panelists' decisions (in this instance, the Independent Objector and the Community Objection Expert), and that "the Board is entitled to decide in a manner inconsistent with expert advice." (Final Declaration at ¶ 127.)
- The Panel found that the Board was not required to approve .ISLAM and .HALAL just because the .KOSHER application proceeded to delegation, as AGIT had argued. (Final Declaration at ¶ 133.)
- Contrary to AGIT's argument, the Panel found that the example scenarios listed in the Guidebook regarding the "ways in which an application may proceed through the evaluation process" "cannot be considered binding" on ICANN (Internet Corporation for Assigned Names and Numbers) and did not "provide applications with a guaranteed route of success." (Final Declaration at ¶¶ 138-139.)

Taking this decision is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the ultimate result of ICANN (Internet

Corporation for Assigned Names and Numbers)'s consideration of this matter is a key aspect of coordinating the allocation and assignment of names in the root zone of the domain name system (DNS (Domain Name System)). Further, the Board's decision is in the public interest, taking into consideration and balancing the goals of resolving outstanding gTLD (generic Top Level Domain) disputes, respecting ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms and advisory committees, and abiding by the policies and procedures set forth in the Applicant Guidebook, which were developed through a bottom-up consensus-based multistakeholder process over numerous years of community efforts and input.

Taking this decision is expected to have a direct financial impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization in the amount the Panel declared ICANN (Internet Corporation for Assigned Names and Numbers) should reimburse the prevailing party. Further review and analysis of the GAC (Governmental Advisory Committee) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) and communications from or with objecting and supporting parties, in light of the Final Declaration, will not have any direct impact on the security, stability or resiliency of the domain name system.

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

d. **Appointment of the Independent Auditor for the Fiscal Year Ending 30 June 2018**

Whereas, Article 22, Section 22.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws ([http://www.icann.org/general/bylaws.htm \(/general/bylaws.htm\)](http://www.icann.org/general/bylaws.htm (/general/bylaws.htm))) requires that after the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) must be audited by certified public accountants, which shall be appointed by the Board.

Whereas, the Board Audit Committee has discussed the engagement of the independent auditor for the fiscal year ending 30 June 2018, and has recommended that the Board authorize the President and CEO, or his designee(s), to take all steps necessary to engage BDO LLP and BDO member firms.

Resolved (2018.03.15.18), the Board authorizes the President and CEO, or his designee(s), to take all steps necessary to engage BDO LLP and BDO member firms as the auditors for the financial statements for the fiscal year ending 30 June 2018.

Rationale for Resolution 2018.03.15.18

The audit firm BDO LLP and BDO member firms were engaged for the annual independent audits of the fiscal year end 30 June 2016 and the fiscal year 30 June 2017. Based on the report from ICANN (Internet Corporation for Assigned Names and Numbers) organization and the Audit Committee's evaluation of the work performed, the committee has unanimously

recommended that the Board authorize the President and CEO, or his designee(s), to take all steps necessary to engage BDO LLP and BDO member firms as ICANN (Internet Corporation for Assigned Names and Numbers)'s annual independent auditor for the fiscal year ended 30 June 2018 for any annual independent audit requirements in any jurisdiction.

The Board's action furthers ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability to its Bylaws and processes, and the results of the independent auditors' work will be publicly available.

Taking this decision is both consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and in the public interest as the engagement of an independent auditor is in fulfilment of ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations to undertake an audit of ICANN (Internet Corporation for Assigned Names and Numbers)'s financial statements, and helps serve ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders in a more accountable manner.

This decision will have no direct impact on the security or the stability of the domain name system. There is a fiscal impact to the engagement that has already been budgeted. There is no impact on the security or the stability of the DNS (Domain Name System) as a result of this appointment.

This is an Organizational Administrative Function not requiring public comment.

e. AOB

No resolution taken.

Published on 15 March 2018

¹ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf> (/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf) [PDF, 600 KB].

² Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf> (/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf) [PDF, 626 KB].

³ Request 14-33 (.LLP) was withdrawn on 15 February 2018. See <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf> (/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf) [PDF, 42 KB].

⁴ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>) (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>)

[PDF, 429 KB]). See also <https://newgtlds.icann.org/en/applicants/cpe> (<https://newgtlds.icann.org/en/applicants/cpe>).

⁵ *Id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf> (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>) [PDF, 429 KB]).

⁶ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a> ([/resources/board-material/resolutions-2016-09-17-en#1.a](https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a)).

⁷ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en> ([/resources/board-material/minutes-bgc-2016-10-18-en](https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en)).

⁸ Reconsideration Request 14-30 was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf> ([/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf)) [PDF, 600 KB].

⁹ Reconsideration Request 14-32 was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf> ([/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf)) [PDF, 626 KB].

¹⁰ Reconsideration Request 14-33 was withdrawn on 15 February 2018. See <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf> ([/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf)) [PDF, 42 KB].



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Approved Board Resolutions | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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17 Sep 2016

1. **Main Agenda:**

a. **President and CEO Review of New gTLD (generic Top Level Domain) Community Priority Evaluation Report Procedures**

Rationale for Resolution 2016.09.17.01

1. Main Agenda:

a. President and CEO Review of New gTLD (generic Top Level Domain) Community Priority Evaluation Report Procedures

Whereas, the Board has discussed various aspects of the Community Priority Evaluation (CPE) process, including some issues that were

identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry LLC.

Whereas, the Board would like to have some additional information related to how ICANN (Internet Corporation for Assigned Names and Numbers) staff members interact with the CPE provider, and in particular with respect to the CPE provider's CPE reports.

Resolved (2016.09.17.01), the Board hereby directs the President and CEO, or his designee(s), to undertake an independent review of the process by which ICANN (Internet Corporation for Assigned Names and Numbers) staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider.

Rationale for Resolution 2016.09.17.01

Community Priority Evaluation (CPE) is a method to resolve string contention for New gTLD (generic Top Level Domain) applications. It occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the Economist Intelligence Unit (EIU). As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 points to prevail in a community priority evaluation.

At various points in the implementation of the New gTLD (generic Top Level Domain) Program, the Board (and the Board New gTLD (generic Top Level Domain) Program Committee) have discussed various aspects of CPE. Recently, the Board has discussed some issues with the CPE process, including certain issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry LLC. The Board is taking action at this time to direct the President and CEO, or his designee(s), to undertake a review of the process by which ICANN (Internet Corporation for Assigned Names and Numbers) staff interacts with the CPE provider in issuing its CPE reports.

The review should include an overall evaluation of staff's interaction with the CPE provider, as well as any interaction staff may have with respect to the CPE provider preparing its CPE reports. The Board's action to initiate this review is intended to have a positive impact on the community as it will help to provide greater transparency into the CPE evaluation process. Additionally, by undertaking additional due diligence in the administration of the CPE process, the Board intends

this review to help gather additional facts and information that may be helpful in addressing uncertainty about staff interaction with the CPE provider.

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- [New gTLD \(generic Top Level Domain\) Applicant Guidebook \(https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf\)](https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf) [PDF, 5.9 MB]
- [Final Community Priority Evaluation Guidelines \(https://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf\)](https://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf) [PDF, 803 KB]
- [Community Priority Evaluation \(CPE\) Panel Process Document \(https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf\)](https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf) [PDF, 314 KB]
- [Dot Registry v. ICANN \(Internet Corporation for Assigned Names and Numbers\) Independent Review Process Final Declaration \(/resources/pages/dot-registry-v-icann-2014-09-25-en\)](/resources/pages/dot-registry-v-icann-2014-09-25-en)

There may be some minor fiscal impact depending on the method of review that the President and CEO chooses to undertake, but none that would be outside of the current budget for administering the New gTLD (generic Top Level Domain) Program.

Initiating a review of the process by which ICANN (Internet Corporation for Assigned Names and Numbers) staff interacts with the CPE provider is not anticipated to have any impact on the security, stability or resiliency of the DNS (Domain Name System).

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

Published on 20 September 2016



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LOS ANGELES – 13 December 2017 – The Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) today published three reports on the review of the Community Priority Evaluation (CPE) process (the CPE Process Review). The CPE Process Review was initiated at the request of the ICANN (Internet Corporation for Assigned Names and Numbers) Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) (<http://www.fticonsulting.com/>) Global Risk and Investigations Practice (GRIP) and Technology Practice, and consisted of three parts: (i) reviewing the process by which the ICANN (Internet Corporation for Assigned Names and Numbers) organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN (Internet Corporation for Assigned Names and Numbers) initiated the CPE Process Review (Scope 3).

FTI concluded that "there is no evidence that the ICANN (Internet Corporation for Assigned Names and Numbers) organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process" (Scope 1) and that "the CPE Provider consistently applied the criteria set forth in the New gTLD (generic Top Level Domain) Applicant Guidebook [] and the CPE Guidelines throughout each CPE" (Scope 2). (See [Scope 1 report \(/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf\)](#) [PDF, 159 KB], Pg. 3; [Scope 2 report \(/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf\)](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report \(/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

"The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process," said Cherine Chalaby, Chairman of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. "Further, this CPE Process Review and due diligence has provided additional facts and information that outline and document the ICANN (Internet Corporation for Assigned Names and Numbers) organization's interaction with the CPE Provider."

For more information about the CPE process and the CPE Process Review, please visit <https://newglds.icann.org/en/applicants/cpe>. (<https://newglds.icann.org/en/applicants/cpe>).

More Announcements[Join the Webinar on the Draft Final Report of the NomCom2 Review \(/news/announcement-2018-04-03-en\)](#)[CCWG-Accountability WS2 Final Report \(/news/announcement-2018-03-30-en\)](#)[Maximal Starting Repertoire Version 3 \(MSR-3\) for the Development of Label Generation Rules for the Root Zone \(Root Zone\) \(/news/announcement-2-2018-03-29-en\)](#)[Annual IANA \(Internet Assigned Numbers Authority\) Functions Audits Validate ICANN \(Internet Corporation for Assigned Names and Numbers\) Systems Controls \(/news/announcement-2018-03-29-en\)](#)

Exhibit 4

ICANN61 SAN JUAN

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ICANN Board Meeting

17:00 - 18:00, Thu, Mar 15, 2018

*Ballroom A



The Board Meeting has concluded early. Please see the the Live Stream Video for the recording.

Joint Meeting: ICANN Board and GAC

Session Leader: Wendy Profit

Staff Facilitator: Lisa Saulino

Media Archive

Video Stream Archive: <https://livestream.com/icannmeeting/events/8077790>

English Audio: <http://audio.icann.org/meetings/sju61/sju61-OPEN-2018-03-15-T1959-ballrooma-51ICISNsZKFgek0udv4mE5nkHj64WIX2-en.m3u>

French Audio: <http://audio.icann.org/meetings/sju61/sju61-OPEN-2018-03-15-T1959-ballrooma-51ICISNsZKFgek0udv4mE5nkHj64WIX2-fr.m3u>

Spanish Audio: <http://audio.icann.org/meetings/sju61/sju61-OPEN-2018-03-15-T1959-ballrooma-51ICISNsZKFgek0udv4mE5nkHj64WIX2-es.m3u>

Chinese Audio: <http://audio.icann.org/meetings/sju61/sju61-OPEN-2018-03-15-T1959-ballrooma-51ICISNsZKFgek0udv4mE5nkHj64WIX2-zh.m3u>

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Arabic Audio: <http://audio.icann.org/meetings/sju61/sju61-OPEN-2018-03-15-T1959-ballrooma-51ICISNsZKFgek0udv4mE5nkHj64WIX2-ar.m3u>

Portuguese Audio: <http://audio.icann.org/meetings/sju61/sju61-OPEN-2018-03-15-T1959-ballrooma-51ICISNsZKFgek0udv4mE5nkHj64WIX2-pt.m3u>

Track: Cross Community

Keywords: GAC Board of Directors - ICANN

Session Type: Open Session

MATERIALS

[TRANS_ICANN61 ICANN Board Meeting-en](#)

LINKS

[ICANN Board Meeting - ICANN61 on Livestream - https://livestream.com/icannme...](#)

[ICANN61 | San Juan - https://61.schedule.icann.org/pages/2350](#)

[BallroomA-15Mar18-PM : Real Time Text - https://www.streamtext.net/player?eve...](#)

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← Prev Page 1 of 9 Next →

Exhibit 5



New gTLD Program
Community Priority Evaluation Report
Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16
Minimum Required Total Score to Pass 14		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application (“GAY¹”) is drawn from:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA². The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is “determined through formal membership with any of dotgay LLC’s [the applicant’s] Authentication Partners (AP) from the community”, a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as “hubs” and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

1. Have an active and reputable presence in the Gay Community
2. Have a mission statement that incorporates a focus specific to the Gay Community
3. Have an established policy that affirms community status for member enrolment
4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

¹ In this report the community as defined by the application is referred to as the “GAY community” instead of the “gay community” or the “LGBTQIA community”. The “GAY community” is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. “Gay community” or “LGBTQIA community” are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant’s defined community. This use is consistent with the references to these groups in the application.

² The Applicant notes with regard to its use of the term LGBTQIA that “LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community.” This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community"³, and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .GAY community⁴ are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.⁵ While socio-political obstacles to community

³ "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

⁴ The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

⁵ Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

organization remain in some parts of the world,⁶ the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a “presence in the Gay Community”, and also “incorporate a focus specific to the Gay Community.” By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community

0/4 Point(s)

2-A Nexus

0/3 Point(s)

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.”

The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus. As cited above:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).

The application, therefore, acknowledges that “the world at large” understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the “Gay community” to be both those individuals who have “come out” as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

⁶ <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

Moreover, while the applied-for string refers to many individuals not included in the application’s definition of membership (i.e., it “substantially over-reaches” based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application’s community definition are transgender and intersex individuals as well as “allies” (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community)⁷. However, “gay” does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked.⁸ Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy⁹; such individuals are not necessarily “gay”¹⁰. Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by “gay” at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but “gay” nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string “.GAY”.

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness **0/1 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application,*” according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above,). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

Criterion #3: Registration Policies **4/4 Point(s)**

3-A Eligibility **1/1 Point(s)**

The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that:

.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

⁷ This prevailing understanding of “ally” is supported by GLAAD and others: <http://www.glaad.org/resources/ally>

⁸ <http://www.glaad.org/reference/transgender>

⁹ http://www.isna.org/faq/what_is_intersex

¹⁰ “Gay” is defined by the Oxford dictionaries as “A homosexual, especially a man.” The applicant defines the community as “individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society.”

3-B Name Selection	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
3-C Content and Use	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”</p> <p>The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.</p>	
3-D Enforcement	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.</p>	

Criterion #4: Community Endorsement	<i>2/4 Point(s)</i>
4-A Support	<i>1/2 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.</p>	

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Exhibit 6



New gTLD Program
Community Priority Evaluation Report
Report Date: 8 October 2015

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p> <p>In its application, dotgay LLC defines its community as follows:</p>	

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships...

The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible...

Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights. (Application, section 20(a))

The applicant relies on the "process of coming out" to delineate its members, who are individuals with non-normative sexual orientation or gender identities, as well as their allies¹. The process of "coming out" is by nature personal, and may vary from person to person. Some individuals within the proposed community may not come out publicly, reflecting real or feared persecution for doing so. Similarly, membership in a community organization may not be feasible for the same reason. Furthermore, organizations within the applicant's defined community recognize "coming out" as a defining characteristic of individuals within the defined community.² Many such organizations advocate on behalf of individuals even though they are not members, precisely because their coming out publicly may be illegal or otherwise harmful. Therefore, the Panel recognizes that the standard of "coming out" – whether publicly or privately – as homosexual, bisexual, transgender, queer, intersex, or ally is sufficiently clear and straightforward to meet the AGB's requirements.³

In addition, the community as defined in the application has awareness and recognition among its members. There is an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies. As cited by the applicant in supporting materials, for example, the American Psychological Association recognizes the process of coming out as a key part of entering the community.⁴ For many individuals, this awareness and recognition of community is made more explicit, such as by membership in organizations, participation in events, and advocacy for the rights of individuals with non-normative sexual orientations and gender identities. As the applicant states, organizations and individuals within the community also often cohere around areas of discrimination, whether in the workplace, marketplace, the media, or other areas. Regardless of whether this awareness and recognition of shared community is explicit or rather an implicit consequence of one's coming

¹ The Panel, following the applicant's reference to "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society", uses the phrase "non-normative sexual orientations and/or gender identities" throughout this document. The term "non-normative" is used both by the applicant as well as organizations, academics, and publications discussing the topic; it is not the Panel's terminology, nor is it considered to be derogatory in this context. This phrase refers to the same individuals usually referred to with the acronyms "LGBT", "GLBT", "LGBTQ", and others. Because issues related to these acronyms are relevant later in this document, they are not used here.

² See as examples <http://www.hrc.org/campaigns/coming-out-center> and http://www.lalgbtcenter.org/coming_out_support

³ For allies, the "coming out" process may differ from that of individuals who are acknowledging privately or sharing publicly their own non-normative sexual orientation or gender identity. Nevertheless, there are risks associated even with supporting non-heterosexual individuals; making this support explicit is how allies can mark their awareness and recognition of the wider community and their sense of belonging to it. For example, large international organizations within the applicant's defined community, such as GLAAD, HRC, and PFLAG offer concrete avenues for individuals to "come out" as allies. See <http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>,

<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>, <http://community.pflag.org/page.aspx?pid=539>

⁴ <http://www.apa.org/topics/lgbt/orientation.pdf>

out, the Panel has determined that the link among these individuals goes well beyond “a mere commonality of interest” and satisfies the AGB’s requirements for recognition and awareness.⁵

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic area and/or segment of the proposed community. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an umbrella organization whose organizational members also include those representing allies. According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA’s website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007. Individuals with non-normative sexual orientations and/or gender identities, as well as their supporters, have been increasingly active in many countries as they work to advance their acceptance and civil rights.⁶

⁵ Although the score on Delineation is unchanged since the first evaluation, the Panel’s analysis has changed due to the applicant’s response to a Clarifying Question regarding the role of Authentication Partners (APs). Previously, the Panel had understood the APs to be a mechanism of members’ awareness and recognition, but, as above, that is no longer the case and the role of APs is correctly understood to be relevant for the purposes of Section 3.

⁶ See for example, advocacy in China, Guyana, and Argentina: <http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>, <http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>, http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension

2/2 Point(s)

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The application cites global estimates of the self-identified population of individuals with non-normative sexual orientations and/or gender identities, but relies on a more conservative size based on the number of such individuals who are affiliated with one or more of the applicant's community organizations:

Most studies place the global gay population at 1.2% (Williams 1996), higher in countries with existing gays rights protections projected at 4-6% (eg. Australia, Canada, United Kingdom, United States). Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.

As the applicant also acknowledges, estimating the size of the defined community is difficult because, for example, of the risks of individuals self-identifying in many parts of the world. The applicant instead offers a "minimum" size based on the 7 million individuals who are members of one or more of its "Authentication Partners", organizations serving as entry points for domain registration. Regardless of the method used to produce these estimates, the Panel has determined that the size of the delineated community is considerable.⁷

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the community defined in the application are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of individuals with non-normative sexual orientations and/or gender identities and their supporters has accelerated since then, especially in recent decades, and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater visibility of these individuals,

⁷ The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally.

recognition of their civil and human rights, and community organization, both in the US and elsewhere.⁸ While socio-political obstacles to community organization remain in some parts of the world,⁹ the overall historical trend of increasing rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community

0/4 Point(s)

2-A Nexus

0/3 Point(s)

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.

In order to identify the community defined by the applicant as required for Nexus, the applied-for string must “closely describe the community or the community members”, i.e. the applied-for string is what “the typical community member would naturally be called” (AGB). The Panel has therefore considered the extent to which the string “gay” *describes* the members of the applicant’s defined community and has evaluated whether “gay” is what these individuals *would naturally be called*. The Panel has determined that more than a small part of the applicant’s defined community is not identified by the applied-for string, as described below, and that it therefore does not meet the requirements for Nexus.

The community as defined by the application consists of

individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The applicant’s assertion that the applied-for string (“gay”) is the “most common” term used by members of its defined community to refer to all gay, lesbian, bisexual, transgender, queer, intersex, and ally individuals is central to its demonstration of Nexus. In order to support this claim, the applicant, in its application and in supporting materials received both prior to and since its initial evaluation, has offered evidence that the Panel has evaluated. The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the

⁸ Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

⁹ <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

media¹⁰ as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor, as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”. Both within the community and outside of it, such as in the media, acronyms such as “LGBT,” “GLBT,” “LGBTQ,” or “LGBTQIA”¹¹ are used to denote a group of individuals that includes those described above, i.e. transgender, intersex and ally individuals. In fact, organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor “gay,” preferring one of the more inclusive terms¹².

The first piece of evidence offered by the applicant to support the claim that “gay” is the “most common” term used to describe the defined community is the Oxford English Dictionary (OED) and its documentation of uses of the word “gay” over hundreds of years. It summarizes the shifting meaning of “gay” in order to show how the word has become embraced by at least a part of its defined community and to support its claim that it is the “most common” term for the entirety of its defined community. According to the applicant, the OED shows that “Gay by the early 20th century progressed to its current reference to a sexuality that was non-heterosexual” (application, 20(d)). The Panel agrees that the more derogatory uses of “gay” or uses unrelated to sexuality have largely fallen away, and that the word has come to refer to homosexual women as well as men, as the applicant asserts, citing the OED. However, the Panel’s review of the OED¹³ as well as other sources (cited below) does not support the applicant’s claim that “gay” identifies or closely describes transgender, intersex, or ally individuals, or that “gay” is what these individuals “would naturally be called,” as the AGB requires. This is because “gay” refers to homosexuality (and to some extent non-heterosexuality more broadly), while transgender and intersex individuals may or may not identify as homosexual or gay, and allies are generally understood to be heterosexual.

The applicant acknowledges that its application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals. It claims that all of these groups, or “sub-communities”, are identified by what it calls the “umbrella” term “gay”:

The term “gay” today is a term that has solidified around encompassing several sub-communities of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. Within these sub-communities even further classifications and distinctions can be made that further classify its members but are equally comfortable identifying as gay, particularly to those outside their own sub-communities. As an example, it has become commonplace for celebrities to acknowledge their homosexuality with the now routine declaration of “Yup, I’m gay” on the cover of newsmagazines as the comedienne Ellen Degeneres did when she “came out” on the cover of TIME magazine.

Notably, “gay” is used to super-identify all these groups and circumstances. Whether homosexual, bisexual, transgender, intersex or ally, all members of the Gay Community march in the “gay pride parade” read the same “gay media” and fight for the same “gay rights.” Gay has become the prevalent term in how members of this community refer to themselves when speaking about themselves as demonstrated by the large number of organizations that use the term globally.

Despite the applicant’s assertions to the contrary, its own evidence here shows that “gay” is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others. The applicant’s “umbrella term” argument does not accurately describe, for example, the many similar

¹⁰ While a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the data in the applicant’s own analysis as well as on the Panel’s own representative samples of media.

¹¹ There is some variability to these acronyms but one or another of them is very commonly used throughout the community defined by the applicant to refer to Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Allies.

¹² While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes. Details of the Panel’s analysis follow.

¹³ See “gay, adj., adv., and n.” *OED Online*. Oxford University Press, June 2015. Web. 19 August 2015.

transgender stories in the mass media where “gay” is not used to identify the subject.¹⁴ In these cases, “transgender” is used because “gay” does not identify those individuals. With regard to the applicant’s argument that the various parts of its defined community are engaged in the same activities, such as “gay pride” events and “gay rights” advocacy, the Panel acknowledges that this is likely the case. However, transgender people’s participation in these activities no more identifies them as gay than allies’ participation in transgender rights advocacy identifies them as transgender. Indeed, there are many organizations focused on events and advocacy specific to the needs of transgender individuals¹⁵ and they often take special care to separate labels of sexual orientation from those of gender identity/expression.¹⁶ Similarly, the Panel has reviewed the literature of several organizations that advocate and provide services and support for intersex individuals and they clarify that sexual orientation is unrelated to being intersex.¹⁷ That is, while such organizations would fall within the applicant’s defined community, they explicitly differ on the applicant’s assertion that the applied-for string “gay” identifies all LGBTQIA individuals. Thus, the applicant’s assertion that even the members of its so-called sub-communities “are equally comfortable identifying as gay” is in fact often not the case.

In materials provided in support of the application¹⁸, a survey of news media articles is analyzed in an effort to show that “gay” is the most common name used to refer to the community defined by the applicant. This analysis shows that indeed “gay” is used more frequently than terms such as “LGBT” or “LGBTQIA” in reference to both individuals and communities:

In the first random sample period (April 1-8, 2013), “gay” was used 2,342 times, “LGBT” 272 times, “lesbian” 1008 times, “queer” 76 times and “LGBTQ” 19 times. “LGBTQIAA” and “GLBTQ” were not used at all, demonstrating that “gay” remains a default generic term for the community. An overwhelming amount of the time these terms beyond gay were used in articles that also used gay. Said another way, “LGBT” was used in only 35 articles that did not also use the term “gay,” “lesbian” in 43 articles, “queer” in 55, and “LGBTQ” in 3. Data shows, thus, that “gay” is both the most frequently used term when referring to non-heterosexual gender identity and sexual orientation and is used as an umbrella term to cover the diversity.

Despite this claim, the analysis fails to show that when “gay” is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities. This is the key issue for the Panel’s consideration of Nexus. That is, the greater use of “gay” does not show that “gay” in those instances is used to identify all LGBTQIA individuals, as the applicant asserts and as would be required to receive credit on Nexus. Indeed, the Panel’s own review of news media¹⁹ found that, while “gay” is more common than terms such as “LGBTQ” or “LGBTQIA”, these terms are now more widely used than ever, in large part due to their greater inclusivity and specificity than “gay”. Even several of the articles cited by the applicant in its reconsideration request²⁰ as evidence of its “umbrella term” argument do not show “gay” being used to identify the groups in question, nor is “gay” the most commonly used term to refer to the aggregate LGBTQIA community in these articles.²¹ Furthermore, researching sources from the same periods as the

¹⁴ As examples of cover stories that parallel the applicant’s own example from Time Magazine, see: <http://time.com/135480/transgender-tipping-point/> and <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>. In these two very prominent examples, the articles do not use “gay” to refer to their subjects.

¹⁵ See for instance <http://transgenderlawcenter.org/>, <http://srlp.org/>, <http://transequality.org/>

¹⁶ See National Center for Transgender Equality: <http://transequality.org/issues/resources/transgender-terminology>

¹⁷ See for example the Organization International Intersex: <http://oii-usa.org/1144/ten-misconceptions-intersex>

¹⁸ See <https://www.icann.org/en/system/files/correspondence/gudelunas-to-icann-eiu-evaluators-30apr14-en.pdf>, drafted and submitted by David Gudelunas a member of the dotGay LLC team according to its website, http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter

¹⁹ As noted above, while a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the applicant’s own analysis, as discussed here, as well as on the Panel’s own representative samples of media.

²⁰ See dotGay’s Reconsideration Request: <https://www.icann.org/en/system/files/request-dotgay-annexes-redacted-29nov14-en.pdf>

²¹ See <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marchesor-clever-substitutes-pride-and-prejudice>, <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>, <http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>

applicant’s analysis for the terms “transgender” or “intersex” shows again that these terms refer to individuals and communities not identified by “gay”.²² In other words, “gay” is not used to refer to these individuals because it does not *closely describe* them and it is not *what they would naturally be called*, as the AGB requires for partial credit on Nexus.

Finally, the Panel reviewed in detail the many letters of support submitted on behalf of the applicant by many LGBTQIA organizations worldwide. In addition to evaluating these letters of support, as noted in Section 4, the Panel examined how these organizations refer to their members and those for whom they advocate, noting in particular the words used to identify them. In a minority of cases, these organizations included in their letters the view that “gay” is an “umbrella term” for the LGBTQIA community, as argued by the applicant. However, even the organizations that made this claim in their letters do not use the term “gay” to identify their transgender, intersex, and/or ally members in their own organizational materials. In fact, the names of many of these organizations usually include a term other than “gay” such as “LGBTQ” or, in the case of some, “transgender” or “intersex”.

GLAAD, as an example of one of the applicant’s supporters, writes on its own website, “Transgender people have a sexual orientation, just like everyone else. Transgender people may be straight, lesbian, gay, or bisexual.”²³ Indeed, it is for this reason that GLAAD, like other organizations active in the defined community, have revised their names and use of labels specifically to be more inclusive of the individuals in their communities whom “gay” does not identify by using instead terms like LGBTQ or LGBTQIA.²⁴ Similarly, ally organizations such as PFLAG (Parents, Families and Friends of Lesbians and Gays) support the applicant and reiterate the importance of allies in the struggles facing the LGBTQIA community. However, not even these organizations use “gay” to describe allies. The Panel’s research and review of the applicant’s materials has demonstrated that even the applicant’s supporters recognize that “gay” is insufficient to identify the diversity of the LGBTQIA community, especially with regard to transgender, intersex, and ally individuals.

The Community Priority Evaluation panel has determined that the applied-for string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness	0/1 Point(s)
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The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application*,” (AGB, emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as it does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

Criterion #3: Registration Policies	4/4 Point(s)
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3-A Eligibility	1/1 Point(s)
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The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as

²² While it is not possible for the Panel to review all the articles in the LexisNexis search results cited by the applicant, the Panel reviewed a representative sample of articles from the same time periods.

²³ See <http://www.glaad.org/transgender/transfaq>

²⁴ In 2013, to be more inclusive of transgender individuals by not including them in the label “gay” or “lesbian”, the organization’s name officially was changed to GLAAD, as opposed to being an acronym for Gay and Lesbian Alliance Against Defamation (<http://www.glaad.org/about/history>). This is reflective of the trend the Panel identified among organizations within the defined community towards greater inclusivity and away from names and labels that identified only gays and lesbians.

eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that registration in “.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.”

According to the application, and as the applicant has confirmed in follow-up materials, in order to register a domain, the applicant requires

community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations.

As the application explains, these Authentication Partners (APs) include some of the largest organizations dedicated to members of the defined community and these organizations will provide “the most trusted entry points into .gay” while “reducing risk to unqualified registrations”.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Eligibility.

3-B Name Selection

1/1 Point(s)

The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application fulfills the requirements for Name Selection.

3-C Content and Use

1/1 Point(s)

The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Content and Use.

3-D Enforcement

1/1 Point(s)

The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals

mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Enforcement.

Criterion #4: Community Endorsement

2/4 Point(s)

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support and opposition documents for the dotgay LLC application for the string “GAY”.

Summary of Review & Verification of Support/Opposition Materials as of 5 September 2015²⁵

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	177	0	0	0
Attachments to 20(f)	128	128	128	51
Correspondence ²⁶	152	136	136	56
Grand Total	457	264	264	107

4-A Support

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

²⁵ The table below reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application both during the period of its previous evaluation and the present one. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information.

²⁶ The Panel reviewed 41 pieces of correspondence that contained 152 individual letters.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).

While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent them. There is no single such organization recognized by all of the defined community's members as the representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one source. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from one group of non-negligible size.²⁷ The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

²⁷ The Panel has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application. In the case of this opposition, all letters have been reviewed.

Exhibit 7

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben – Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

On February 1st, 2016, ICANN published the Determination of the Board Governance Committee (BGC) in relation to Requester's Reconsideration Request 15-21 (hereinafter: the "Second BGC Determination").

On the basis of the arguments set out in the Second BGC Determination, *"the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21."*

4. Date of action/inaction:

February 1st, 2016.

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

February 2nd, 2016.

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

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see

<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the “Application”).

Requester has elected to participate in the Community Priority Evaluation (“CPE”) in accordance with the provisions set out in the Applicant Guidebook.

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester’s application for the .GAY gTLD “*did not prevail in Community Priority Evaluation*”.

Despite having invoked ICANN’s Accountability Mechanisms on various occasions, “*the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21.*”

Therefore, the Requester is now facing contention resolution with three other applicants for the same string “*through the other methods as described in Module 4 of the Applicant Guidebook*”, requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in a “last resort” auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the EIU Determinations had been developed in accordance with ICANN’s standards, in particular those set out in the Applicant Guidebook.

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

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and does not necessarily have the public interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group in many countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the safety and security of this community and its members.

The fact that not only Requester but the gay community in its entirety is affected by the CPE Report and the Determinations is substantiated by the various letters of support for the Reconsideration Requests that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce. Requester also refers in this respect to the numerous letters of support received when developing its Application for the .GAY gTLD.

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.

In the First Determination, the BGC specified that *“new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel’s Report.”*

Now, the evidence provided by Requester shows that the EIU has appointed at least one evaluator who developed the First EIU Determination in order to develop the Second EIU Determination, which is contrary to the instructions by the BGC.

8.2. The Second BGC Determination

Section C of the Second BGC Determination reads as follows:

“The Requester contends that reconsideration is warranted because “it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,” in contravention of the BGC’s Determination on Request 14-44. However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU. Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE.” (emphasis added)

8.3. The “CPE Panel Process Document”

On August 6, 2014, ICANN published the Economist Intelligence Unit’s Process documentation for Community Priority Evaluation in view of providing

“transparency of the panel’s evaluation process”.^{1 2}

According to this CPE Panel Process Document:

*“The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”*³ (emphasis added)

The CPE Panel Process Document describes the CPE Evaluation Process as follows:

“The EIU evaluates applications for gTLDs once they become eligible for review under CPE. The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:

[...]

*As part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see “Verification of letter(s) of support and opposition” section for further details.)”*⁴ (emphasis added)

Furthermore, on page 5 of the CPE Panel Process Document, the EIU has described the process for “Verification of letter(s) of support and opposition”, which reads as follows:

“As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:”

[...]

“For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter

¹ See <https://newgtlds.icann.org/en/applicants/cpe>, § CPE Resources.

² See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf> for the actual CPE Panel Process Document.

³ CPE Panel Process Document, Page 2.

⁴ CPE Panel Process Document, Page 2, §CPE Evaluation Process, third bullet.

verification process.”

And:

“To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month.”

8.4. The EIU made a process error in allowing a third person, not even a core team member, and certainly not an “independent evaluator” to perform the verification of the letters of support and opposition

Bearing in mind the confirmation by the BGC that the “*CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements*”, and that “*the CPE Materials are entirely consistent with the Guidebook*”, the BGC confirmed – apparently on the basis of information ICANN does not want to see independently verified – that:

“The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”

Now, considering the fact that the CPE Process Document – which is considered by the BGC to be “*consistent with*” and “*strictly adheres to the Guidebook’s criteria and requirements*”, it is clear that the verification of the letters should have been performed by an independent evaluator (as emphasized in §8.2 above), and not by someone “*responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”.

It is therefore clear that, according to the CPE Panel Process Document, the point of contact for organizations had to be an evaluator. Also, the verification of the letters had to be performed by an evaluator.

Based on the statement contained in the last BGC Determination, it is clear that the BGC confirmed that the contact person for organizations was not an evaluator, and the letters of have not been verified by an evaluator.

In any case, it is obvious that – when reviewing the Second BGC Determination in light of the Applicant Guidebook and the CPE Panel Process Document –

previously defined processes and policies have not been followed, regardless of whether one sees the Applicant Guidebook and the CPE Panel Process Document as defining the same process, or that the one complements the other.

8.5. The BGC rejected Requester’s arguments that the CPE Materials imposed additional requirements than the ones contained in the New gTLD Applicant Guidebook

In the context of its First and Second Reconsideration Requests, Requester claimed that the EIU was not entitled to develop the CPE Materials in so far and to the extent they imposed more stringent requirements than the ones set forth by the Applicant Guidebook. Furthermore, Requester contended that the EIU’s use of these CPE Materials violated the policy recommendations, principles and guidelines issued by the GNSO relating to the introduction of new gTLDs.⁵

Nonetheless, the BGC confirmed in the Second BGC Determination that:

- *“none of the CPE Materials comprise an addition or change to the terms of the Guidebook;”^{6 7}*
- *“The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements”;*⁸
- *“the CPE Materials are entirely consistent with the Guidebook”.*⁹

One of the key arguments put forward by the BGC was that Requester should have challenged the development and implementation of the CPE Materials earlier, in particular *“within 15 days of the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action”.*

The BGC concluded that:

- *“[...] nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested.”;* and
- *“no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit.”¹⁰*

Requester notes that the Applicant Guidebook does not include the concept of a

⁵ Second BGC Determination, page 11.

⁶ The Second BGC Determination defines the term “CPE Materials” as “(1) the EIU’s CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN’s CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline).”

⁷ Second BGC Determination, page 12.

⁸ *Ibid.*

⁹ Second BGC Determination, footnote 34.

¹⁰ Second BGC Determination, page 14.

“core team” that is appointed in the context of CPE. In fact, the Applicant Guidebook only refers to a “Community Priority Panel” that is appointed by ICANN in order to perform CPE.¹¹

Therefore, the CPE Panel Process Document introduces a concept that has not been included in the Applicant Guidebook, which only refers to “evaluators”.

Indeed, according to the CPE Panel Process Document, each application is evaluated by seven individuals, being two independent evaluators and five core team members.

The fact that the BGC confirmed that, in addition to the seven individuals, an eight person has contributed to developing the CPE Determinations, being a “*person [...] responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”, can only lead to the following conclusions:

- the CPE Panel Process Document provides for a process and composition of a team that is different from what the Applicant Guidebook states (being only a “Community Priority Panel” that performs CPE);

OR

- the team that has been composed by the EIU in order to perform CPE for Requester’s Application does not have the composition that has been defined in the Applicant Guidebook nor in the CPE Panel Process Document.

8.6. Conclusion

For the reasons set out above, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies:

- contained in the Applicant Guidebook;
- contained in the CPE Materials;
- relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester’s Application in a discriminatory manner.

Indeed, when developing the Second BGC Determination, the BGC should, on the basis of the arguments and facts set out above, have confirmed:

- that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator, as

¹¹ See Applicant Guidebook, 4-8.

prescribed by this CPE Panel Process Document, but by someone else (a “core team member” or someone “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU”; or

- that the CPE Panel Process Document *does* define and describe a process that is more stringent than the one set out in the Applicant Guidebook, which does not require the independent evaluator perform such verification of letters of support and objection.

In the first case, the process followed by the EIU would be in direct contradiction with the processes it has designed itself and, moreover, would be contrary to the First BGC Determination, which required the EIU to appoint a new evaluation panel for performing CPE.

In the second case, the BGC has erred in confirming that “*none of the CPE Materials comprise an addition or change to the terms of the Guidebook*”.

Setting aside any possible arguments regarding possibly unfounded time-barred allegations, it is obvious that the outcome of a process is often, if not always, determined by the fact whether the correct process has been followed. In any event, the above facts clearly show that the EIU and – by extension ICANN – have not.

8.7. Request for a Hearing

Bearing in mind the elements set out above, Requester respectfully submits the request to organize a hearing with the BGC in order to further explain its arguments and exchange additional information in this respect.

8.8. Reservation of Rights

Notwithstanding the fact that Requester only relates to the fact that the EIU and ICANN have not followed due process in developing the Second CPE Determination, Requester is submitting this Reconsideration Request with full reserve of its rights, claims and defenses in this matter, whether or not stated herein.

9. What are you asking ICANN to do now?

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

- (i) acknowledge receipt of this Reconsideration Request;

- (ii) determine that the Second BGC Determination is to be set aside;
- (iii) invite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;
- (iv) determine that, given the circumstances, any and all of its requests set out in §9 of Requester's Second Reconsideration Request be awarded, which are incorporated herein by reference.

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

Requester has standing in accordance with:

- (1) ICANN's By-Laws, considering the fact that Requester has been adversely affected by the Second BGC Determination; and
- (2) ICANN's Top-Level Domain Application Terms and Conditions.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

- Yes
- No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

N/A

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

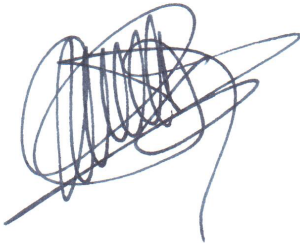
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be "Bart Lieben", with a large, loopy flourish extending from the bottom right.

February 17, 2016

Bart Lieben

Date

Attorney-at-Law

Exhibit 8

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben – Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

On October 8, 2015, ICANN published its second Community Priority Evaluation Panel’s New gTLD Program Community Priority Evaluation Report for the .GAY gTLD application submitted by the Requester. Reference is made to <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> (hereinafter: the “CPE Report” - See **Annex 1**).

According to this CPE Report, the Community Priority Evaluation concluded that:

“After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.”

Although the Disclaimer contained in the Determination states that “[...] these Community Priority Evaluation results do not necessarily determine the final result of the application”, ICANN has changed the “Contention Resolution Status” of the Application again into “Active”, and the “Contention Resolution Result” into “Into Contention”, apparently following the publication of the Second CPE Report. This action by ICANN is hereinafter referred to as the “Determination”, which Requester is seeking to have reconsidered.¹

Following receipt of the Determination, Requester has also submitted a detailed Request for Information to ICANN under the latter’s Documentary Information

¹ See Requester’s Application Status Page at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>.

Disclosure Policy (DIDP) (See **Annex 2-A**).

4. Date of action/inaction:

October 8, 2015, in relation to the publication of the Second CPE Report and the Determination; November 22, 2015 in relation to the response to Requester's Request for Information to ICANN under the latter's Documentary Information Disclosure Policy (DIDP).

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

October 9, 2015.

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

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the "Application").

Requester has elected to participate in the Community Priority Evaluation ("CPE") in accordance with the provisions set out in the Applicant Guidebook.

On October 8, 2015 ICANN published the Second CPE Report that has been drawn up by the EIU, which states that the Requester's application for the .GAY gTLD "*did not prevail in Community Priority Evaluation*".

Having experienced:

- (a) the process carried out by ICANN in approving the Application following Initial Evaluation;
- (b) the publication of the First CPE Report and the corresponding Determination on October 6, 2014, in which ICANN determined that Requester's Application did not prevail in Community Priority Evaluation;
- (c) not responding to Requester's Request for Information nor its allegations regarding spurious activity in relation to such CPE, which has been provided to ICANN shortly after;
- (d) the Board Governance Committee's Determination in connection with Requester's Request for Reconsideration #14-44 of January 20, 2015, in which the First CPE Report has been set aside, and a new

- evaluation by new evaluators has been decided;²
- (e) the publication of the Second CPE Report and the corresponding Determination on October 8, 2015, in which ICANN determined that Requester's Application did – again – not prevail in Community Priority Evaluation;

it has become clear to Requester that:

- (i) the EIU has interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook. Moreover, by publishing and implementing additional processes and criteria, the EIU has clearly exceeded the scope of its mission for ICANN that relates to the performance of CPE;
- (ii) in so far and to the extent ICANN would have allowed the EIU to publish its own processes and criteria within the remit of its mission as described in the AGB, ICANN and the EIU should have provided Requester with the opportunity to amend its application accordingly. Requester points out to the fact that, in similar situations, ICANN has provided applicants with the opportunity to amend or supplement their applications (e.g., in the framework of Public Interest Commitments, Specification 13, etc.). By not allowing Requester to do so, ICANN and the EIU have treated Requester and Requester's application unfairly and have discriminated against Requester;
- (iii) the EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Second CPE Report and the corresponding Determination;
- (iv) the EIU has not taken into account prior Expert Determinations regarding the .GAY gTLD and Requester's supporters;
- (v) the EIU has not taken into account relevant information provided to ICANN by Requester prior to and after the commencement of CPE;
- (vi) the CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the Second CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU;
- (vii) the EIU has wilfully and knowingly disregarded the decision of the BGC to appoint two new evaluators in order to perform CPE, which demonstrates (a) that the EIU has a clear bias towards Requester's Application and (b) the EIU has treated Requester and Requester's Application unfairly when performing CPE.

² <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>.

Bearing in mind the above elements, Requester is convinced that the approach taken by ICANN in allowing the latter to define processes and criteria different from those reflected in the Applicant Guidebook, applying scores and scoring criteria that are flawed, in particular by not having conducted a “careful and extensive review” as they have stated in the CPE Report, and this based on the information, arguments and evidence provided herein.

Therefore, the Requester is now facing contention resolution with three other applicants for the same string “*through the other methods as described in Module 4 of the Applicant Guidebook*”, requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the Determination had been developed in accordance with ICANN’s standards, in particular those set out in the Applicant Guidebook.

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

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and not necessarily having the best interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group by the United Nations, the EU, the USA and in many other countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the self-awareness of this community and its members.

The fact that the gay community is affected by the CPE Report and the Determination is substantiated by the various letters of support for this Reconsideration Request that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce, and others (See **Annexes 3-A to 3-P**).

Furthermore, by not providing certain information to which ICANN is entitled to have access under its contractual terms with the EIU, ICANN is deliberately and knowingly putting Requester at a disadvantage in the context of ICANN’s own accountability mechanisms.

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

According to the Requester, the EIU and ICANN has not acted in compliance with a wide variety of processes, procedures, and rules, in particular ICANN's own By-Laws as well as the Applicant Guidebook at various stages of the CPE process and thereafter. This has materially affected the Second CPE Report, the resulting Determination and Requester's Application for the .GAY gTLD, as well as Requester's position for operating such new gTLD in favor of the gay community.

Requester refers to the claims made in its response to the requirements set out in §6 hereof.

8.2. Summary

As will be outlined in further detail below and in the Annexes hereto, Requester has identified the following issues:

- (1) ICANN having allowed the EIU to develop processes and criteria outside of ICANN's policy development process and the Applicant Guidebook without providing the Requester with an opportunity to amend its Application, and hence discriminate community-based applicants in general, and Requester in particular;
- (2) Various process errors in identifying, assessing, verifying and evaluating Requester's Application as well as information provided by third parties against the criteria set out in the Applicant Guidebook;
- (3) Various inconsistencies in the CPE evaluation processes when comparing the CPE Report with other reports developed by the EIU in the context of the CPE process;
- (4) Clear violations of ICANN's By-Laws, in particular in relation to ICANN's transparency and accountability mechanisms, by not providing clear answers to Requester's Request for Information under ICANN's Documentary Information Disclosure Policy; and
- (5) The fact that the EIU appointed the same evaluator during the second CPE as the one who has performed the first CPE, notwithstanding the clear and unambiguous instruction to the EIU to appoint new evaluators for performing the CPE after having set aside the First CPE Report.

8.3. The EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook

Following ICANN's announcement that the EIU would be the sole evaluator for community-based applications having selected CPE, the EIU promulgated its own criteria for conducting such reviews, which included requirements in addition to those in the AGB.

According to the first Recommendation of the GNSO, which formed the basis of the New gTLD Program:

"ICANN must implement a process that allows the introduction of new top-level domains.

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."³

The EIU has published four documents in the timeframe September 2013 – September 2014, being more than one and a half years, respectively two and a half years *after* the publication of the final version of the Applicant Guidebook, and more than a year / two years following the closing of the application window for new gTLDs, which are available on ICANN's website:⁴

- *CPE Panel Process Document*, published on August 6, 2014 (**Annex 4-A**);
- *CPE Guidelines*, published on September 27, 2013 (**Annex 4-B**);
- *Updated Frequently Asked Questions (FAQs)*, published on September 10, 2014 (**Annex 4-C**); and
- *CPE Processing Timeline*, published on September 10, 2014 (**Annex 4-D**) (jointly referred to as the "CPE Documents").

Notwithstanding the fact that the BGC has confirmed that the latter documents are to be considered policy documents, Requester has not been invited to amend their applications bearing in mind these new or additional requirements when

³ This was in fact the first GNSO Recommendation, contained in its Principles, Recommendations & Implementation Guidelines, attached hereto as **Annex B-1**.

⁴ See **Annex B-2**.

they submitted them in the beginning of 2012 ...⁵

In order to deal with similar situations – for instance in order to respond to concerns expressed by the Governmental Advisory Committee (“GAC”) or brand owners – ICANN has also created additional criteria or interpretations thereof, but these processes have been implemented by allowing affected applicants to clarify their position on an individual basis, or even make changes to their applications.

Requester points out in this respect to the policy development process that led to Specification 13 to the Registry Agreement.⁶ In the context of this process, applicants of so-called brand-TLDs have had the opportunity to indicate in a separate document whether they complied with such new rules, processes and criteria, and have even been given the possibility to draft specific terms and conditions for the registration of domain names in their gTLDs.

Also, applicants for TLDs that have been earmarked by the GAC in 2013 as “Category 2 – Exclusive Access” gTLDs have been given the express opportunity to clarify their positions in relation to such qualification and have been given the opportunity to amend their applications accordingly. Specific response forms have been developed by ICANN to this end, which have been published on the ICANN website.

For community-based gTLDs, however, requests for dialogue expressed by the cTAG went ignored, no such outreach has taken place, no specific clarifying questions have been issued, and no opportunities were presented to clarify – on an individual basis – their position in relation to the CPE Documents that have been used by the EIU in order to prepare their CPE reports.

In Requester’s view, ICANN has therefore clearly discriminated community-based gTLDs by changing or “interpreting” the processes and criteria set out in the Applicant Guidebook more than a year and a half after the closing of the application window, without providing applicants with the opportunity to amend their applications accordingly.

Therefore, Requester is of the opinion that:

- ICANN has not acted in compliance with the requirement set out by the GNSO and the ICANN community at large that applicants had to be evaluated against transparent and predictable criteria, since the processes and criteria contained in the CPE Documents are to be considered *“additional selection criteria used in the selection process”* that have not been made *“fully available to the applicants prior to the initiation of the process”*.

⁵ Requester points out to the fact that the final version of the Applicant Guidebook dates from June 2012, i.e. after the closing of the application window.

⁶ Reference is made to <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>.

- ICANN has obviously discriminated community-based applicants by not providing each applicant, and Requester in particular, on an individual basis with the opportunity to clarify its position in relation thereto.

The EIU has expressly confirmed that they *“reviewed all application materials, including correspondence for the .gay application evaluation. This meets the AGB standards. The EIU took an extra step, as outlined in our evaluation guideline, to attempt to verify relevant letters of support and opposition under certain circumstances. For the .gay evaluation, a single piece of correspondence (i.e. one PDF document) that contained a number of letters of support was reviewed but not verified via email. Again, the verification is not required by the AGB. ...”*⁷

This underlines the point made by Requester that the EIU has not applied the AGB criteria and procedures, but rather its own processes.

For this reason alone, the Second CPE Report should be set aside by the BGC.

8.4. The EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination

According to the Applicant Guidebook: *“As part of the evaluation process, evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators.”*

In the context of the Second CPE, the EIU has submitted Clarifying Questions to Requester, specifically in relation to Criterion #1 – Community Establishment.

As was the case in the First CPE, Requester received a full score of 4 out of 4 points on this Criterion.

However, Requester did not receive a Clarifying Question in relation to the Criteria where Requester did not receive a passing score, such as the "Nexus" criterion.

Indeed, according to the EIU's own CPE Panel Process Document, they clearly had this option:

“If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support

⁷ <https://omblog.icann.org>.

*could not be verified.*⁸

According to the Frequently Asked Questions page relating to ICANN's Clarifying Questions process,⁹ it is clear that such questions may be sent from the following panels:

- Background screening
- Geographic name
- String similarity
- DNS stability
- Registry services
- Technical/Operational
- Financial
- Community priority evaluation (if applicable)

ICANN has consistently been sending clarifying questions throughout the Initial Evaluation phase if – according to the evaluation panels – the applicant's answers to the evaluation questions did not qualify for a passing score. For instance, Requester received a clarifying question in relation to its response to Question 44.

When ICANN forwarded such clarifying question to Requester on March 4 of 2013, ICANN indicated that *"The evaluators will complete the evaluation based on the most current application information, which will include any new information you submit. If the new information introduces inconsistencies in the application, creates new issues, or is still insufficient for the evaluators to award a passing score, the application will be scored and results posted without further notice."* (emphasis added)

Requester did not receive any further questions relating to its answers to community-related Questions 20 *et seq.* Hence, Requester rightfully assumed that ICANN had no further questions with respect to the answers provided by Requester to such community-related questions.¹⁰

Since ICANN and the EIU have nowhere and never indicated that Requester's answers to Questions 20 *et seq.* posed issues to the evaluators, ICANN and the EIU have misguided and misled Requester by creating the impression that the answers to Questions 20 *et seq.* were sufficient for the evaluators to award a passing score.

⁸ CPE Panel Process Document, page 3.

⁹ See **Annex B-7**.

¹⁰ Reference is made to ICANN Case #00022186, where ICANN has asked for additional information in relation to Requester's response to Question 44.

Furthermore, bearing in mind the fact that the EIU clearly misinterpreted certain parts of Requester's application in the context of developing the First CPE Report, one would expect that it would provide Requester with each and every opportunity to fully clarify certain issues that were unclear for the EIU. Indeed, in the Second CPE Report, the EIU stated that:

“(5) Although the score on Delineation is unchanged since the first evaluation, the Panel’s analysis has changed due to the applicant’s response to a Clarifying Question regarding the role of Authentication Partners (APs). Previously, the Panel had understood the APs to be a mechanism of members’ awareness and recognition, but, as above, that is no longer the case and the role of APs is correctly understood to be relevant for the purposes of Section 3.”

Notwithstanding the fact that the EIU admitted having misinterpreted Requester's application during the first CPE, and although certain elements remained unclear to the EIU during the second CPE, the EIU deliberately chose not to ask Clarifying Questions to Requester in order to make sure that it completely understood what Requester's application was about.

Instead, the EIU deliberately chose to finalize and publish the Second CPE Report without providing Requester with the opportunity to give a full view on its intentions with the .GAY gTLD and hence avoid any misunderstanding the EIU might have had.

In doing so, the EIU knew that Requester's application would not pass CPE, which can only be interpreted as unfairly treating Requester and Requester's application.

8.5. ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE

According to the CPE Panel Process Document, the EIU's "core team" may carry out additional research *“to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures”*.¹¹

Referring to the CPE Report, it is clear that such additional research has been carried out by the EIU. For instance, the EIU has referred to an organization within the communities explicitly addressed by the application, which has opposed to Requester's Application, however without disclosing who this organization was, making it impossible for Requester to verify whether the EIU's evaluation was accurate.

Requester is therefore of the opinion that:

¹¹ CPE Panel Process Document, page 3.

- the EIU has not followed its own process, which enabled the EIU to issue clarifying questions to Requester when performing additional research;
- the EIU has not acted in a transparent way by not reaching out to Requester when analyzing additional information outside the context of Requester’s Application;
- the EIU deliberately acted in an intransparent way in developing the CPE Report, which does not allow Requester to verify whether the CPE Report in general and the information relied upon by the EIU in particular meet the standards set out in the Applicant Guidebook; and
- ICANN has deliberately not provided access to the information relied upon by the EIU following Requester’s Request for Information, which made it impossible for Requester to verify whether the Determination was founded.

8.6. The EIU has not taken into account relevant information provided to ICANN by Requester during the CPE process

Bearing in mind the fact that various incorrect allegations have been made with respect to Requester’s Application (on public fora, in the context of objections that have been initiated against Requester’s Application, etc.), Requester has reached out to ICANN on various occasions, providing proof of the fact that such allegations were false. Such information included clear and irrefutable evidence of the fact that Q Center, a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based – provided ICANN with false information with respect to Requester’s intentions. Reference is made to the correspondence with and evidence provided to ICANN contained in Annexes **5-A** to **5-J** hereto.

However, ICANN allowed misleading and untruthful documents to be presented by at least one other applicant for the .GAY gTLD to be used as evidence, without allowing Requester to provide for any context or challenge.¹²

On April 1st, 2015 Requester provided a letter from Q Center whereby Ms Antoinette Edwards, in her capacity of Q Center’s Board of Directors, has provided notice of their *“request to void the opposition letter bearing the Q Center name”*.¹³

The Request for Reconsideration process is a mechanism provided by Article IV, Section 2 of the ICANN Bylaws, *“by which any person or entity materially affected by an action (or inaction) of ICANN may request review or*

¹² More in general, ICANN staff refused to hear comments from cTAG and multiple community applicants concerning vulnerability to spurious activity faced by community applicants when opposed by standard applicants.

¹³ <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-14apr15-en.pdf>.

reconsideration of that action by the Board. According to the criteria developed for this process, “any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that the person or entity has been adversely affected by:

- *one or more staff actions or inactions that contradict established ICANN policy(ies); or*
- *one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or*
- *one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.”*

14

For these reasons alone, Requester is of the opinion that the EIU has relied on incorrect, at least biased, material information, considering the fact that the EIU has considered this letter of opposition to be sufficient to deduct one point in scoring Requester’s Application in relation to the Opposition criterion.

Furthermore, Requester points out to the fact that Q Center is a member of CenterLink, as is shown on the latter’s website:

<http://www.lgbtcenters.org/Centers/Oregon/482/Q-Center.aspx>.

CenterLink, as a membership and support organization, has provided various letters of support for Requester’s Application.¹⁵

As CenterLink stated in its endorsement letter that has been submitted to ICANN in connection with Requester’s Application, “[its] goal is to develop and harness the power of over 200 LGBT community centers in small towns and big cities throughout the United States and abroad”.

Requester therefore does not understand how the EIU could have determined that one letter – which has been declared void by the organization itself – from one LGBT community center can be considered “relevant” if the overarching membership organization of which Q Center forms part has repeatedly and consistently expressed support for Requester’s Application. Furthermore, Requester does not understand how the EIU could consider a ratio of 1 to more than 200 would be “non negligible”.

When reviewing other CPE reports prepared by the EIU, it is clear that the approach taken by the latter is inconsistent, bearing in mind the fact that – by way of example – the letter of opposition provided by the International Radio Emergency Support Coalition against the .RADIO community-based gTLD

¹⁴ <https://www.icann.org/resources/pages/mechanisms-2014-03-20-en>.

¹⁵ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>; <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadattachment/138830?t:ac=444>;

application has been disregarded by the EIU, notwithstanding the fact that this organization is internationally recognized and even has a Special Consultative Status with the Economic and Social Council of the United Nations (ECOSOC) ...

Furthermore, the AGB sets a clear threshold for opposition letters to be considered in the context of CPE. According to the AGB: “[to] be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”¹⁶

Now, the Second CPE Report does not provide a clear indication that this letter of objection is of a reasoned nature, nor does it state that the conditions for non-relevancy have not been met. Indeed, the opposition letter has never been disclosed by ICANN or the EIU (or, at least, ICANN or the EIU have never made it clear which letter was considered in this context), so Requester is unable to verify whether this letter met the standards set out above. Therefore, by not providing such a letter to Requester, the latter has been deliberately kept in the dark and put at a disadvantage in any possible defense in the context of ICANN’s accountability and transparency processes.

The EIU (and ICANN) have therefore in Requester’s view not complied with their standards of due diligence and transparency, which makes Requester believe that there was a clear bias against Requester’s Application. Hence, Requester’s Application has been treated unfairly by the EIU.

On the basis of these arguments alone, Requester believes that it is entitled to request reconsideration of the Second CPE Report.

8.7. The EIU has not taken into account relevant expert opinions provided to and decisions taken by ICANN in relation to Requester’s Application

It is obvious that the EIU has not taken into account the various decisions taken in the context of Community Objections.¹⁷

Requester hereby particularly refers to §22 of the Decision rendered by Prof. Dr. Bernhard Schlink, who was the Expert appointed by the International Chamber for Expertise of the International Chamber of Commerce *in re: The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited* (sic),

¹⁶ AGB, page 4-19.

¹⁷ See ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex 6-A**; ICDR Case No. EXP/394/ICANN/11, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. United TLD Holdco Ltd*, **Annex 6-B**; ICDR Case No. EXP/392/ICANN/9, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Design, LLC*, **Annex 6-C**; and ICDR Case No. EXP/393/ICANN/10, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Domain Holdings Limited*, **Annex 6-D**.

and many other objections concerning applications relating to the “.gay” and “.lgbt” gTLDs. Indeed, Dr. Schlink recognized in multiple Expert Determinations, after having carefully examined the more stringent criteria and conditions required to initiate Community Objection proceedings that:

“[t]he legitimate interests of the gay community can only legitimize a claim to a gTLD that is exclusively linked to the gay community. A community that represents the legitimate interests of its members can claim a safe and secure position in the society and on the market, and this holds particularly for a community that represents the legitimate interests of a minority. Its claim to a safe and secure position on the society and on the market includes a safe and secure position in the internet. Therefore, while the gay community cannot exclude competition, it could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay’s community application for the string .gay.”¹⁸

And although Requester respects the fact that CPE and Community Objections are distinct processes, it does not understand the reasons why the EIU has simply and entirely disregarded any of these elements in developing the CPE Report, nor has it provided for any reasons why it did not agree with these unambiguous and unilateral decisions to the contrary. Indeed, not a single reference has been made to these Expert Determinations throughout the CPE Report.

Requester is therefore of the opinion that the EIU obviously did not rely on essential information publicly available to ICANN and the EIU that was directly relevant for Requester’s Application. Hence, the EIU (and ICANN) did not act in an open and transparent manner in rendering the CPE Report and the Determination, the outcome whereof is diametrically opposed to previous Expert Determinations endorsed by ICANN.

8.8. The CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU

According to the EIU, “consistency of approach in scoring applications is of particular importance”.¹⁹ This has also been a key criterion in selecting independent evaluators for performing Community Priority Evaluations, and has been an essential obligation in the context of the agreement that has been

¹⁸ See: ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex 6-A**.

¹⁹ Community Priority Evaluation Panel Process, page 1.

entered into by and between ICANN and the EIU.²⁰

In order to verify whether the EIU has been consistent, a comparison needs to be made between the elements and arguments used by the EIU in this particular CPE with other CPE results.

8.8.1. The EIU is using different standards than the ones set out in the AGB

According to the criteria for Community Priority Evaluation set out by the Applicant Guidebook, as well as the Community Priority Evaluation (CPE) Guidelines, the following question must be scored when evaluating the application:

“Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.”

“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.” “Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.

“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community. “Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’. “Identify” does not simply mean ‘describe’, but means ‘closely describes the community’.
“Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has”.

As indicated above, Requester has performed an Internet search, as suggested by the CPE Guidelines, and has found substantial evidence that proves that in common language, the words “gay”, “LGBT” and “LGBTQIA” are used as synonyms.²¹ Requester refers to various references in quality press, including the Economist²² and the New York Times,²³ where the word “gay” is being used as a “catch-all term”, synonym or *pars pro toto* term for LGBTQIAs.

²⁰ References to be included.

²¹ See the research report and press articles contained in **Annexes 7-A to 7-D**.

²² <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;

<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;

²³ http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&_r=0.

Requester has not only obtained the official endorsement and support for its application for the .GAY gTLD from the Complainant in the case referred to above, namely the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA),²⁴ but is also recognized by the ICDR and ICANN as an established institution associated with a clearly delineated community.²⁵

Considering the above, Requester does not understand why, on the one hand, ICANN recognizes the fact that Requester and one of its key supporters “*could file and have filed its own application for a gTLD that is designed to service the gay community and to operate accordingly*” as expressly confirmed by the ICDR, whilst, ICANN and the CPE Panel determining on the other hand that “*the string does not identify or match the name of the community as defined in the application*”.

Furthermore, Requester does not understand that although the ILGA has obtained the recognition from the ICDR – and hence also from ICANN – to be “*clearly recognized by the community members as representative of the community*” as required by the AGB in order to qualify for a score of 2 out of 2 points on the CPE criterion “Support”, the EIU has countered such argument without even having reached out to the ILGA nor the Requester in the context of the CPE process ...

Therefore, it is undisputedly so that the evaluation processes and procedures designed and followed by the EIU is flawed, at least has generated outcomes that are inconsistent with previous determinations made by or on behalf of ICANN.

8.8.2. Community definition not to include non-community members

As regards the definition of the community contained in the various community-based applications, the EIU has considered whether or not the applicant has attempted to include certain “non-community members”. Rightfully so, registries of community-based gTLDs should restrict the registration of domain names to members of their respective community. Therefore, the EIU should indeed assess whether or not a particular applicant is basically not imposing any restrictions or requirements upon registrants of domain names in the proposed community-based gTLDs.

In the case of Requester’s Application, the EIU has determined that:

“The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus.”

²⁴ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>;

²⁵ See ICDR Case No. EXP/390/ICANN/7, §13.

The CPE Panel emphasizes the fact that Requester has included “allies” in its community definition, and appears to have found therein an argument for determining that Requester’s community definition has been “overreaching substantially” beyond the “gay” concept.

According to Requester:

- the EIU has not taken into account Requester’s specific arguments for including “allies” into its community definition;
- the EIU has in this context not considered the Requester’s requirement for an “ally” to be verified by Authentication Partners prior to being eligible to register a domain name in the .GAY gTLD and, in general, has ignored endorsing organizations with defined roles for allies;
- the EIU has accepted in other CPE Reports similar concepts as eligibility requirement for a “community-based gTLD”; and
- no clarifying questions have been issued in this respect.

LGBTQIA stands for “Lesbian”, “Gay”, “Bisexual”, “Transgender”, “Queer”, “Intersex”, and “Allies” and is one of the commonly used terms to emphasize a diversity of sexuality and gender identity-based cultures.

As Requester has demonstrated throughout its Application, it has obtained the support from more than 240 organizations and companies from all over the world for its .gay gTLD application, all of which are supporting at least one of the stakeholders set out above. Given their membership, posture and outreach, it goes without saying that these sponsors will play an important moral, and – for Authentication Partners – even an operational role in the establishment and management of the .gay gTLD.

Now, since an organization or company in itself can impossibly have a gender identity or sexual orientation, Requester has been seeking for a way to also position these companies and organizations in this community definition. For this reason, Requester has referred to these organizations as “allies” in the context of the LGBTQIA definition.

Furthermore, as stated in the Application, LGBTQIAs are a vulnerable group in many countries and societies, and too often still the subject of prosecution for who they are. In order to put in place safeguards for those gay community members who do not wish to be directly associated with a domain name registration, organizations and companies who in essence cannot be “non-heterosexual” should have the possibility to act as a proxy service, which is common practice in the domain name industry.

In any case, any such “ally” must be approved by an Authentication Partner in order to be able to register a domain name in its own name or in the name or on behalf of a third party who meets the LGBTQI requirements.

Irrespective of the fact that the EIU has clearly misunderstood the concept of “allies” in Requester’s Application, it is obvious that they have attempted to find herein an argument that Requester is over-reaching substantially beyond the community. Requester points out to the fact that the EIU does not seem to have issues with similar concepts in other CPE reports, which clearly shows that the EIU has not been consistently applying the policy requirements for community-based applications:

- the community definition contained in the .OSAKA gTLD application # 1-901-9391 states: *[m]embers of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following: [...] Entities, including natural persons who have a legitimate purpose in addressing the community.*” (emphasis added);²⁶
- the community definition contained in the .HOTEL gTLD application #1-1032-95136 includes: *“Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2”;*

Request does not understand why, on the one hand, an “ally” who assumes a supporting role for a vulnerable individual or group of individuals and, on the other hand, “other organizations representing hotels” are treated differently in view of community membership criteria. Nor does it understand why someone who “self-identifies as having a tie to [the community]” or “entities or natural persons who have a legitimate purpose in addressing the community” can possibly be considered as have a closer connection to a community than an “ally”, especially when in the latter case such connection is verified by an independent Authentication Partner, and in the former case a self-identified “tie” to the community suffices ...

It is therefore clear to Requester that the EIU has used double standards in preparing the various CPE reports, and is discriminating between the various community-based applicants, since they have been evaluating similar definitions and criteria in a different way.

8.8.3. The EIU has taken different approaches in other CPE reports, which clearly indicates that they have not applied the AGB evaluation criteria in a consistent way

Both the AGB evaluation criteria and process have been designed in order to create an open and “welcoming” framework for a wide variety of communities, and especially for those who do not have the financial resources in order to outbid commercial registry operators who have applied for the same or a

²⁶ See the .OSAKA CPE Report, attached hereto as **Annex 8**, page 2.

confusingly similar string.

When looking at the CPE results of all community-based applications evaluated so far, one cannot but conclude that the EIU has had a clear preference for industry or geographically focused applicants, notwithstanding the fact that the criteria against which each community-based application had to be evaluated have been the same.

When comparing the different evaluation reports issued by the EIU, it is obvious that the EIU has treated similar situations in dissimilar ways, for instance by:

- on the one hand, recognizing the letter of objection submitted by Q Center of Portland, Oregon as “relevant”, notwithstanding the fact that the organization notified that this letter was voided; and
- on the other hand, disregarding the letter of objection of an international organization that has a Special Consultative Status with the ECOSOC and is a member of the “radio” community as “not relevant” in the determination regarding the .RADIO gTLD application submitted by the European Broadcasting Union.

For this reason alone, the Second CPE Report has to be set aside.

8.8.4. The EIU has set aside the evidence provided by Requester in its application without providing proper argumentation

The EIU has not taken into account arguments provided by Requester in its application, in additional submissions to ICANN, as well as in the context of the Clarifying Question that was issued during the second CPE process without stating the reasons why such information or arguments were not taken into account.

8.9. Support

In relation to the criterion “Support”, the EIU concludes in the CPE Report that:

“There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”

It does not appear to Requester that there is one single organization recognized by the “radio” community²⁷ or the “hotel” community²⁸, who have both obtained a score of 2 out of 2 points on this criterion. Based on these CPE reports, it is clear that also these community-based applicants appear to have sought (and found) support from a number of national and international endorsers in a similar way than Requester, who only scored 1 out of 2 points.

It is not clear for Requester, who is in the same position as the community-based applicants for the .RADIO and the .HOTEL gTLDs, why he has been treated in a dissimilar manner.

Furthermore, it appears that the EIU has erroneously qualified ILGA (the International Lesbian, Gay, Bisexual, Trans and Intersex Association) as a “group with relevance”, notwithstanding the wording of Criterion 4 Guidelines. Indeed, according to these Guidelines:

“With respect to “Support,” it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.

Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.

The applicant will score a 1 for “Support” if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application.”

If the EIU would have considered the decisions that have been taken in the context of Community Objections, it would have been immediately clear that an ICANN endorsed organization with standing has clearly and unambiguously recognized ILGA as *the* organization to represent the targeted community.²⁹ Instead, the EIU chose to completely disregard such a determination without providing for any argumentation in this respect.

²⁷ <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

²⁸ <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

²⁹ See ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex 6-A**; ICDR Case No. EXP/394/ICANN/11, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. United TLD Holdco Ltd*, **Annex 6-B**; ICDR Case No. EXP/392/ICANN/9, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Design, LLC*, **Annex 6-C**; and ICDR Case No. EXP/393/ICANN/10, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Domain Holdings Limited*, **Annex 6-D**.

8.10. ICANN has refused to provide access to information that is at its disposal or could easily be requested with the EIU in accordance with the terms of their *New gTLD Program Consulting Services Agreement*

On October 22, 2015, Requester filed a detailed Request for Information with ICANN, which is attached to this Reconsideration Request as **Annex 2-A**.

In its response to Requester's Request for Information under the DIDP of November 22, 2015, ICANN either stated that the information requested in the Request for Information (i) either met the Conditions for Nondisclosure and are hence, according to ICANN, "*not appropriate under the DIDP*", or (ii) were not available to ICANN, who did not have access to the information requested (See **Annex 2-B**).

More in particular, the response contained the following elements and arguments:

- "*to help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses*";
- "*Thus, with the exception of the CPE Report, which has been published, ICANN does not have documents that contain the requested information*" (DIDP Response, p. 10).

According to the terms of the *New gTLD Program Consulting Services Agreement* entered into by and between ICANN and the EIU, ICANN effectively has access to such information or is able to have access to such information.

Requester refers to:

- Section 8 of Statement of Work #2, which states that "*Panel Firm will reasonably cooperate and provide reasonably requested documentation to ICANN and its appointed independent Quality Control service provider for the purposes of helping it verify that Panel Firm's evaluation services have been and are performed in accordance with QC Guidelines*";
- Furthermore, according to the same Section, "*[t]he detailed activities to provide support to on-going gTLD evaluation process Quality Control requirements include the following: [... 3.] Access to working papers as required verifying Panel Firm's compliance.*"

It is therefore clear that ICANN has the opportunity to have insight in materials that have been prepared by the EIU in the context of Community Priority Evaluation; however, it has deliberately chosen not to request access to such information, by hiding behind the independency of the evaluation panels and the standards of non-disclosure set out in the DIDP.

8.11. The EIU has engaged the same evaluator, notwithstanding the BGCs clear instruction to appoint two different evaluators to perform the new CPE

In its Determination of January 20, 2015 regarding Requester's Request for Reconsideration 14-44, the BGC stated:

*"[...] that the CPE Panel Report shall be set aside, and that the EIU shall identify two different evaluators to perform a new CPE for the Application. Further, the BGC recommends that the EIU include new members of the core team that assesses the evaluation results."*³⁰

According to the CPE Panel Process Document, one of the evaluators is responsible for the verification of the letters that have been submitted in conjunction with the Community-based application under review. This document states that "[a]s part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see "Verification of letter(s) of support and opposition" section for further details.)"³¹

However, according to the verification emails that have been sent by the EIU, it appears that both during the first and the second CPE, the EIU appointed the same evaluator for performing the new CPE. Indeed, according to the evidence contained in **Annex 9-A** (containing verification emails sent by the EIU during the first CPE) and **Annex 9-B** (containing verification emails sent by the EIU during the second CPE), Mr Benjamin Parisi was responsible for performing the CPE, which is a clear violation of the BGC Determination.

Therefore, in performing the CPE, the EIU did not only adhere to the clear instruction provided in the determination of the BGC, it also did not follow its own processes (which is, as stated above, different from the process described in the AGB).

For this reason alone, the Second EIU Determination should be set aside by ICANN.

The information provided by ICANN as a response to Requester's Request for Information has not disclosed any information to the contrary, which implies that ICANN has at least tacitly consented to the fact that at least one evaluation panelist has been working on the new evaluation, which is contrary to the BGC's Determination set out above.

³⁰ See BGC Determination, pages 2 and 31-32.

³¹ See "Community Priority Evaluation Panel and its Processes", page 2 (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>), contained in **Annex 4-A**.

8.12. Conclusion

It is obvious that the EIU has acted in an intransparent and discriminatory manner when performing the first and the second CPE with respect to Requester's community-based application.

Although it has been clear from the outset that the AGB criteria for CPE have been developed in order to accommodate and welcome a wide variety of self-identified communities, it is clear that the implementation of this process (and, moreover, the EIU's interpretation and implementation thereof) did not follow the same principles.

Requester has paid USD 22,000 in order to participate to the CPE Process, which is an amount that is far higher than the USD 10,000 estimate that has been referred to in the AGB. One would expect that for such an amount, ICANN and the CPE firm, under the delegated authority of ICANN, would act diligently when applying the standards set out in the AGB, follow the processes defined prior to the establishment of the New gTLD Program.

During the development of both CPE Reports and both EIU Determinations, it is clear that:

- criteria and standards have been used that have been developed outside of ICANN's policy development processes more than two years after the closing of the application window in May of 2012, without having given Requester the opportunity to amend its application;
- additional research has been performed without verifying and validating the outcome thereof with the Requester;
- undisputable process errors have been made by the EIU when verifying the identity and statements made by Requester's supporters, including but not limited to performing the CPE by the same evaluators, which shows that there is a clear bias against Requester's Application and that the latter has been treated unfairly;
- information that has been provided by Requester to ICANN in order to counter and put into context certain false information has been disregarded despite multiple attempts to clarify any issues that have arisen;
- inconsistent standards have been used by the EIU in actually performing the evaluation, especially when comparing the arguments and information relied upon by the EIU in other CPEs;
- even where the EIU's evaluation process expressly deviated from the processes described in the AGB, the EIU failed to follow its own processes;
- notwithstanding the fact that the standards used by the EIU in the First

CPE Report are different from the standards referred to in the Second CPE Report – likely bearing in mind the criticisms expressed by Requester in the context of its first Request for Reconsideration, the EIU’s basic conclusions have remained the same;

- one of the overarching comments that can be made is that the EIU has taken an extremely Western-world / UK centric approach in evaluating Requester’s application. Reference is made to promoting the hardcopy Oxford English Dictionary as a standard, whilst the international on line version provides for different definitions. ICANN, as a global organization, serving the global public interest, should utilize and implement standards and practices that are truly international by nature, and not self-serving.

Based on the above, Requester cannot but conclude that the EIU had a clear bias against Requester and Requester’s application. By deliberately creating and implementing an obscure process for performing an evaluation of a wide array of community-based applications, it has basically transformed this process into a straitjacket.

And, as said before, for some vulnerable groups like the gay community, opaqueness is a breeding ground for discrimination, as was clearly the case in both the First and the Second CPE Report.

Therefore, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester’s Application in a discriminatory manner.

9. What are you asking ICANN to do now?

Considering the information and arguments included in this Reconsideration Request, Requester requests ICANN to:

- (i) suspend the process for string contention resolution in relation to the .GAY gTLD;
- (ii) review the Requester’s above requests, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN,
- (iii) set aside the Second CPE Report and the resulting Determination;
- (iv) request a third party other than the EIU to perform a new determination at ICANN’s cost in view of the CPE criteria set out in the Applicant Guidebook;
- (v) within a timeframe of one month following the appointment of such third party, allow Requester to submit a written statement to such third party;

- (vi) following that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue;
- (vii) if ICANN would decide not to award the remedies sought by Requester set out in (i) to (viii) above, Requester respectfully requests ICANN to reconsider the Determination and determine that the Application meets the required thresholds for eligibility under the Community Priority Evaluation criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application:
 - a score of 4 out of 4 points in relation to Criterion #2: Nexus between Proposed String and Community; and
 - a score of 4 out of 4 points in relation to Criterion #4: Community Endorsement,whilst keeping the scores on the other criteria reflected in the CPE Report.
- (viii) In any case, given the issues encountered by Requester, provide Requester with a full refund of the CPE fees paid by the latter to ICANN.

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

As stated above, ICANN published on October 8, 2015 its Determination on the basis of the Second CPE Report, stating that Requester's application for the .GAY gTLD did not meet the criteria for community-based applications, as defined in the Applicant Guidebook.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

x No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

N/A

Do you have any documents you want to provide to ICANN?

Reference is made to the Annexes attached hereto, a list whereof has been contained in a separate overview.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

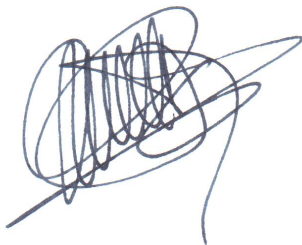
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,



December 4, 2015

Bart Lieben
Attorney-at-Law

Date

Exhibit 9



Community Priority Evaluation Process Review Update

2 June 2017

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

Background on CPE Process Review

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On [17 September 2016](#), the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his [letter of 26 April 2017 to concerned parties](#), Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

CPE Process Review and Current Status

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending [Requests for Reconsideration](#).

The review is being conducted in two parallel tracks by [FTI Consulting Inc.'s \(FTI\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists.

For more information about the CPE process, please visit <https://newgtlds.icann.org/en/applicants/cpe>.

Exhibit 10

13 DECEMBER 2017

ANALYSIS OF THE APPLICATION OF THE COMMUNITY PRIORITY EVALUATION (CPE) CRITERIA BY THE CPE PROVIDER IN CPE REPORTS

PREPARED FOR JONES DAY





Table of Contents

I.	Introduction.....	1
II.	Executive Summary.....	3
III.	Methodology.....	3
	A. FTI's Investigative Approach.....	3
	B. FTI's Investigative Steps for Scope 2 of the CPE Process Review..	5
IV.	Background on CPE.....	10
	A. Criterion 1: Community Establishment.....	13
	B. Criterion 2: Nexus between Proposed String and Community.....	15
	C. Criterion 3: Registration Policies.....	17
	D. Criterion 4: Community Endorsement.....	19
V.	The CPE Provider Applied The CPE Criteria Consistently In All CPEs. ...	21
	A. The Community Establishment Criterion (Criterion 1) was Applied Consistently in all CPEs.....	22
	1. Sub-criterion 1-A: Delineation	23
	a. Clearly Delineated.....	24
	b. Organization.....	27
	c. Pre-existence	30
	2. Sub-Criterion 1-B: Extension.....	32
	a. Size	32
	b. Longevity.....	34
	B. The Nexus Criterion (Criterion 2) was Applied Consistently in all CPEs.....	36
	1. Sub-Criterion 2-A: Nexus	37
	2. Sub-Criterion 2-B: Uniqueness.....	41
	C. The Registration Policies Criterion (Criterion 3) was Applied Consistently in all CPEs.....	42
	1. Sub-Criterion 3-A: Eligibility	43

2.	Sub-Criterion 3-B: Name Selection	44
3.	Sub-Criterion 3-C: Content and Use	47
4.	Sub-Criterion 3-D: Enforcement.....	48
D.	The Community Endorsement Criterion (Criterion 4) Was Applied Consistently in all CPEs.....	51
1.	Sub-Criterion 4-A: Support.....	51
2.	Sub-Criterion 4-B: Opposition	54
VI.	The CPE Provider's Use of Clarifying Questions Did Not Evidence Disparate Treatment.....	56
VII.	The CPE Provider's Use of Outside Research.	57
VIII.	Conclusion.....	57

I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the "process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the New gTLD Program.¹ The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

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

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 2 of the CPE Process Review and specifically details FTI's evaluation of whether the CPE Provider consistently applied the CPE criteria throughout each CPE.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process/newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (Applicant Guidebook)⁹ and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI's review of the written communications and documents and FTI's interviews with the relevant personnel described in Section III below.

Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.

III. Methodology

A. FTI's Investigative Approach.

In Scope 2 of the CPE Process Review, FTI was tasked with evaluating whether the CPE Provider applied the CPE criteria consistently throughout each CPE. This type of evaluation is commonly referred to in the industry as a "compliance investigation." In a compliance investigation, an investigator analyzes applicable policies and procedures and evaluates whether a person, corporation, or other entity complied with or properly applied those policies and procedures in carrying out a specific task. Here, FTI

⁹ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 to 4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

employed the aforementioned compliance-focused investigative methodology and strategy in connection with Scope 2 of the CPE Process Review.

FTI also incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE).¹⁰ This international investigative methodology is used by both law enforcement and private investigative companies worldwide.

These types of investigations begin with the formation of an investigative plan which identifies documentation, communications, individuals, and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation, including applicable procedures, materials, and communications pertaining to the subject of the investigation. After gaining a comprehensive understanding of the relevant background facts, investigators then interview relevant individuals deemed to have knowledge pertinent to the subject being investigated.

Investigators then re-review relevant documents and materials, compare information contained in those materials to the information obtained in interviews, identify any gaps, inconsistencies, or contradictions within the information gathered, and ascertain any need for additional information. This step also frequently results in follow-up interviews in order to either confirm or rule out any gaps, inconsistencies, or contradictions. Follow-up interviews also may be conducted to re-confirm with interviewees certain facts or ask for elaboration on certain issues.

Investigators then re-analyze all relevant documentation to prepare for writing the investigative report.

¹⁰ THE ACFE is the largest and most prestigious anti-fraud organization globally; it grants certification to members who meet its standards of professionalism. See www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

B. FTI's Investigative Steps for Scope 2 of the CPE Process Review.

Consistent with the above-described methodology, FTI undertook the following process to evaluate whether the CPE criteria were applied consistently throughout each CPE.

Specifically, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:
 1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2):
<https://newgtlds.icann.org/en/applicants/agb>;
 2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
 3. CPE Panel Process document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
 4. CPE Guidelines document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
 5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
 6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
 7. CPE results and reports: <https://newgtlds.icann.org/en/applicants/cpe#invitations>;
 8. Preparing Evaluators for the New gTLD Application Process: <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
 9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest: <https://www.icann.org/news/announcement-2009-02-25-en>;
 10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
 11. Evaluation Panels Selection Process: <https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;

12. Application Comments:
<https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request:
<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests:
<https://www.icann.org/resources/pages/accountability/reconsideration-en>;
16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1,
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;

26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
 27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
 28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;
 29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016:
<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>;
 30. New gTLD Program Implementation Review Report,
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman, <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN Organization that were

responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel.
- Interviewed relevant CPE Provider personnel.
- Compared the information obtained from both ICANN organization and the CPE Provider.

FTI understands that various applicants requested that they be interviewed in connection with the CPE Process Review. FTI determined that such interviews were not necessary or appropriate because FTI's task is to evaluate whether the CPE Provider consistently applied the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, and neither of those governing documents provide for applicant interviews. Further, in keeping with the Applicant Guidebook and CPE Guidelines, the CPE Provider did not interview applicants during its evaluation process; accordingly, FTI determined that it was not warranted to do so in connection with Scope 2 of the CPE Process Review. FTI did obtain an understanding of applicants' concerns through a comprehensive review and analysis of the materials described above, including claims raised in all relevant Reconsideration Requests and IRP proceedings.

In the context of Scope 2 of the CPE Process Review, FTI examined all aspects of the CPE Provider's evaluation process in evaluating whether the CPE Provider consistently applied the CPE criteria throughout each CPE. Specifically, FTI's investigation included the following steps:

1. FTI formulated an investigative plan and, based on that plan, collected potentially relevant materials (as described above).
2. FTI analyzed all relevant materials (as described above) to ensure that FTI had a solid understanding of the CPE process and specifically the guidelines pertaining to the scoring of the CPE criteria.

3. With that foundation, FTI then evaluated the materials and email communications (including attachments) provided by ICANN organization and the CPE Provider (as described above). FTI also analyzed drafts and final versions of the CPE reports, as well materials submitted in relevant Reconsideration Requests and IRP proceedings challenging CPE outcomes. These documents were particularly relevant to Scope 2 of the CPE Process Review because they reflect the manner in which the CPE Provider applied the CPE criteria to each application and the concerns raised by various applicants regarding the CPE process.
4. FTI then interviewed relevant ICANN organization personnel separately. FTI asked each individual to describe the CPE process and his/her role in that process. FTI also asked each individual to explain his/her interaction with the CPE Provider and his/her understanding of the steps the CPE Provider undertook in order to perform CPE.
5. FTI then interviewed two members of the CPE Provider's staff and asked each to explain in detail his/her understanding of the CPE guidelines. As noted in FTI's report addressing Scope 1 of the CPE Process Review, these two individuals were the only two remaining personnel who participated in the CPE process (both were also part of the core team for all 26 evaluations). Each explained in detail his/her understanding of the CPE criteria. The interviewees also explained the evaluation process the CPE Provider undertook to perform CPE.
6. FTI then analyzed the CPE Provider's working papers associated with each evaluation, including documents capturing the evaluators' work, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, and every draft of each CPE report including the final report as published by ICANN organization.
7. FTI engaged in follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided.
8. FTI then re-analyzed the Reconsideration Requests and materials submitted in IRP proceedings pertaining to CPE with a specific focus on identifying any claims that the CPE Provider inconsistently applied the CPE criteria.
9. FTI then reviewed the written materials produced by ICANN organization and the CPE Provider and prepared this report for Scope 2 of the CPE Process Review.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹¹ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹² CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹³

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹⁴ The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their "bible." Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁵ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics,

¹¹ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹² *Id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³ *Id.*

¹⁴ <https://newgtlds.icann.org/en/applicants/agb>.

¹⁵ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

definitions of key terms, and specific questions to be scored.¹⁶ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. As discussed in further detail below, the CPE Guidelines set forth the methodology that the CPE Provider undertook to evaluate each criterion.

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁷

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁸

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant

¹⁶ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹⁷ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁸ *Id.*

Guidebook and CPE guidelines. During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, "Is the community clearly delineated?"; the same question appears in the CPE Guidelines. The Answer section had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a "yes" or "no" response. In the Evidence section, the evaluator provided his/her reasoning for his/her answer. In the Source section, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including but not limited to, the application (or sections thereof), reference material, or letters of support or opposition. The same questions were asked and the same criteria were applied to every application, and the responses and resulting evaluations formed the basis for the evaluators' scoring decisions.

According to the CPE Provider interviewees, each evaluator separately presented his/her findings in the database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' answers to the Question section in the database and summarizing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer

questions that arose during the review.¹⁹ The core team would then deliberate and coming up with a consensus as to scoring.

The process of drafting a CPE report would then commence. Each sub-criterion and the scoring rationale were addressed in each relevant section of the draft report. As discussed in further detail in FTI's report relating to Scope 1 of the CPE Process Review, ICANN organization had no role in the evaluation process and no role in the writing of the initial draft CPE report. Based upon FTI's investigation, the CPE Provider followed the same evaluation process in each CPE.²⁰ The CPE Provider's role was to determine whether the community-based application fulfilled the four community priority criteria set forth in Section 4.2.3 of the Applicant Guidebook. As discussed in detail below, the four criteria include: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement. The sequence of the criteria reflects the order in which they will be assessed by the panel.²¹ To prevail in CPE, an application must receive at least 14 out of 16 points on the scoring of the foregoing criteria, each of which is worth a maximum of four points.²² The CPE criteria is discussed further below.

A. Criterion 1: Community Establishment.

The Community Establishment criterion evaluates "the community as explicitly identified and defined according to statements in the application."²³ The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, "Delineation;" and (ii) 1-B, "Extension."²⁴

¹⁹ *Id.*

²⁰ See Report Re: Scope 1 of CPE Process Review.

²¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

²² *Id.* at Pg. 4-10.

²³ *Id.*

²⁴ *Id.*

An application may receive a maximum of four points on the Community Establishment criterion, including up to two points for each sub-criterion, which are Delineation and Extension. To obtain two points for Delineation, the community must be "clearly delineated, organized, and pre-existing."²⁵ One point is awarded if a community is a "clearly delineated and pre-existing community" but does not fulfill the requirements for a score of 2.²⁶ Zero points are awarded if there is "insufficient delineation and pre-existence for a score of 1."²⁷

To obtain two full points for Extension, the community must be "of considerable size and longevity."²⁸ One point is awarded if the community is "of either considerable size or longevity, but not fulfilling the requirements for a score of 2."²⁹ Zero points are awarded if the community is "of neither considerable size nor longevity."³⁰

For sub-criterion 1-A, Delineation, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community clearly delineated?³¹
- Is there at least one entity mainly dedicated to the community?³²
- Does the entity have documented evidence of activities?³³
- Has the community been active since at least September 2007?³⁴

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

The CPE Guidelines provide additional guidance on factors that can be considered when evaluating these four questions.³⁵

For sub-criterion 1-B, Extension, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community of considerable size?³⁶
- Does the community demonstrate longevity?³⁷

B. Criterion 2: Nexus between Proposed String and Community.

The Nexus criterion evaluates "the relevance of the string to the specific community that it claims to represent."³⁸ The Nexus criterion is measured by two sub-criterion: (i) 2-A, "Nexus"; and (ii) 2-B, "Uniqueness."³⁹

An application may receive a maximum of four points on the Nexus criterion, including up to three points for Nexus and one point for Uniqueness. To obtain three points for Nexus, the applied-for string must "match the name of the community or be a well-known short-form or abbreviation of the community."⁴⁰ For a score of 2, the applied-for string should closely describe the community or the community members, without overreaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not

³⁵ *Id.* at Pgs. 3-5.

³⁶ *Id.* at Pg. 5.

³⁷ *Id.*

³⁸ See Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³⁹ *Id.* at Pgs. 4-12-4-13.

⁴⁰ *Id.*

qualify for a 2.⁴¹ Zero points are awarded if the string "does not fulfill the requirements for a score of 2."⁴² It is not possible to receive a score of one for this sub-criterion.

To obtain one point for Uniqueness, the applied-for string must have "no other significant meaning beyond identifying the community described in the application."⁴³ Uniqueness will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for Uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrase "beyond identifying the community" in the score of 1 for Uniqueness implies a requirement that the string does identify the community, i.e. scores 2 or 3 for Nexus, in order to be eligible for a score of 1 for Uniqueness.⁴⁴ It should be noted that Uniqueness is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."⁴⁵ Zero points are awarded if the string "does not fulfill the requirements for a score of 1."⁴⁶

For sub-criterion 2-A, Nexus, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.⁴⁷

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at Pg. 4-13.

⁴⁴ *Id.* at Pgs. 4-13-4-14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See CPE Guidelines at Pg. 7 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

For sub-criterion 2-B, Uniqueness, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?⁴⁸

C. Criterion 3: Registration Policies.

The Registration Policies criterion evaluates the registration policies set forth in the application on four elements: (i) 3-A, "Eligibility"; (ii) 3-B, "Name Selection"; (iii) 3-C, "Content and Use"; and (iv) 3-D, "Enforcement."⁴⁹ An application may receive a maximum of four points on the Registration Policies criterion, including one point for each of the four sub-criterion stated above.

For sub-criterion 3-A, Eligibility, one point is awarded if "eligibility is restricted to community members."⁵⁰ If there is a "largely unrestricted approach to eligibility," zero points are awarded.⁵¹

For sub-criterion 3-B, Name Selection, one point is awarded if the policies set forth in an application "include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD."⁵²

For sub-criterion 3-C, Content and Use, one point is awarded if the policies set forth in an application "include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD."⁵³

For sub-criterion 3-D, Enforcement, one point is awarded if the policies set forth in an application "include specific enforcement measures (e.g., investigation practices,

⁴⁸ *Id.* at Pgs. 9-10.

⁴⁹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵⁰ *Id.* at Pg. 4-14.

⁵¹ *Id.*

⁵² *Id.* at Pg. 4-15.

⁵³ *Id.*

penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms."⁵⁴

For sub-criterion 3-A, Eligibility, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Is eligibility for being allowed as a registrant restricted?⁵⁵

For sub-criterion 3-B, Name Selection, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Do the policies set forth in the application include name selection rules?⁵⁶
- Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?⁵⁷

For sub-criterion 3-C, Content and Use, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the policies set forth in the application include content and use rules?⁵⁸
- If yes, are the content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?⁵⁹

For sub-criterion 3-D, Enforcement, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the enforcement policies set forth in the application include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?⁶⁰

⁵⁴ *Id.*

⁵⁵ See CPE Guidelines at Pg. 11 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁵⁶ *Id.* at Pg. 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at Pg. 13.

⁵⁹ *Id.*

⁶⁰ *Id.* at Pg. 14.

D. Criterion 4: Community Endorsement.

The Community Endorsement criterion evaluates community support for and/or opposition to an application.⁶¹ The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, "Support"; and (ii) 4-B, "Opposition."⁶² An application may receive a maximum of four points on the Community Endorsement criterion, including up to two points for each sub-criterion.

To obtain two points for the Support sub-criterion, an applicant must be the recognized community institution/member organization or have documented support from the recognized community institution/member organization, or have otherwise documented authority to represent the community.⁶³ "Recognized" community institutions are those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.⁶⁴ In cases of multiple institutions/organizations, there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.⁶⁵ To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.⁶⁶

One point is awarded if the applicant has submitted documented support with its application from at least one group with relevance,⁶⁷ but does not have documented support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent

⁶¹ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at Pgs. 4-17-4-18.

⁶⁵ *Id.* at Pg. 4-18.

⁶⁶ *Id.*

⁶⁷ *Id.* at Pg. 4-17.

the community with its application.⁶⁸ Zero points are awarded if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community.⁶⁹

To obtain two points for the Opposition sub-criterion, there must be "no opposition of relevance" to the application.⁷⁰ One point is awarded if there is "relevant opposition from one group of non-negligible size."⁷¹ Zero points are awarded if there is "relevant opposition from two or more groups of non-negligible size."⁷² When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.⁷³

For sub-criterion 4-A, Support, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the applicant the recognized community institution or member organization?⁷⁴
- Does the applicant have documented support from the recognized community institution(s)/member organization(s) to represent the community?⁷⁵

⁶⁸ *Id.* at Pg. 4-18.

⁶⁹ *Id.*

⁷⁰ *Id.* at Pg. 4-17.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at Pgs. 4-18-4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁷⁴ See CPE Guidelines at Pgs. 16-17 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁷⁵ *Id.*

- Does the applicant have documented authority to represent the community?⁷⁶
- Does the applicant have support from at least one group with relevance?⁷⁷

For sub-criterion 4-B, Opposition, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the application have any opposition that is deemed relevant?⁷⁸

V. The CPE Provider Applied The CPE Criteria Consistently In All CPEs.

FTI assessed whether the CPE Provider consistently followed the same evaluation process in all CPEs, and whether the CPE Provider applied the CPE criteria on a consistent basis throughout the evaluation process. FTI found that the CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE. In particular, as explained in detail below, the CPE Provider evaluated each application in the same way. While some applications received full points, others received partial points, and others received zero points for any given criterion, the scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI also evaluated whether the CPE Provider was consistent in the use of Clarifying Questions, and concludes that a consistent approach was employed.

FTI's investigation was informed by the concerns raised in the Reconsideration Requests, IRP proceedings and correspondence submitted to ICANN organization related to the CPE process. Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at Pg. 19.

BGC.⁷⁹ Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC's recommendations and/or determinations, as well as the Board's actions associated with these requests.⁸⁰ Several requestors made claims that are of particular relevance to Scope 2 of the CPE Process Review. Specifically, FTI observed several claims that certain CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports, particularly with respect to the Community Establishment and Nexus criteria. FTI also reviewed claims raised by various claimants in IRP proceedings challenging CPE outcomes. FTI factored the CPE-related claims raised in both the Reconsideration Requests and the IRPs into its investigation. It is noted, however, that FTI's task is to evaluate whether the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines were applied consistently throughout each CPE.⁸¹ FTI was not asked to re-evaluate the applications. Ultimately, as detailed below, FTI found no evidence of inconsistent or disparate treatment by the CPE Provider.

A. The Community Establishment Criterion (Criterion 1) was Applied Consistently in all CPEs.

To assess whether the Community Establishment criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Delineation and Extension. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and

⁷⁹ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN organizations Bylaws, 1 October 2016, ART. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN organization Bylaws, 22 July 2017, 4, § 4.2 (e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁸⁰ *Id.*

⁸¹ See <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; see also <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

corresponding rationale for each sub-criterion for Community Establishment for each report and compared all reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Community Establishment criterion is measured by two sub-criterion: (i) Delineation (worth two points); and (ii) Extension (worth two points).⁸² While some applications received full points for the Community Establishment criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on its investigation, FTI concludes that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-criterion 1-A: Delineation

To receive two points for Delineation, the Applicant Guidebook and CPE Guidelines require that the community as defined in the application be clearly delineated, organized, and pre-existing.⁸³ FTI observed that all 26 CPE reports revealed that the CPE Provider methodically evaluated each element across all 26 CPEs. As reflected in twelve CPE reports, the relevant applications received the maximum two points;⁸⁴ as

⁸² Applicant Guidebook, Module 4.2.3 at Pg. 4-10 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸³ *Id.* See also CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁸⁴ Twelve CPE reports recorded the maximum two points. See OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

shown in one CPE report, the relevant application received one point;⁸⁵ and as noted in 13 CPE reports, the relevant applications received zero points.⁸⁶

a. Clearly Delineated

Two conditions must be met for a community to be clearly delineated: (i) there must be a clear, straightforward membership definition; and (ii) there must be awareness and recognition of a community as defined by the application among its members.⁸⁷

FTI observed that "a clear and straightforward membership" definition was deemed to be sufficiently demonstrated where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).⁸⁸ This was the case even if the CPE Provider found the community definition to be

⁸⁵ One CPE report recorded one point. See RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

⁸⁶ Thirteen CPE reports recorded zero points. See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

⁸⁷ Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸⁸ The CPE Provider determined that six of the 13 applications that received zero points for the Delineation sub-criterion were not "clearly delineated" because they did not demonstrate "a clear and straightforward membership." See ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>), GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

broad.⁸⁹ On the other hand, the CPE Provider determined that a community definition did not demonstrate a "clear and straightforward membership" if it was too broadly defined in the application and could not be determined through formal registration, or was "unbound and dispersed" because the community may not resonate with all stakeholders that it seeks to represent.⁹⁰ The CPE Provider also determined that a community definition showed a clear and straightforward membership where the membership was dependent on having a clear connection to a defined geographic area.⁹¹

FTI observed that the CPE Provider determined that there was "awareness and recognition of a community as defined by the application among its members" where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).⁹² On the other hand, the CPE Provider determined that the community as defined in the application did not have awareness and recognition among its members if the affiliated businesses and sectors had only a tangential relationship with the core community. In those instances, the CPE Provider found that the affiliated businesses and sectors would not associate

⁸⁹ See, e.g., TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

⁹⁰ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁹¹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>).

⁹² See, e.g., MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

themselves with the community as defined.⁹³ The CPE Provider also determined that commonality of interest was not enough to satisfy the "awareness and recognition of a community" element because it did not provide substantive evidence of what the Applicant Guidebook defines as "cohesion."⁹⁴

The applications underlying the 12 CPE reports that recorded two points, and the one CPE report that recorded one point satisfied both aspects of the clearly delineated prong of the Delineation sub-criterion: the applications demonstrated a "clear and straightforward membership" of community and an "awareness and recognition of a community as defined by the application among its members."⁹⁵ Of the applications underlying the 13 CPE reports that recorded zero points for the clearly delineated prong of the Delineation sub-criterion, six did not satisfy either element for the clearly delineated prong.⁹⁶ The applications underlying the seven CPE reports that recorded

⁹³ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); and LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁹⁴ See, e.g., ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>).

⁹⁵ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

⁹⁶ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report ([26](https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-</p></div><div data-bbox=)

zero points for the clearly delineated prong were determined to have demonstrated a "clear and straightforward membership" of community, but failed to demonstrate an "awareness and recognition of a community as defined by the application among its members."⁹⁷ The applications underlying all 13 of the CPE reports that recorded zero points failed to satisfy the "awareness" element of the clearly delineated prong of the Delineation sub-criterion.

b. Organization

Two conditions must be met to fulfill the requirements for organization: (i) there must be at least one entity mainly dedicated to the community; and (ii) there must be documented evidence of community activities.⁹⁸

FTI observed that, where the CPE Provider determined that there was not "at least one entity mainly dedicated to the community," then the existing entities did not represent a majority of the community as defined in the application.⁹⁹ If the CPE Provider determined that an application failed to satisfy either prong under the "clearly delineated" analysis (*see infra*), then the CPE Provider also determined that there was not "at least one entity mainly dedicated to the community" as defined in the application.¹⁰⁰ All applications that received two points for the Delineation sub-criterion

46695-en.pdf); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

⁹⁷ TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

⁹⁸ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁹⁹ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁰⁰ See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840->

were determined to have "at least one entity mainly dedicated to the community."¹⁰¹ Of the applications underlying the 13 CPE reports that recorded zero points and the one report that recorded one point for the Delineation sub-criterion, all were deemed to lack "at least one entity mainly dedicated to the community" as defined.¹⁰²

With respect to the "documented evidence of community activities" prong, FTI observed that an application was deemed to have satisfied this condition where community

en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁰¹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁰² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

activities were documented through formal membership or registration.¹⁰³ On the other hand, if the CPE Provider determined that an application was unable to demonstrate that there existed at least one entity mainly dedicated to the community as defined, then that application did not satisfy this prong. Of the applications underlying the 12 CPE reports that recorded two points for the Delineation sub-criterion, all satisfied the "documented evidence of community activities" prong.¹⁰⁴ All of the applications underlying the 14 CPE reports that were deemed to lack "at least one entity mainly dedicated to the community" as defined in the application, were also deemed to lack "documented evidence of community activities."¹⁰⁵

¹⁰³ See, e.g., HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

¹⁰⁴ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁰⁵ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

c. Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).¹⁰⁶

Thirteen applications failed to satisfy the pre-existence prong;¹⁰⁷ twelve applications satisfied this prong.¹⁰⁸

FTI observed that, if the community as defined in the application was determined by the CPE Provider to be a "construed" community,¹⁰⁹ then the CPE Provider also found that the community did not exist prior to September 2007, even if its constituent parts may have been active prior to September 2007.¹¹⁰ Further, if the CPE Provider determined

¹⁰⁶ Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁰⁷ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁰⁸ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁰⁹ Applicant Guidebook, Module 4.2.3 at Pg. 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹¹⁰ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>).

that an application failed to satisfy either prong under the "clearly delineated" analysis (see *infra*), then the CPE Provider also determined that the application did not satisfy the requirements for pre-existence.¹¹¹ Each of the applications underlying the 13 CPE reports that recorded zero points for the Delineation sub-criterion were deemed by the CPE Provider to set forth a "construed community."¹¹² Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion were determined to have demonstrated pre-existence prior to September 2007.¹¹³

18840-en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

¹¹¹ See Applicant Guidebook, Module 4.2.3 at Pg. 4-10

(<https://newgtlds.icann.org/en/applicants/agg/string-contention-procedures-04jun12-en.pdf>).

¹¹² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹¹³ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

2. Sub-Criterion 1-B: Extension

The Applicant Guidebook and CPE Guidelines require a community of considerable size and longevity to receive full points for the Extension sub-criterion.¹¹⁴

a. Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members. The CPE Provider determined that all community applicants defined communities of considerable size.¹¹⁵ FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the

¹¹⁴ See Applicant Guidebook, Module 4.2.3 at Pg. 4-10, (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also CPE Guidelines at Pg. 5 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹¹⁵ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the size requirements could not be met.¹¹⁶ All of the applications underlying the 13 CPE Reports that recorded zero points for the "clearly delineated" prong failed to demonstrate awareness of a community among its members.¹¹⁷ Therefore, despite the fact that the CPE provider concluded that these 13 applications demonstrated communities of considerable size, all 13 that received zero points for the "clearly delineated" prong could not satisfy the size requirements.¹¹⁸ Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the clearly delineated prong.¹¹⁹ Consequently, each of the applications

¹¹⁶ See, e.g., MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (application failed to satisfy size requirements because it did not satisfy the awareness requirement of the "clearly delineated" prong); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (application failed to satisfy size requirements because it did not satisfy either the clear and straightforward membership requirement or the awareness requirement of the clearly delineated prong).

¹¹⁷ IMMO (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹¹⁸ See *id.*

¹¹⁹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>);

underlying the 13 CPE reports that recorded points for Delineation also satisfied the awareness requirement for size.¹²⁰

b. Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.¹²¹ FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the longevity requirement could not be met. Of the 13 CPE Reports that recorded zero points for the "clearly delineated" prong, all 13 corresponding applications failed to demonstrate awareness of a community among its members.¹²² Therefore, each of the applications underlying the 13 CPE reports that recorded zero points for the "clearly delineated" prong could not satisfy the longevity requirements. Because each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the "clearly delineated" prong as well as the pre-existence prong, each of the

and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁰ See *id.*

¹²¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11-4-12 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

applications that received points for Delineation satisfied both requirements for longevity.¹²³

The CPE Guidelines state that if an application obtains zero points for Delineation, an application will receive zero points for Extension.¹²⁴ Accordingly, the 13 applications that received zero points for Delineation also received zero points for Extension.

One application received three out of a possible four points for the Community Establishment criterion.¹²⁵ For the Delineation sub-criterion, the application received one point because the CPE Provider determined that there was not one entity mainly dedicated to the community as defined in the application, and therefore the community as defined in the application was deemed not sufficiently organized.¹²⁶ The application received the full two points on the Extension sub-criterion.

Twelve applications received full points on the Community Establishment criterion. Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community

¹²³ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁴ See Applicant Guidebook, Module 4.2 at Pg. 4-12, (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²⁵ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁶ *Id.* at Pgs. 2-3.

Establishment criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

B. The Nexus Criterion (Criterion 2) was Applied Consistently in all CPEs.

To assess whether the Nexus criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Nexus and Uniqueness. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Nexus for each report and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Nexus criterion is measured by two sub-criterion: (i) Nexus (worth three points); and (ii) Uniqueness (worth one point).¹²⁷ While some applications received full points for the Nexus criterion and others did not,¹²⁸ the CPE Provider's

¹²⁷ Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²⁸ Of the 26 CPE reports, the CPE Provider determined that 19 applications received zero points for Nexus. SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); SHOP CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); MUSIC (.music LLP) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085->

findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-Criterion 2-A: Nexus

To receive a partial score of two points for Nexus,¹²⁹ the applied-for string must identify the community. According to the Applicant Guidebook, "'Identify' means that the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community."¹³⁰ In order to receive the maximum score of three points, the applied-for string must: (i) "identify" the community; and (ii) match the name of the community or be a well-known short-form or abbreviation of the community.

FTI observed that the CPE Provider determined that the applications underlying 19 CPE reports received zero points for the Nexus sub-criterion because, in the CPE Provider's determination, the applications failed to satisfy both of the requirements described above. First, for the applications underlying 11 of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider determined that the applied-for string did not identify the community because it substantially overreached the

en.pdf); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

¹²⁹ The Applicant Guidebook does not provide for one point to be awarded for the Nexus sub-criterion. An application only may receive two points or three points for the Nexus sub-criterion.

¹³⁰ Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community.^{131, 132}

Second, for the applications underlying eight of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider found that the applied-for string did not match the name of the community or was not a well-known short form or abbreviation. In this regard, the CPE Provider determined that, although the string identified the name of the core community members, it failed to match or identify the peripheral industries and entities included in the definition of the community set forth in the application. Therefore, there was a misalignment between the proposed string and the proposed community.¹³³ In several cases, the CPE Provider's conclusion that the

¹³¹ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

¹³² See Applicant Guidebook, Module 4.2.3 Criterion 2 definitions and Criterion 2 guidelines at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹³³ GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>) ("While the string identifies the name of the core community members (i.e. companies with the legal form of a GmbH), it does not match or identify the regulatory authorities, courts and other institutions that are included in the definition of the community as described in Criterion 1-A."); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>) (where community is defined to include tangentially related industries, applied-for string name of "TAXI" fails to match or identify the peripheral industries and entities that are included in the defined community); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (applied for string identifies only the name of the core community members (primary and secondary real estate members), but fails to identify peripheral industries and entities described as part of the community by the applicant and does not match the defined community); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>) ("While the string identifies the name of the core community members (i.e. artists and organized members of the arts community) it does not match or identify the art supporters that are included in the definition of the community as described in Criterion 1-A" such as "audiences, consumers, and donors"); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>) (concluding that although applied-for string identifies the core community members—kids—it fails to closely describe other community members such as parents, who are not commonly known as "kids"); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>) (applied

string did not identify the entire community was the consequence of the CPE Provider's finding that the proposed community was not clearly delineated because it described a dispersed or unbound group of persons or entities.¹³⁴ Without a clearly delineated community, the CPE Provider concluded that the one-word string could not adequately identify the community.

Five CPE reports recorded two points for the Nexus sub-criterion.¹³⁵ FTI observed that these CPE reports recorded partial points because the CPE Provider determined that the underlying applications satisfied only the two-point requirement for Nexus: the applied-for string must identify the community.¹³⁶ The CPE Provider determined that, although the applied-for string identified the proposed community as defined in the application, it did not "match" the name of the community nor constitute a well-known short-form or abbreviation of the community name.¹³⁷ Specifically, the CPE Provider concluded that, for the applications underlying these five CPE reports, the community definition encompassed individuals or entities that were tangentially related to the proposed community as defined in the application and therefore, the general public may

for string is over inclusive, identifying more individuals than are included in the defined community); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>) (applied-for string "GAY" is commonly used to refer to men and women who identify as homosexual but not necessarily to others in the defined community).

¹³⁴ See, e.g., KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

¹³⁵ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹³⁶ Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³⁷ See, e.g., ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own).

not necessarily associate all of the members of the defined community with the string.¹³⁸ Thus, for these applications, there was no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus.¹³⁹ For all CPE reports that did not record the full three points for the Nexus sub-criterion, the CPE Provider's rationale was based on the definition of the community as defined in the application.

Two CPE reports recorded the full three points for the Nexus sub-criterion.¹⁴⁰ The CPE Provider determined that the applied-for string in the applications underlying these two CPE reports was closely aligned with the community as defined in the application,¹⁴¹

¹³⁸ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>) (applied-for string "HOTEL" identifies core members of the defined community but is not a well-known name for other members of the community such as hotel marketing associations that are only related to hotels); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (concluding that because the community defined in the application is a collection of many categories of individuals and organizations, there is no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus, but that partial points may be awarded because the string "MUSIC" identifies all member categories, and successfully identifies the individuals and organizations included in the applicant's defined community); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (applied-for string "ART" identifies defined community, but, given the subjective meaning of what constitutes art, general public may not associate all members of the broadly defined community with the applied-for string); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>) (applied-for string "RADIO" identifies core members of the defined community but is not a well-known name for other members of the community such as companies providing specific services that are only related to radio).

¹³⁹ See, e.g., MUSIC (DotMusic Limited) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁴⁰ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁴¹ SPA CPE Report at Pg. 4 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); and OSAKA CPE Report at Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

and/or was the established name by which the community is commonly known by others.¹⁴²

2. Sub-Criterion 2-B: Uniqueness

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application.¹⁴³ According to the Applicant Guidebook and CPE Guidelines, if an application did not receive at least two points for the Nexus sub-criterion, it could not receive the one point available for the Uniqueness sub-criterion.¹⁴⁴ Therefore, the CPE Provider determined that the applications underlying the 19 CPE reports that recorded zero points for Nexus were ineligible for a score of one for Uniqueness. Each of the applications underlying the five CPE reports that recorded two points for Nexus,¹⁴⁵ as well as the applications underlying the two CPE reports that recorded three points for Nexus,¹⁴⁶ received one point for Uniqueness. For each of the applications underlying these seven CPE reports, the CPE Provider determined that the applied-for string had no other significant meaning beyond identifying the community described in the application.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Nexus

¹⁴² SPA CPE Report at Pgs. 4-5 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁴³ Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹⁴⁴ See CPE Guidelines at Pgs. 9-10, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). See also Applicant Guidebook, Module 4.2.3 at Pg. 4-14 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹⁴⁵ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (efflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁴⁶ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Nexus criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

C. The Registration Policies Criterion (Criterion 3) was Applied Consistently in all CPEs.

To assess whether the Registration Policies criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Eligibility, (ii) Name Selection, (iii) Content and Use; and (iv) Enforcement. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Registration Policies for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Registration Policies criterion is measured by four sub-criterion: (i) Eligibility; (ii) Name Selection; (iii) Content and Use; and (iv) Enforcement, each of which is worth one point.¹⁴⁷ While some applications received full points for the Registration Policies criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

¹⁴⁷ Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

1. Sub-Criterion 3-A: Eligibility

To fulfill the requirements for Eligibility, the registration policies set forth in the application must restrict the eligibility of prospective registrants to community members.¹⁴⁸ All applications received one point for Eligibility. The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point for Eligibility for all applications that underwent CPE because each application restricted eligibility to community members only, as required by the Applicant Guidebook.¹⁴⁹

In particular, the CPE Provider found that each application contained a registration policy that restricted eligibility in one of the following ways: (i) by requiring registrants to be verifiable participants in the relevant community or industry;¹⁵⁰ (ii) by listing the professions that are eligible to apply;¹⁵¹ (iii) by requiring proof of affiliation through licenses, certificates of registration or membership, official statements from

¹⁴⁸ *Id.* at Pg. 4-14.

¹⁴⁹ *Id.*

¹⁵⁰ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC CPE Report (.music LLC) (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); CPA (AICPA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁵¹ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

superordinate authorities, or owners of trademarks;¹⁵² (iv) by requiring registrants to be members of specified organizations linked to or involved in the functions relating to the applied-for community;¹⁵³ (v) by requiring that the registered domain name be "accepted as legitimate; and beneficial to the cause and values of the radio industry; and commensurate with the role and importance of the registered domain name; and in good faith at the time of registration and thereafter."¹⁵⁴

2. Sub-Criterion 3-B: Name Selection

To fulfill the requirements for Name Selection, the application's registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD.¹⁵⁵

In the sub-criterion for Name Selection, five CPE reports recorded zero points.¹⁵⁶ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to these five applications because each failed to satisfy a required element of the CPE Guidelines, including: (i) the name selection rules were too vague to be consistent with the purpose of the community;¹⁵⁷ (ii) there were no comprehensive name selection rules;¹⁵⁸ (iii) there were no restrictions or

¹⁵² TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>);

¹⁵³ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); and GmbH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁵⁴ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁵⁵ See Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁵⁶ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

¹⁵⁷ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

¹⁵⁸ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

guidelines for name selection;¹⁵⁹ (iv) the rules did not refer to the community-based purpose;¹⁶⁰ and (v) the applicant had not finalized name selection criteria.¹⁶¹

Twenty-one CPE reports recorded one point for Name Selection.¹⁶² The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the applications set forth registration policies for name selection that were consistent with the articulated community-based purpose of the applied-for gTLD, as required by the Applicant Guidebook.¹⁶³

The CPE Provider determined that the applications demonstrated adherence to the Name Selection sub-criterion by: (i) outlining a comprehensive list of name selection

¹⁵⁹ MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

¹⁶⁰ SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

¹⁶¹ MERCK (RH) CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

¹⁶² TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁶³ Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

rules;¹⁶⁴ (ii) outlining the types of names that may be registered, while the name selection rules were consistent with the purpose of the gTLD;¹⁶⁵ (iii) specifying that naming restrictions be specifically tailored to meet the needs of registrants while maintaining the integrity of the registry, and ensuring that domain names meet certain technical requirements;¹⁶⁶ (iv) specifying that the associated boards use their corporate name or an acronym, while foreign affiliates will also have to include geographical modifiers in their second level domains;¹⁶⁷ (v) specifying that the registrant's nexus with the community and use of the domain must be commensurate with the role of the registered domain, and with the role and importance of the domain name based on the meaning an average user would reasonably assume in the context of the domain name;¹⁶⁸ (vi) specifying that eligible registrants are entitled to register any domain name that is not reserved or registered at the time of registration submission while setting aside a list of domain names that will be reserved for major brands;¹⁶⁹ and (vii) outlining

¹⁶⁴ TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/llp-cpe-1-880-35508-en.pdf>).

¹⁶⁵ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁶⁶ TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

¹⁶⁷ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

¹⁶⁸ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁶⁹ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

restrictions on reserved names as well as a program providing special provisions for trademarks and other rules.¹⁷⁰

3. Sub-Criterion 3-C: Content and Use

To fulfill the requirements for Content and Use, the registration policies set forth in the application must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD.¹⁷¹

In the sub-criterion for Content and Use, six CPE reports recorded zero points.¹⁷² The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying six of the CPE reports for one of three reasons: (i) the rules for content and use for the community-based purpose were too general or vague;¹⁷³ (ii) there was no evidence in the application of requirements, restrictions, or guidelines for content and use that arose out of the community-based purpose of the application;¹⁷⁴ or (iii) the policies for content and use were not finalized.¹⁷⁵

¹⁷⁰ ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

¹⁷¹ Applicant Guidebook, Module 4.2.3 at Pg. 4-16 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁷² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁷³ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁷⁴ MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

¹⁷⁵ MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

Twenty CPE reports recorded one point for Content and Use. FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications included registration policies for content and use that were consistent with the articulated community-based purpose of the applied-for gTLD. The CPE Provider found this to be the case when the application: (i) set forth specific registration policies for content and use that were tailored to the community-based purpose of the gTLD;¹⁷⁶ (ii) had policies that stated that content or use could not be inconsistent with the mission/purpose of the gTLD;¹⁷⁷ or (iii) had prohibitions on certain types of content and/or abuse.¹⁷⁸

4. Sub-Criterion 3-D: Enforcement

Two conditions must be met to fulfill the requirements for Enforcement: (i) the registration policies set forth in the application must include specific enforcement

¹⁷⁶ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹⁷⁷ TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁷⁸ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

measures constituting a coherent set; and (ii) the application must set forth appropriate appeal mechanisms.¹⁷⁹

In the sub-criterion for Enforcement, 14 CPE reports recorded zero points.¹⁸⁰ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying 13 CPE reports because each of the relevant applications lacked appeal mechanisms.¹⁸¹ The remaining CPE report recorded zero points because the corresponding application did not outline specific enforcement measures constituting a coherent set.¹⁸² A coherent set refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with

¹⁷⁹ Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁸⁰ INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

¹⁸¹ INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁸² ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants.¹⁸³

Twelve CPE reports recorded one point.¹⁸⁴ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications set forth appeal mechanisms and outlined specific enforcement measures constituting a coherent set.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Registration Policies criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Registration Policies criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

¹⁸³ See CPE Guidelines at Pg. 14 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹⁸⁴ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

D. The Community Endorsement Criterion (Criterion 4) Was Applied Consistently in all CPEs.

To assess whether the Community Endorsement criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Support and (ii) Opposition. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Community Endorsement for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.¹⁸⁵

As noted above, the Community Endorsement criterion is measured by two sub-criterion: (i) Support; and (ii) Opposition, each worth two points. While some applications received full points for the Community Endorsement criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-Criterion 4-A: Support

To receive two points for Support: (i) the applicant must be the recognized community institution/member organization; (ii) the application has documented support from the recognized community institution(s)/member organization(s); or (iii) the applicant has

¹⁸⁵ In its investigation, FTI observed that the CPE Provider engaged in the following process to evaluate the Community Endorsement criterion. The CPE Provider sent verification emails to entities that submitted letters of support or opposition in order to attempt to verify their authenticity. The CPE Provider's evaluators then logged the results into a database. Separate correspondence tracker spreadsheets also were maintained by the CPE Provider for each applicant. FTI reviewed all of these materials in the course of its investigation. See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>; and <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>.

documented authority to represent the community.¹⁸⁶ To receive one point for Support, the application must have documented support from at least one group with relevance.¹⁸⁷ Zero points are awarded if the application has "insufficient proof of support for a score of 1."¹⁸⁸

All 26 CPE reports recorded at least one point for Support. Of those, 17 CPE reports recorded only one point.¹⁸⁹ Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the CPE Provider determined that each application had sufficient documented support from at least one group with relevance, but could not receive a full score of two points because the applicant was not the recognized community institution/member organization, the applicant did not have documented support from the recognized community institution/member organization, nor did the applicant have documented authority to represent the community, as required by the Applicant Guidebook.¹⁹⁰ In each instance, the entity(ies) expressing support for the application was not deemed by the CPE Provider to constitute the recognized institutions that represent the community as

¹⁸⁶ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>)

¹⁹⁰ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

defined in the application.¹⁹¹ In some cases, this meant that, although the supporting entity was dedicated to the community, the supporting entity lacked reciprocal recognition from community members as the entity authorized to represent them.¹⁹² In others, the supporting entity did not "represent" the community because the supporting entity was limited in geographic or thematic scope and, therefore, did not represent the entire community as defined in the application.¹⁹³

Nine CPE reports recorded the full two points for Support. Of the applications underlying these nine CPE reports, FTI observed that four applications received two points because the CPE Provider determined that the applications had documented support from the recognized community institution/member organization.¹⁹⁴ For the other applications that received two points, the CPE Provider determined that the applicant was the recognized community institution/member organization with the authority to represent the community.¹⁹⁵ Whether the applicant or the supporting entity

¹⁹¹ See 204, *supra*.

¹⁹² See, e.g., GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (concluding that supporting entity is clearly dedicated to the community and it serves the community and its members in many ways, but is not the "recognized" community institution because it lacked reciprocal recognition by community members of the organization's authority to represent it as required by the Applicant Guidebook).

¹⁹³ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (relevant groups providing support do not constitute the recognized institutions to represent the community because they are limited in geographic and thematic scope); and ART (eFlux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (*same*).

¹⁹⁴ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁹⁵ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

constituted the recognized community institution was determined based upon consistent application of the Applicant Guidebook's definition of "recognized."¹⁹⁶

2. Sub-Criterion 4-B: Opposition

To receive two points for Opposition, an application must have no opposition of relevance.¹⁹⁷ To receive one point, an application may have relevant opposition from no more than one group of non-negligible size.¹⁹⁸

Nine CPE reports recorded one point for Opposition.¹⁹⁹ In each instance, the CPE Provider determined that the underlying applications received relevant opposition from no more than one group of non-negligible size. Opposition was deemed relevant on several grounds: (i) opposition was from a community not identified in the application but had an association to the applied-for string;²⁰⁰ (ii) the application was subject to a legal rights objection (LRO);²⁰¹ or (iii) opposition was not made for any reason forbidden by the Applicant Guidebook, such as competition or obstruction.²⁰²

¹⁹⁶ Applicant Guidebook, Module 4.2.3 at Pgs. 4-17 and 4-18 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁹⁷ *Id.* at Pg. 4-17.

¹⁹⁸ *Id.*

¹⁹⁹ MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>). No CPE reports recorded zero points for Opposition.

²⁰⁰ LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

²⁰¹ MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

²⁰² GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

Seventeen CPE reports recorded the full two points for Opposition.²⁰³ The CPE Provider determined that the applications corresponding to 17 CPE reports did not have any letters of relevant opposition.²⁰⁴

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Community Endorsement criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community Endorsement criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

1830-1672-en.pdf); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

²⁰³ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

²⁰⁴ *Id.*

VI. The CPE Provider's Use of Clarifying Questions Did Not Evidence Disparate Treatment.

Throughout the CPE process, the CPE Provider had the option to ask Clarifying Questions of the applicant about the relevant application.²⁰⁵ Clarifying Questions were not intended to permit an applicant to introduce new material or otherwise amend an application, but rather were a means for the applicant to make its application more clear and free from ambiguity.²⁰⁶ The CPE Provider composed the Clarifying Questions and sent them to ICANN organization, which would transmit the Clarifying Questions to the applicants. FTI observed that ICANN organization would review the wording of Clarifying Questions prior to sending them to the applicants. The CPE Provider confirmed that was done to ensure that the wording of the question was appropriate insofar as it did not contravene the Applicant Guidebook's guideline that responses to Clarifying Questions may not be used to introduce new material or amend the application.²⁰⁷ ICANN organization did not comment on the substance of any Clarifying Question.

Based on FTI's investigation, it was observed that the CPE Provider posed Clarifying Questions seven times in the CPE process. Based on a plain reading, five of the seven were framed to clarify information in the applications. For example, the CPE Provider asked a Clarifying Question where it found part of an application to be unclear or internally inconsistent insofar as the community was defined by the applicant differently in two different sections of the application.

Two Clarifying Questions related to letters of support. In one application, letters of support were referenced, but were not submitted with the application materials. Accordingly, the CPE Provider issued a Clarifying Question identifying the

²⁰⁵ See CPE Frequently Asked Questions at Pg. 4 (<https://newgtlds.icann.org/en/applicants/cpe/faqs-13aug14-en.pdf>).

²⁰⁶ *Id.* at Pgs. 4-5. See also Board Determination, at Pgs. 15-16 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>).

²⁰⁷ *Id.*

administrative error. In the other, the applicant submitted multiple letters of support, but the CPE Provider was unable to verify the nature and relevance of the support that the applicant received because the CPE Provider's verification attempts were unsuccessful. As a result, the CPE Provider issued a Clarifying Question; this application ultimately received the full two points for the Support sub-criterion.

Based on FTI's investigation, the CPE Provider did not issue Clarifying Questions on an inconsistent basis; nor did the CPE Provider's use of Clarifying Questions reflect disparate treatment of any applicant.

VII. The CPE Provider's Use of Outside Research.

FTI understands that "certain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted."²⁰⁸ This is the subject of Scope 3 of the CPE Process Review, where FTI will compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations that are the subject of pending Reconsideration Requests.

VIII. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI concludes that the CPE Provider consistently applied the CPE criteria throughout all Community Priority Evaluations.

²⁰⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

Exhibit 11

ARIF HYDER ALI

Contact Information Redacted

January 31, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process

Dear Members of the ICANN Board:

On behalf of our client, dotgay LLC (“dotgay”), please find attached the Second Expert Opinion of Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, addressing FTI’s purported “independent” review of the CPE process.

Professor Eskridge’s Second Expert Opinion unequivocally concludes that FTI Consulting, Inc.’s (“FTI”) findings are based on a superficial investigative methodology wholly unsuited for the purpose of an independent review. His Opinion confirms that the Economist Intelligence Unit’s (“EIU”) evaluation of dotgay’s application was incorrect, superficial, and discriminatory. In fact, a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.

We urge – indeed beseech – the Board (i) to not rely on the FTI Reports in determining how to proceed with dotgay’s application; (ii) to not hide behind technicalities and process; (iii) to carefully review Professor Eskridge’s two detailed expert opinions; (iv) to act in accordance with the spirit and letter of ICANN’s Articles of Incorporation, Bylaws, gTLD Applicant Guidebook (“AGB”), and the most basic principles of fairness, decency, and morality; and, on these bases, (v) to approve dotgay’s community priority application.

If the Board needs expert support for its consideration of dotgay’s application, we respectfully submit that it has Professor Eskridge. Professor Eskridge is a renowned expert in both legal interpretation and in sexuality, gender, and the law. He is, according to recent empirical ranking of law review citations, among the ten most-cited legal scholars in American history. He has delved in to the AGB and the Community Priority Evaluation (“CPE”) Process, and has provided empirical evidence as to why dotgay’s application

should be granted community priority status. He has demonstrated that to do otherwise would be discriminatory and unfair, and he has laid bare a number of fundamental flaws in FTI's investigation and analysis. He is available at any time to present his findings to ICANN's General Counsel, ICANN's outside counsel, and to the Board.

Professor Eskridge analyzes two of the three reports drafted by FTI: the "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports" ("Scope 2 Report"), and the "Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests" ("Scope 3 Report"). As part of this analysis, Professor Eskridge identifies the reports' fundamental errors, performs a substantive review of dotgay's application, and explains why dotgay should receive community priority status based upon a proper application of the CPE criteria to its application.

Professor Eskridge disagrees with the Scope 2 Report's conclusion that the EIU consistently applied the CPE criteria throughout the CPE process. After determining that the "Scope 2 Report is long on description and conclusory statements and short on actual evaluation,"¹ Professor Eskridge demonstrates several flaws in FTI's Scope 2 Report:

1. FTI "failed to recognize or engage the many criticisms of the EIU Panel's application of ICANN's and CPE's guidelines to the dotgay and other applications."²
2. FTI's conclusion, that "the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements,"³ "was supported by no independent analysis."⁴ In fact, "the approach followed by FTI was a 'description' of the CPE Reports, but not an 'evaluation' to determine whether the CPE Reports were actually following the applicable guidelines."⁵
3. "Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of

¹ Second Eskridge Opinion, ¶ 3.

² Second Eskridge Opinion, ¶ 37.

³ Second Eskridge Opinion, ¶ 38.

⁴ Second Eskridge Opinion, ¶ 38.

⁵ Second Eskridge Opinion, ¶ 38.

ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as in the CPE Reports.⁶

4. FTI “completely failed to examine the EIU Panel’s analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.”⁷

Professor Eskridge likewise examines the Scope 3 Report and concludes that the report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).”⁸ His study of the sources referenced in the Scope 3 Report, the very sources to which the EIU cited in support of its adverse findings against dotgay, reveals that “some of those sources directly support dotgay’s position.”⁹ For instance, one of the EIU’s major sources confirms that the term “gay” is in fact a well-recognized umbrella term for the entire LGBT community – completely contrary to the EIU’s determination in dotgay’s CPE. How could FTI have missed this? Is such a blatant omission, coupled with FTI’s superficial analysis, evidence of intentional discrimination against the gay community by ICANN, the EIU and FTI?

We respectfully submit that the best interests of ICANN as an organization would not be served by letting this matter go to an Independent Review Process. Accordingly, pursuant to the Board’ obligation to exercise due diligence, due care, and independent judgment, we sincerely hope that the Board will (1) review and agree with Professor Eskridge’s expert opinions; (2) reject the findings made by FTI in the FTI Reports; and (3) grant dotgay’s community priority application without any further delay.

Sincerely,



Arif Hyder Ali

AAA

⁶ Second Eskridge Opinion, ¶ 42.
⁷ Second Eskridge Opinion, ¶ 76.
⁸ Second Eskridge Opinion, ¶ 37.
⁹ Second Eskridge Opinion, ¶ 88.

SECOND EXPERT REPORT

PROFESSOR WILLIAM N. ESKRIDGE, JR.

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY	1
II. QUALIFICATIONS OF THE EXPERT	4
III. BACKGROUND AND RELEVANT ICANN DIRECTIVES	5
A. DOTGAY’S APPLICATION AND THE CPE REPORT	5
B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK.....	6
C. THE ICANN COMMUNITY NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT	7
D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT	12
E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI.....	13
IV. THE FTI SCOPE 2 REPORT COMPLETELY MISSED THE IMPORTANT WAYS THE CPE REPORT MISINTERPRETED OR IGNORED THE ESTABLISHED DIRECTIVES FOR EVALUATING APPLICATIONS.....	16
A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS	17
1. The EIU Panel and FTI Substantially Ignored The Primary Test for Nexus: Is the Proposed String a “Well Known Short-Form or Abbreviation of the Community”?.....	18
2. The EIU Panel and FTI Created an “Under-Reach” Criterion for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the Novel Criterion to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws	20
3. The CPE Report Ignored and Is Inconsistent with ICANN’s Bylaws	24
B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE	26

1.	The CPE Report Was Inconsistent with the CPE Guidelines.....	27
2.	The CPE Report Was Inconsistent with the EIU’s Own Previous Reports	32
C.	IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER CPE REPORTS	34
V.	THE FTI SCOPE 3 REPORT CONFIRMS DOTGAY’S CLAIM THAT THE EIU PANEL IGNORED IMPORTANT EVIDENCE THAT SUPPORTS FULL CREDIT UNDER THE NEXUS CRITERION.....	39
A.	FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER NONCONFORMISTS, AND NOT JUST A TERM FOR HOMOSEXUAL MEN	44
B.	“GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND “ALLIED” PERSONS	58
VI.	CONCLUSION AND SIGNATURE.....	65

APPENDICES

APPENDIX 1

**CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF
JURISPRUDENCE, YALE LAW SCHOOL**

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

I. EXECUTIVE SUMMARY

- 1 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU), identified by FTI Consulting, Inc. as the CPE Provider, recommended that the application be denied. The predominant reason given was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender, namely, the community to be served by the string. Also, the EIU Panel authoring the Report incorrectly awarded dotgay only partial scores for the community endorsement requirement. Dotgay promptly requested reconsideration of and objected to the conclusions of its CPE Report, on the grounds that it did not properly follow the directives of the ICANN Guidebook and the principles of the ICANN Bylaws, was inconsistent with the CPE Reports for other applications, and rested upon an incomplete understanding of the facts.
- 2 Responding to the objections that dotgay and other community applicants that were raised against the CPE process, as well as certain findings of the IRP Panels in the Dot Registry and Despegar proceedings, the ICANN Board of Directors ordered a CPE Process Review. FTI Consulting, Inc. (FTI) was retained to conduct the Review. Scope 2 of the Review was supposed to be an “evaluation of whether the CPE criteria were applied consistently throughout each CPE Report.” Scope 3 was supposed to be a “compilation of the reference material relied upon by the CPE Provider * * * for the evaluations which are the subject of pending

Reconsideration Requests,” such as that of dotgay. On December 13, 2017, ICANN published FTI’s Scope 2 and Scope 3 Reports, as well as its Scope 1 Report. This Second Expert Report focuses on the Scope 2 and Scope 3 FTI Reports.

- 3 The **FTI Scope 2 Report** “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner” (p. 3). Unfortunately, the FTI Scope 2 Report is long on description and conclusory statements and short on actual evaluation. At best, it is superficial; at worst, it echoes the errors and confusion of the CPE Report for dotgay’s application. As I show in this Second Expert Report, the FTI Scope 2 Report (a) not only fails to correct the EIU Panel’s many erroneous interpretations of ICANN’s fundamental directives, but sometimes adds new mistakes of its own (such as FTI’s own erroneous statements about the requirements reflected in Criterion #2, Nexus); (b) fails to engage with the evident inconsistencies in the EIU Panel’s application of the standards to the .RADIO, .HOTEL, .OSAKA, and .SPA applications and to the .GAY application; and (c) tries to paper over the demonstrable fact that the EIU Panel showed no interest in or knowledge of gay history, made no serious attempt to gain such knowledge, misunderstood the deep interrelationship among sexual and gender minorities historically and currently, and had no systematic method for determining how the general population refers to LGBTQUIA people and their community.
- 4 The **FTI Scope 3** Report describes FTI’s compilation of the reference materials relied upon by the EIU for each of the eight pending Reconsideration Requests, including that of dotgay’s

second evaluation (p. 3 & note 11). A review of the FTI Scope 3 Report confirms the substantive criticisms of the EIU Panel’s CPE Report on the dotgay application, as outlined in the previous paragraph. Specifically, the FTI Scope 3 Report reveals that most of the evidence relied upon by the EIU Panel was not actually identified in the CPE Report (pp. 35-37), and confirms that the Panel employed no systematic methodology to determine whether, in fact, “gay” is a term that describes the broad community that includes transgender and intersex persons. Moreover, much of the evidence FTI found in the Panel’s working papers actually supports dotgay’s objections to the CPE Report’s scores for Nexus and Community Endorsement. This raises serious red flags because it calls into question whether anyone actually read the sources that the EIU Panel says it consulted.

- 5 The only proper methodological response to the many failures of the EIU Panel’s determinations would have been a substantive review of the affected applications, namely, a review that considered dotgay’s and other applicants’ objections to the EIU Panel’s interpretations of ICANN directives, its implementation of those directives for different applications, and the research methodology and findings of the EIU staff.¹ FTI chose to conduct a different kind of review—one that can only be described as superficial and far from fit for its assigned purpose. Accordingly, in my expert opinion, I do not see how the Board can rely on FTI’s review and still comply with the requirement of ICANN’s Bylaws that

¹ As part of this methodological response, for example, FTI should have taken into consideration my Expert Report of September 2016, Professor Lee Badgett’s Expert Report, the Council of Europe Report, the Recommendation from ICANN’s Ombudsman, and the ICC Independent Expert Determination. It does not appear to have done any of this.

decisions must be made by applying documented policies neutrally and objectively, with integrity and fairness, as well without discrimination.

II. QUALIFICATIONS OF THE EXPERT

6 I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent expert opinion on the validity of the ICANN Community Priority Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), which evaluated dotgay’s community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string “.gay”, as well as FTI’s review of the CPE process.

7 I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,² leading monographs,³ and dozens

² William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its fourth edition). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, “by far,” ever published in the field of legislation and suggesting that it would “alter the law school curriculum”).

³ For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.⁴

- 8 My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN’s gTLD Applicant Guidebook (AGB), especially Module 4.2.3, “Criterion #2: Nexus Between Proposed String and Community” and “Criterion #4 Community Endorsement”; (iii) the history of the terminology in dispute, especially the term “gay” and its applicability to the community of sexual and gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND AND RELEVANT ICANN DIRECTIVES

A. DOTGAY’S APPLICATION AND THE CPE REPORT

- 9 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by ICANN (the Internet Corporation for Assigned Names and Numbers).

⁴ According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (most recently viewed January 23, 2018).

10 The EIU Panel completed its first evaluation and report on the dotgay application in October 2014, but a procedural error was identified and the BGC determined that the application should be reevaluated. A second evaluation and report were completed on October 15, 2015. References in this Second Expert Report will be to the second CPE evaluation and report, which I shall refer to as the CPE Report.

B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK

11 The governing legal materials include ICANN’s Bylaws and its Applicant Guidebook. The Bylaws establish ICANN’s mission “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.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

12 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

13 ICANN’s Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay’s application. *See* AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant “community,” nexus between the proposed string and the community, registration policies, and community endorsement. AGB, Module 4.2.3. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The EIU Panel awarded dotgay a score of 10 out of 16 points, including a score of 0 out of 4 points for Criterion #2, the community nexus requirement, and a score of 2 out of 4 points for Criterion #4, the community endorsement requirement.

C. THE ICANN NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT

14 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay’s application. Dotgay’s petition lost 4 of 4 possible points on Criterion #2, “Nexus Between Proposed String and Community (0-4 Points).” In this part of this Second Expert Report I focus on the nexus element, which is responsible for 3 of the 4 points. (A uniqueness element accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)

15 An application merits **3 points** for the nexus element if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p.4-12 (emphasis added). “Name” of the community means “the established name by which the community is commonly known by others.” AGB, p. 4-13. “[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, p. 4-13.

- 16 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.
- 17 An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that the “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, p. 4-13.
- 18 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus element. CPE Report, pp. 4-6. Because dotgay secured 10 points from the remaining criteria and needed 14 points for approval, Criterion #2 was the main reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.
- 19 Recall that an application merits 3 points if “[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the

community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, p. 5. As I demonstrate below, this is demonstrably not correct.

20 The CPE Report did not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not “a well known short-form or abbreviation of the community” defined in dotgay’s application, but it did read into the explicit requirement (“a well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement was taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits 2 points if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation. Neither the EIU Panel nor FTI provided any explanation in this regard.

21 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, p. 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel

“determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the EIU Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6. I will return to the EIU Panel’s representation regarding the “review” it claims to have conducted “of the language used in the media as well as by organizations that work within the community” below.

22 The CPE Report did not identify the methodology the EIU Panel followed to support these sweeping empirical statements. Instead, the CPE Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, p. 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, p. 5 note 12. While this may be true to a certain extent, there is a significant and material gap between what the EIU Panel did and what is in fact feasible and indeed easily doable.

23 Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The EIU Panel conceded this point (CPE Report, p. 7) but nevertheless took the position that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, p. 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are

“many similar transgender stories in the media where ‘gay’ is not used to identify the subject.”
CPE Report, pp. 6-7 and note 14.

24 The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, p. 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, p. 7. But, the Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that although “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, p. 7 and note 19. This inconsistency is not addressed anywhere in the CPE Report or by FTI.

25 The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, p. 8.

26 Based upon this reasoning, the EIU Panel awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the Panel awarded 0 of 1 points for uniqueness. CPE Report, p. 8.

D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT

- 27 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications; Criterion #4 is “Community Endorsement.” As many as 2 points are awarded based upon support within the relevant community; as many as 2 points are awarded based upon lack of opposition within the relevant community. Dotgay’s petition lost 1 of 2 possible points on each element of Criterion #4.
- 28 Under the support element of the community endorsement criterion, **2 points** are awarded if the “[a]pplicant is, or has documented support from, the recognized community institution(s)/member organization(s) **or** has otherwise documented authority to represent the community.” AGB, p. 4-17 (emphasis added). **1 point** is awarded if there is “[d]ocumented support from at least one group with relevance, but insufficient support for a score of 2.” AGB, p. 4-17. An applicant will be awarded 1 rather than 2 points if “it does not have support from a majority of the recognized community institutions/member organizations.” AGB, p. 4-18.
- 29 Under the opposition prong of the community endorsement criterion, **2 points** are awarded if there is “[n]o opposition of relevance.” AGB, p. 4-17. **1 point** is awarded if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 30 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 2 out of 4 possible points for Criterion #4, including 1 out of 2 possible points for support and one out of 2 possible points for opposition. CPE Report, pp. 10-11.

31 The EIU Panel awarded dotgay a partial score (1 point) for support, even though dotgay submitted strong statements of support from dozens of relevant organizations, including the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which the EIU Panel identified as perhaps the only “entity mainly dedicated to the entire global community as defined.” CPE Report, p. 3. The Panel, however, “determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have the documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).” CPE Report, p. 11.

32 The EIU Panel awarded dotgay a partial score (1 point) for opposition. The reason was that “there is opposition to the application from one group of non-negligible size.” CPE Report, p. 11. Although the CPE Report did not identify the group, it was the Q Center in Portland, Oregon. The Q Center is a small, local community center. It is a member of CenterLink, a national association of around 200 community centers. CenterLink endorsed dotgay’s application; the Q Center was the only one of its 200 members to oppose the dotgay application.

E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI

33 Dotgay objected to the conclusions reached by the CPE Report and requested a Reconsideration. Specifically, dotgay objected that its application deserved an award of all 4 possible points under Criterion #2, Nexus with the Community. Awarding 0 points, the EIU Panel made three different errors of legal or factual analysis: (i) interpretive errors, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring

ICANN’s mission and core values; (ii) errors of inconsistency and discrimination, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) errors of fact, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world. On September 15, 2016, I submitted an Expert Report documenting these three errors. In addition, dotgay objected that its application deserved an award of all 4 possible points under Criterion #4, Community Endorsement.

34 On October 18, 2016, the ICANN Board Governance Committee responded to the pending Reconsideration Requests with a CPE Process Review. Scope 2 of that Review was supposed to be an evaluation of whether the CPE criteria were applied consistently throughout each CPE Report. Scope 3 was supposed to be a compilation of reference materials relied upon by the EIU Panel for its evaluations of the applications of the pending Requests, including that of dotgay. Through counsel, ICANN retained FTI Consulting, Inc.’s Global Risk and Investigations and Technology Practice (FTI) to conduct the CPE Process Review. On December 13, 2017, FTI released its three Reports on Scopes 1-3. (This Second Expert Report will not discuss or analyze the FTI Report on Scope 1, which evaluates the EIU Panel’s communications.)

35 FTI’s Report on Scope 2, “Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports,” determined “whether the CPE Provider consistently applied the CPE criteria throughout each CPE.” FTI Scope 2 Report, p. 2. “FTI

found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.” FTI Scope 2 Report, p. 3.

36 FTI’s Report on Scope 3, “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations Which Are the Subject of Pending Reconsideration Requests,” examined the EIU Panel’s “working papers” associated with each evaluation. FTI Scope 3 Report, p. 3. On the nexus criterion, FTI observed as many as “23 references to research or reference materials” in the working papers that were not cited in the CPE Report. FTI Scope 3 Report, pp. 38-39 & note 117. The FTI Report made no effort to evaluate these materials and so made no determination whether they supported the conclusions and generalizations of the CPE Report. On the community endorsement criterion, FTI reported three sources of information about the Q Center, which was the only opposition to the dotgay application. FTI Scope 3 Report, p. 40 & note 120.

37 This Second Expert Report addresses the FTI Scope 2 and Scope 3 Reports as they relate to the CPE Report for dotgay’s application. This Report will focus on the FTI Reports as they relate to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement). In my expert opinion, the FTI Scope 2 Report is not a serious analysis of the many interpretive and factual problems with the CPE Report. FTI failed to recognize or engage the many criticisms of the EIU Panel’s application of ICANN’s and CPE’s guidelines to the dotgay and other applications. Indeed, nothing in the FTI Scope 2 Report rescues the CPE Report from a variety of logical and analytical flaws or from its documented inconsistency with other CPE reports.

I shall set forth those criticisms in detail below. In my expert opinion, the FTI Scope 3 Report provides evidence that undermines the factual basis for the CPE Report's conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).

IV. The FTI Scope 2 Report Completely Missed the Important Ways the CPE Report Misinterpreted or Ignored the Established Directives for Evaluating Applications

38 The FTI Scope 2 Report “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines.” FTI Scope 2 Report, p. 3. The Report quoted the applicable guidelines and claimed to have considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. The conclusion was supported by no independent analysis, however. The Report uncritically repeated the conclusions found in the EIU Panel’s reports and did not ask whether the criteria the EIU Panel claimed to apply were the criteria laid out in the Applicant Guidebook and other authorities, some of which the EIU Panel and FTI ignored altogether. E.g., FTI Scope 2 Report, pp. 37-41 (Nexus). The approach followed by FTI was a “description” of the CPE Reports, but not an “evaluation” to determine whether the CPE Reports were actually following the applicable guidelines. As regards the dotgay application, they were decidedly **not**.

A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN'S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

- 39 The FTI Scope 2 Report says that EIU personnel “stated that they were strict constructionists and used the Applicant Guidebook as their ‘bible.’” FTI Scope 2 Report, p. 10. If it were true that the EIU considered the Guidebook to be its “Bible,” its personnel were far from strict constructionists—they were heretics who rewrote rather than interpreted the Guidebook’s rules for Criterion #2, especially its nexus element.
- 40 Recall the requirements ICANN has set forth, explicitly, for the nexus element in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p. 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’” AGB, p. 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
- 41 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.

42 As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁵ As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes. Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes. FTI Scope 2 Report, pp. 37-41.

1. The EIU Panel and FTI Substantially Ignored the Primary Test for Nexus: Is the Proposed String “a Well Known Short-Form or Abbreviation of the Community”?

43 To begin with, the EIU Panel and FTI systematically ignored the Applicant Guidebook’s focus on whether the proposed string (“.gay”) is “**a well known short-form or abbreviation of the community**” (3 points) or “closely describes **the community**” (2 points) (emphasis added in both quotations). Notice the precise language, especially the language set **in bold**. The proposed string does not have to be “**the only** well known short-form or abbreviation of the community” and does not have to be “**the only term that** closely describes the community”

⁵ The proposition in text is explained and defended in virtually all the leading books on statutory, treaty, and contract interpretation, including such works as Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Antonin Scalia, *A Matter of Interpretation* (1997); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

(bold type for language added for contrast). More important, the primary focus is “the community,” not just “community members” (an alternative focus for the 2-point score).

44 For dotgay’s application, the overall community is sexual and gender nonconformists. As set forth in more detail in Part V below, this is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely asserted natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. “Gay” is “a well known short-form or abbreviation of the community” (the requirement for 3 points) and also “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be the only umbrella term for the community or even that it be the most popular term—but in fact “gay” remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that “gay” has been a popular word for more than a century, but also

demonstrates that once “gay rights” became ascendant in the 1990s, the term’s dominance increased and consolidated. (Appendix 2 describes the methodology underlying Figure 1.)

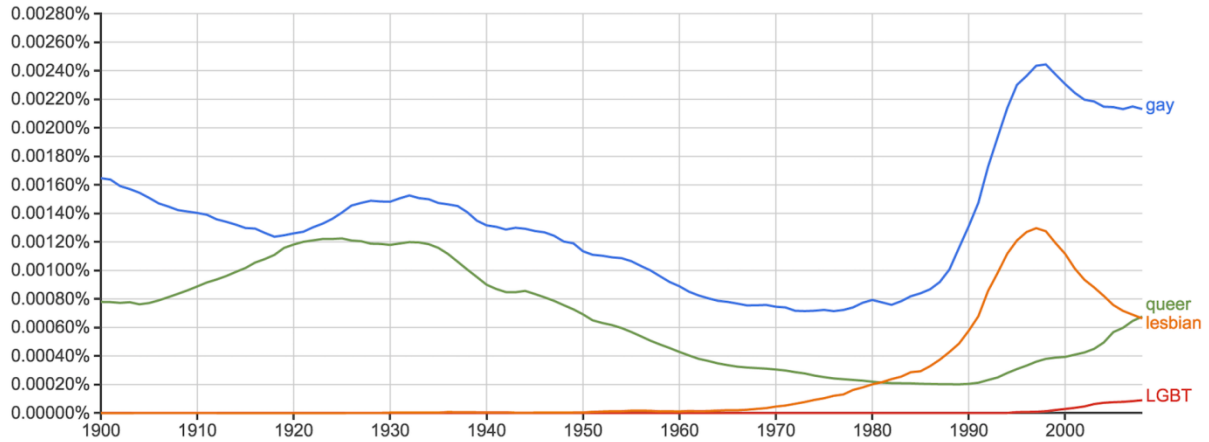


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

2. The EIU Panel and FTI Created an “Under-Reach” Test for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the New Test to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws

45 In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel has introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus element. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The EIU Panel created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.”

CPE Report, p. 5 (emphasis added). In its uncritical presentation, FTI simply repeated the error. FTI Scope 2 Report, pp. 37-39.

- 46 Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, p. 4-12, nor was it taken from the Guidebook’s definitions of “Name” or “Identify,” AGB, p. 4-13. Yet the EIU Panel and FTI cited the Applicant Guidebook for their misunderstanding of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake, a mistake completely missed by FTI.
- 47 According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. For the dotgay application, the EIU Panel recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, p. 5 (quoting the AGB). Notice that the first part [1] of the Report’s requirement is taken from the Guidebook’s 2-point nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so it ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

48 Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that, for its 2-point score, the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, p. 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The EIU Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. In evaluating the dotgay application, the EIU Panel worried that the applied-for string is narrower than the community defined in the application:

EIU Panel Concern: Applied-For String < Community Defined in Application

49 The EIU Panel imported its “under-reaching” concern into the Applicant Guidebook, but in the teeth of the ordinary meaning of its text. The Liberum Veto for “under-reaching” is a regulatory addition to the Guidebook and not a proper interpretation of the Guidebook, which only requires that the proposed string be “a well known short-form or abbreviation of the community” (3 points) or “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be only term, or even the most popular term, that would be used by every member of the community. On the other hand, the Applicant

Guidebook does say, for a 2-point score, that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community.” AGB, p. 4-13 (2 points). The explicit concern of the Applicant Guidebook is that the proposed string not “over-reach”; by omitting parallel language for “under-reach,” the Applicant Guidebook should be interpreted to allow more latitude for under-reaching.⁶ It is a widely accepted canon of contract, statutory, and even constitutional interpretation that the expression of one exception suggests the exclusion of others.⁷

50 Stating the matter more simply, and even more at odds with ICANN’s Applicant Guidebook, the FTI’s Scope 2 Report identified eight applications (including dotgay’s) where the proposed “string identified the name of the core community members,” but “failed to match or identify the **peripheral industries and entities** included in the definition of the community set forth in the application.” FTI Scope 2 Report, p. 38 & note 133 (emphasis added). To impose upon applicants the duty to carefully match each and every conceivable “peripheral” entity or subgroup to the proposed string would be absurd, and the FTI’s overstatement helps us see why the Applicant Guidebook avoids this requirement. In our dynamic culture, groups tend to expand and subdivide. If an applicant had to come up with a term that embraced every

⁶ The EIU Panel and FTI read the Applicant Guidebook as if it said that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community **and without under-reaching substantially within the community.**” AGB, p. 4-13 (new language, implicitly added by the EIU Panel, **in bold**).

⁷ Antonin Scalia & Bryan Garner, *Reading Law* 107-11 (2012); 2A *Sutherland Statutes and Statutory Construction* § 47.23 (7th ed. 2015).

“peripheral” entity that might be included in its community, ICANN would be pushing those applicants toward increasing complexity—such as LGBTQIA, “Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Allied.” That is too complicated a domain name—and it, too, would be subject to an “under-reaching” objection because it might not adequately describe “Asexuals,” a significant portion of the population, or even “Pansexuals,” perhaps a “peripheral” subgroup, but one that the FTI analysis would consider.

51 I shall document, in Part V, how the EIU Panel was mistaken in its application of its “under-reaching” analysis, another clear error missed by the uncritical analysis by FTI. Here, my point is that the new Librum Veto based upon the proposed string’s “under-reach” is a strong example where the “CPE Provider’s evaluation process or reports deviated * * * from the applicable guidelines,” contrary to the uncritical assumption of the FTI Scope 2 Report, p. 3. The “under-reach” analysis and the Librum Veto are also inconsistent with the CPE Guidelines, Version 2.0. *See* EIU, CPE Guidelines, pp. 7-8 (Version 2.0), analyzed below.

3. In Evaluating the Nexus Criterion, the CPE Report Ignored and Violated ICANN’s Bylaws

52 Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN’s mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support “broad, informed participation reflecting the * * * cultural diversity of the Internet.” ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those

in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.⁸

53 There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—“.gay”—is ideally suited for these purposes. Conversely, no other string would bring together all the websites of interest to sexual and gender minorities as comprehensively as “.gay.” Certainly, a longer string—like “.LGBTQIA”—would be less accessible for the general population or, as I shall demonstrate below, even for the various subgroups within the larger gay community.

54 Consider an example. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), “suicide.gay” (one of the community-operated websites proposed in the dotgay application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Second Expert Report) would think “suicide.gay” before they would think “suicide.lgbt” or “suicide.lgbtqia.” See Figure 1, above. Indeed, many educated people (including the author of this Second Expert Report) cannot easily remember the correct order of the letters in the

⁸ See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85 (2006); William Eskridge Jr., *Interpreting Law* 3-11, 105-08 (2016); Robert Katzmann, *Judging Statutes* (2015); Antonin Scalia & Bryan Garner, *Reading Law* 63-66 (2012).

latter string (“lgbtqia”). Does a Librum Veto based on “under-reach” make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). As I documented in my earlier Expert Report, “gay suicide” is a common locution; the search of books published between 1950 and 2008 did not register any significant usage for “LGBT suicide” or “LGBTQIA suicide.”

55 Not least important, “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU Panel’s Librum Veto based upon a made-up “under-reaching” test has been fabricated without any notice in its own guidelines. Needless to say, other CPE evaluations have ignored that fabricated test in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian manner, namely, creating a Librum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE

56 The FTI Scope 2 Report concluded that “the CPE Provider’s scoring decisions were based upon a consistent application of the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 3. As before, the FTI said that it considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant

Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. As before, this conclusion is supported by no independent analysis. The FTI Scope 2 Report uncritically repeated the conclusions found in the CPE Reports and did not discuss or consider the various fairness and nondiscrimination objections raised by dotgay and other applicants. E.g., FTI Scope 2 Report, pp. 37-41 (nexus). This approach is a “description” of the CPE Reports, but is not an “evaluation” to determine whether the CPE Reports were actually applying the guidelines in a neutral and nondiscriminatory manner. At least as regards the dotgay application, they were decidedly **not**.

1. The CPE Report Was Inconsistent with CPE Guidelines

57 According to FTI’s interviews with EIU Panel personnel, “the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.” FTC Scope 2 Report, p. 11. Yet the EIU Panel has imported into the nexus element a *Liberum Veto* based on “under-reaching” which is strikingly inconsistent with the EIU’s CPE Guidelines. Rather than transparency, the CPE Guidelines, if read carefully in light of their ordinary meaning, are a trap for the applicant. Indeed, as applied by the EIU Panel, they open the door to discriminatory, unfair, and unpredictable application.

58 Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full

(3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.

59 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, pp. 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’” CPE Report, p. 5.

60 Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, pp. 5-6.

61 As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Moreover, this report’s unauthorized test is also directly inconsistent with the published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the CPE Guidelines developed by the Economist Intelligence Unit quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching” language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

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

EIU, CPE Guidelines, Version 2.0, p. 7 (emphasis added). The EIU’s CPE Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

62 The EIU’s CPE Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, p. 8 (emphasis in original). Notice that the EIU’s CPE Guidelines do **not** include the following inquiries (new language in **bold**):

*Does the string identify a **narrower** community **than that which is revealed in the applicant’s description of its community?***

*Does the string capture a **narrower** geographic/thematic remit than the community has?*

63 Given these CPE Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka.” “Members of the community are defined as those who are within the

Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, p. 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, p. 2.

64 The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to the Osaka application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. Shouldn’t the Liberm Veto, grounded upon “under-reaching,” apply here?

65 Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular Air BnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” CPE Report, p. 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

66 I must say that this kind of Liberm Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for

“.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the CPE Report.

67 By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of a possible 3 points for nexus. Osaka CPE Report, p. 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, p. 4. Yes, but the applicant defined the community much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Liberum Veto in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

68 Notwithstanding the foregoing analysis, which was spelled out in my earlier Expert Report, FTI made no effort to reconcile the EIU Panel’s lenient treatment of the Osaka application and its draconian treatment of the dotgay application, even though the Osaka application seems like a more obvious candidate for a Liberum Veto based upon the made-up “under-reaching” requirement. Instead, FTI simply observed that the Osaka application was awarded full credit (3 points) for the nexus element of Criterion #2. FTI Scope 2 Report, p. 40.

2. The CPE Report Was Inconsistent with the EIU Panel's Own Previous Reports

69 Dotgay's application was not the first time the EIU Panel has performed a nexus analysis suggesting an "under-reach" of an applied-for string, compared with the identified community. *See* FTI Scope 2 Report, pp. 38-39. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

70 An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether ".hotel" should be approved as a top-level domain. The EIU Panel may have performed a kind of "under-reach" analysis—but it was nowhere as critical as that which it performed for dotgay's application, even though the ".hotel" name was a much more dramatic illustration of "under-reach."

71 The applicant wanted a domain that would serve the "global Hotel Community." It defined its community in this way: "A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available." Hotel CPE Report, p. 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.

72 In the discussion of the nexus requirement, the EIU Panel observed that "the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the

gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, p. 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

73 The EIU’s “under-reach” analysis of the hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the EIU Panel’s tolerant analysis in the hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in this Second Expert Report (reported below).

74 Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 possible points, including 4 of 4 possible points for nexus and uniqueness. Like the

“.hotel” applicant, the “.spa” applicant presented more significant problems of “under-reach” than dotgay’s application did.

75 The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, p. 2. The EIU Panel awarded the applicant 4 of 4 possible points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, p. 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa.” As a consumer, I should not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

C. IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE DOTGAY REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER REPORTS

76 The EIU Panel awarded dotgay only 2 out of 4 points for Criterion #4, Community Endorsement. Dotgay lost 1 point for the community support element and 1 point for the community opposition element of that criterion. Both deductions by the EIU Panel were profoundly unfair and were justified by reasoning that is inconsistent with ICANN’s governing directives. As before, the FTI Scope 2 Report completely failed to examine the EIU Panel’s

analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.

77 In connection with the support element of the community endorsement criterion, dotgay’s application established wide and deep community support, with letters from around 150 organizations, including the ILGA. Founded in 1978, ILGA is a worldwide federation of more than 1100 lesbian, gay, bisexual, transgender, and intersex national and local organizations in over 100 nations on five continents. It is the leading world-wide organization dedicated to establishing the anti-discrimination norm for the benefit of sexual and gender minorities. ILGA enjoys consultative status with the Economic and Social Council of the United Nations.

78 Notwithstanding this impressive—overwhelming—support from the world gay community, the EIU Panel refused to award the full 2 points for community support. While the ILGA was clearly an entity dedicated to the community, the Panel found that it did not meet the standard of a “recognized” organization. According to the Panel, the AGB defines “recognized” to mean that the organization must “be clearly recognized by the community members as representatives of the community.” Without citing any evidence, the Panel concluded that there was no “reciprocal recognition on the part of community members of the [ILGA’s] authority to represent them.” Indeed, the Panel opined that “there is no single such organization recognized by all of the defined community members as the representative of the defined community in its entirety.” CPE Report, p. 11.

79 In the foregoing analysis, the EIU Panel, once again, rewrote the directive set forth in the Applicant Guidebook. The AGB contemplates one or more “recognized community

institution(s)/community organization(s)” and does not contemplate a situation where there is no “recognized community institution(s)/community organization(s)” at all. AGB, p. 4-17. Moreover, the Applicant Guidebook defines “recognized” to mean “the institution(s)/organization(s) that, **through membership or otherwise**, are clearly recognized by the community members as representative of the community.” ABG, pp. 4-17 to 4-18 (emphasized language omitted from the CPE Report). More than 1100 organizations representing the rights of sexual and gender minorities have become **members** of ILGA, and the United Nations has recognized it as the world-wide representative of LGBTI persons. This is surely enough to satisfy the actual requirements of the Applicant Guidebook. If there were any doubt about that, the EIU Panel should resolve the ambiguity by reference to the ICANN Bylaws, which require application of the directives in a nondiscriminatory manner.

80 Indeed, the EIU Panel applied the actual, more liberal, requirements found in the Applicant Guidebook to the application for “.hotel.” The hotel applicant could not identify a single institution that was as recognized a representative of the entire hotel industry, with the widespread membership that ILGA represents for the dotgay applicant. Instead, like dotgay, the hotel applicant offered support from a number of “recognized” organizations. The EIU Panel awarded 2 points for a submission that was less impressive than that made by dotgay. *See* Hotel CPE Report, p. 6. Even the statement of the AGB’s directive was more liberal (and more accurate) in the CPE Report for “.hotel” than in the CPE Report for “.gay.” Specifically, the EIU Panel evaluating the hotel application accurately quoted the AGB’s definition of “recognized” that included the “through membership or otherwise” language and applied the

definition with the understanding that there will normally be several “recognized” institutions and organizations. *See* Hotel CPE Report, p. 6.

- 81 In connection with the opposition element of the community endorsement criterion, only one organization registered opposition: the Q Center in Portland, Oregon, the home of an applicant for a competing string to that of dotgay. Yet the EIU Panel failed to award dotgay the full 2 points for opposition. Recall that the Applicant Guidebook requires an award of 2 points if there is “[n]o opposition of relevance,” and 1 point if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 82 To justify an award of only 1 point, the CPE Report invoked opposition from “one group of non-negligible size” (p. 11). The FTI Scope 3 Report identified that group as the Q Center in Portland, Oregon, and provided three references to the Q Center in the EIU Panel’s working papers (p. 40 note 120). The references establish that the Q Center is a local community center, geographically limited to Portland, Oregon. It is one of several gay groups and institutions in Oregon, which is a state with a small population. The Q Center is also one of more than 200 community centers in 45 states and overseas that are members of CenterLink: The Community of LGBT Centers, <https://www.lgbtcenters.org/> (viewed January 25, 2018). CenterLink is one of dozens of gay organizations that endorsed dotgay’s application. One two-hundredths of CenterLink’s membership—the Q Center in Portland—was deemed sufficient to count as opposition from “one group of non-negligible size.” In my expert opinion, the application by the EIU Panel to dotgay’s case was an absurd interpretation of the Application Guidebook’s stated approach for evaluating the support element of the community endorsement criterion.

It is standard legal interpretation to read terms of a statute, treaty, or contract to avoid absurd results.⁹ The absurdity of the interpretation morphed into the realm of the bizarre, however, once I examined the materials discussed in the FTI Scope 3 Report.

83 Two of the three references identified in the FTI Scope 3 Report raise red flags. One reference reveals that in 2014 the Q Center had an organizational meltdown. *See* Dan Borgan, “A New Era Begins at Q Center,” *P.Q. Monthly*, Dec. 19, 2014, <http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355> (viewed January 25, 2018). The article reported that the Q Center had been mismanaged for some years and that in 2014 its officers had resigned amid charges of fraud and mismanagement. “Q Center is in a tumultuous time: many staff and board members have left.” Community trust had been shattered, according to the source in the CPE working papers. A subsequent article (not identified in the working papers) says that the Q Center’s troubles worsened in 2015. According to this source, the Q Center was operated for the benefit of whites; persons of color and transgender persons felt unwelcome. A Q Center panel addressing a gay bar’s blackface performance raised tensions because it excluded voices of color. The Q Center’s turmoil seemed to deepen, and new managers took over. David Stabler, “Can the Q Center Survive Anger, Plunging Donations, and Staff Departures?,” *The Oregonian*, March 2, 2015, http://www.oregonlive.com/portland/index.ssf/2015/03/problems_at_portlands_q_center.htm 1 (viewed January 25, 2018). Soon after this article appeared, on April 1, 2015, the new Chair

⁹ *See* William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 69-73 (2016); Antonin Scalia & Bryan Garner, *Reading Law* 234-39 (2012).

of the Q Center Board wrote dotgay a letter seeking to void the earlier opposition; dotgay passed on this letter to ICANN. On July 25, 2015, however, yet another new Chair of the Q Center Board wrote ICANN a letter reasserting the Q Center's opposition.

84 In 2014-2015, was the Q Center a “group of non-negligible size,” and was its “opposition of relevance,” the stated criteria in the Applicant Guidebook? The EIU Panel answered yes to both questions, yet such an answer is not even supported by the sources the EIU Panel consulted. Indeed, those sources should have alerted the EIU Panel to proceed cautiously, given the charges of racism and transphobia that were being made against the Q Center. Should ICANN not be concerned that the gay community's application for a needed string has been penalized because of opposition by a small local group riven with strife and charged with race and trans exclusions? Why did the EIU Panel not explore this problem? Why did FTI not flag it?

V. The FTI Scope 3 Report Confirms Dotgay's Claim that the EIU Panel Ignored Important Evidence that Supports Full Credit under the Nexus Criterion

85 Assume, contrary to any sound analysis, that the EIU Panel correctly interpreted and applied the Applicant Guidebook's requirements for Criterion #2 (Community Nexus and Uniqueness). Even under the EIU Panel's excessively restrictive understanding of ICANN's requirements, dotgay's application would merit 4 of 4 possible points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

86 Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6.

87 The CPE Report made no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor did it identify the methodology or evidence the EIU Panel followed to support these sweeping empirical statements. The FTI’s Report on Scope 3 examined the EIU Panel’s working papers. Most of the sources it identified are searches allegedly conducted by the EIU Panel, using terms that are blacked out (and therefore inaccessible) in the FTI Scope 3 Report, pp. 37-39 & note 117. Has the FTI’s Scope 3 Report been censored? Or was the EIU Panel’s methodology so scattershot that even its own working papers do not reveal how it conducted its research?

88 Other sources were specifically identified—and some of those sources directly support dotgay’s position. For a dramatic example, the FTI identified, as a major source contained in the EIU Panel’s working papers, the Wikipedia entry for “LGBT Community,”

https://en.wikipedia.org/wiki/LGBT_community (viewed January 25, 2018). See FTI Scope 3 Report, p. 38 note 117. Here is the first paragraph of that entry (emphasis in the original):

The **LGBT community** or **GLBT community**, also referred to as the **gay community**, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supportive people, organizations, and subcultures, united by a common culture and social movements. These communities generally celebrate pride, diversity, individuality, and sexuality. LGBT activists and sociologists see LGBT community-building as a counterbalance to heterosexism, homophobia, biphobia, transphobia, sexualism, and conformist pressures that exist in the larger society. The term “pride” or sometimes *gay pride* is used to express the LGBT community’s identity and collective strength; pride parades provide both a prime example of the use and a demonstration of the general meaning of the term. The LGBT community is diverse in political affiliation. Not all LGBT individuals consider themselves part of the LGBT community.

The remaining discussion in Wikipedia’s entry for “LGBT Community” uses “gay” and “LGBT” interchangeably. For example, the Wikipedia entry has an extensive discussion of “LGBT Symbols,” which starts this way: “The gay community is frequently associated with certain symbols; especially the rainbow or rainbow flags. The Greek lambda symbol (‘L’ for liberation), triangles, ribbons, and gender symbols are also used as ‘gay acceptance’ symbol. There are many types of flags to represent subdivisions in the gay community, but the most commonly recognized one is the rainbow flag.”

89 If the EIU Panel actually consulted the Wikipedia entry contained in its working papers, why did it not mention that entry in its CPE Report? If FTI actually read the Wikipedia entry that it cited in its Scope 3 Report, why did it not raise a question about whether the evidence assembled by the EIU Panel really supported its conclusion that “gay” was not a name that

matched or identified the community? These are troubling concerns. For a similar example, taken from the EIU Panel’s working papers referenced in the FTI Scope 3 Report, pp. 37-38 & note 117, *see* Wikipedia, “Coming Out, https://en.wikipedia.org/wiki/Coming_out (viewed January 25, 2018).

90 Many of the sources contained in the EIU Panel’s working papers (cited in FTI’s Scope 3 Report, pp. 37-39 & note 117) relate to the widely-known distinction between sexual orientation and gender identity. *See* GLAAD, “Glossary of Terms—Transgender,” <https://www.glaad.org/reference/transgender> (viewed January 25, 2018); Transgender Law Center, “Values—Mission,” <https://transgenderlawcenter.org/about/mission> (viewed January 25, 2018), both referenced in the FTI Scope 3 Report, p. 38 note 117. These and other sources can support the proposition that transgender persons distinguish between sexual orientation and gender identity and commonly use terms such as “trans” or “transgender” to describe themselves. One could make the same point about black women who sexually partner with other women: they distinguish among race, sex, and sexual orientation and commonly use terms such as “black” and “feminist”—rather than “lesbian” or “gay”—to describe themselves. Does that mean that “gay” cannot be a general descriptor for the larger community of sexual and gender minorities, a community that includes transgender persons, black lesbians, and intersex feminists? Of course, “gay” can be a general descriptor of such an internally diverse group.

91 The FTI Scope 3 Report reveals how unsophisticated the EIU Panel’s personnel were as they went about the process of evaluating the connection between the proposed string (“.gay”) and

the community of sexual and gender minorities. Consider a striking analogy. If the proposed string were “.car,” and the Applicant Guidebook awarded no nexus points if a proposed string “under-reached” the community (a requirement rejected by the actual ICANN Applicant Guidebook), would the nexus requirement be defeated upon a claim that “car” did not match or describe some members of the described community, such as people who are very proud of their Cadillacs and never refer to their automobiles as mere “cars”? Of course not. That would be supremely silly—but that is pretty much what the EIU Panel did when its personnel thought that because transgender persons consider themselves part of a “trans community,” they are not **also** part of a larger “gay community.” The same personnel who would conclude, “Of course, a Cadillac owner is **also** part of the larger car community,” apparently were not able to conclude, “And a transgender person is **also** part of the larger LGBT or gay community” (see Wikipedia, “LGBT Community,” quoted above). Why would they make this mistake? One explanation could be homophobia, but a much more likely explanation would be ignorance about sexual and gender minorities—and about the term “gay.”

92 My earlier Expert Report, presumably available to FTI, provided a terminological history of the term “gay” as a reference to the larger community of sexual and gender minorities. Without repeating all of that earlier evidence, let me reassemble most of it, in order to demonstrate not only how “gay” is, historically, the best term for the larger community of sexual and gender minorities, but also how “gay” brings together the ways that sexuality and gender are deeply interrelated. That is, one reason why lesbians and gay men are part of the same larger social movement as transgender and intersex persons is that all of these people have traditionally

been demonized and persecuted for the same general reason: they “deviate” from rigid gender roles that are derived from a naturalized (mis)understanding of biological sex.

A. FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER MINORITIES, AND NOT JUST A TERM FOR HOMOSEXUAL MEN

93 In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”¹⁰ European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.¹¹

94 Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he described as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common was that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological,

¹⁰ E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

¹¹ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, pp. 46-49.

feminine woman) and procreative sexual practices that were socially expected in this country.¹²

Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.

95 Most of these terms were derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.

96 An early literary example was Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicted a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed

¹² See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908).

or posed as a man. (Such an explicit book would have been subject to immediate censorship.)

Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, the censors and most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive, literary manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

97 Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. As the twentieth century progressed, meaning (1) has been eclipsed by meanings (2) and (3), which are deeply related. There was in this early, closeted, era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity or being in on the secret.

98 An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sent his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asked why the handsome leading man was thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality or transvestism), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.¹³

99 In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. *See* Figure 1, above. Indeed,

¹³ For a provocative analysis of the Cary Grant-Randolph Scott bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

in many countries, “queer” to this day carries more negative connotations than “gay,” which continues to make “queer” a less attractive generic term.

100 A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City’s Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the “Gay Revolution.”¹⁴ Sympathetic accounts of the Stonewall riots mobilized the popular term “gay” to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the “Gay Revolution.” For example, Carter reports that this “Gay Revolution” began when a “butch dyke” punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that “special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * *

A common theme links those who resisted first and fought the hardest, and that is gender transgression.”¹⁵

101 Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts described as a “gay bar.” The patrons of the gay bar included

¹⁴ David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

¹⁵ *Id.* at 261; *see id.* at 150-51 (describing the first punch thrown by the “butch dyke,” who floored a police officer).

homosexual and bisexual men who were insisting they be called “gay” and not the disapproved Greek terms (“homosexual” and “bisexual”) that had been devised by the doctors. Many of the people in the gay bar were not homosexual men, but were lesbians, gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends and allies of these gender and sexual nonconformists.¹⁶

102 Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”¹⁷ In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other gay groups. These groups included gay men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

103 Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many

¹⁶ See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

¹⁷ Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

times since, Katz's *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called "hermaphrodites" and "man-women";¹⁸ poet Walt Whitman, who celebrated "the love of comrades," which he depicted as male bonding and intimate friendships;¹⁹ "male harlots," or prostitutes, on the streets of New York;²⁰ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;²¹ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.²² More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.²³

¹⁸ *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

¹⁹ *Id.* at 509-12 (Whitman).

²⁰ *Id.* at 68-73 (male prostitutes, called "harlots" in a contemporary report).

²¹ *Id.* at 317-90 (dozens of women who "passed" as men, many of whom marrying women).

²² *Id.* at 118-27 (Smith), 787-97 (Goldman).

²³ Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of "Gay Los Angeles"); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the "gay male world" bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

104 Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.

105 Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as lesbian, gay, and bisexual persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community.

106 I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgender people.”²⁴ Although many readers were taken aback that

²⁴ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn

“gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

107 In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

108 Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? In my expert opinion, it has not. Recall that ICANN’s requirement for the nexus requirement between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“.gay”) “is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. There is a great deal of evidence indicating that it is. As the FTI Scope 3 Report makes painfully obvious, none of this evidence was considered by the EIU

from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

Panel, and none was considered by FTI when it concluded that the EIU Panel faithfully adhered to the ICANN and CPE guidelines and consistently applied those guidelines.

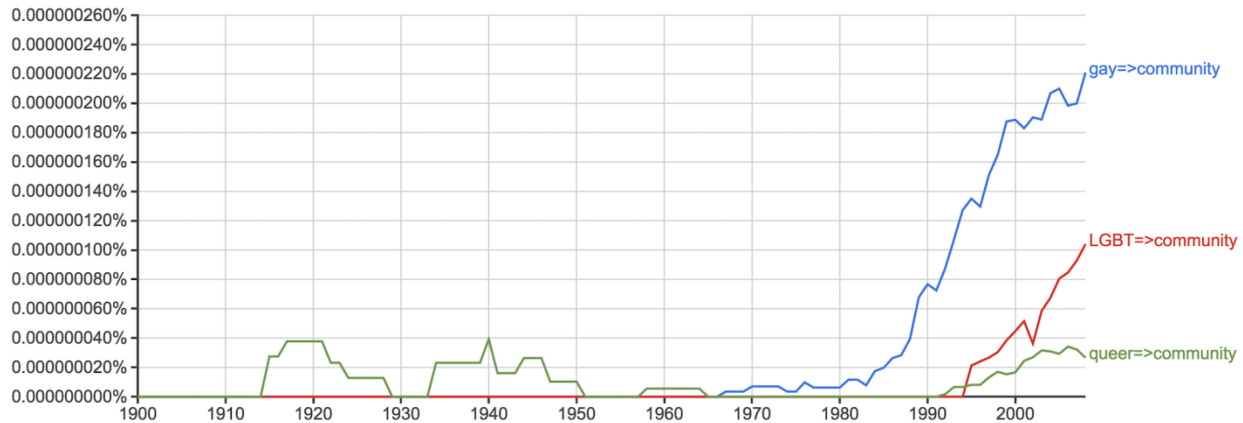


Figure 2. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

109 Figure 2, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (The methodology for the search is contained in Appendix 2.)

110 There are other corpuses that can be searched, and I have done so to check the reliability of the data in Figure 2. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed Jan. 28, 2018). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. In my 2016

search, I found 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

111 Does “gay community” generate a comparable number of hits? In my 2016 search of the BYU Corpus, I found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3 provides an illustration of these results.

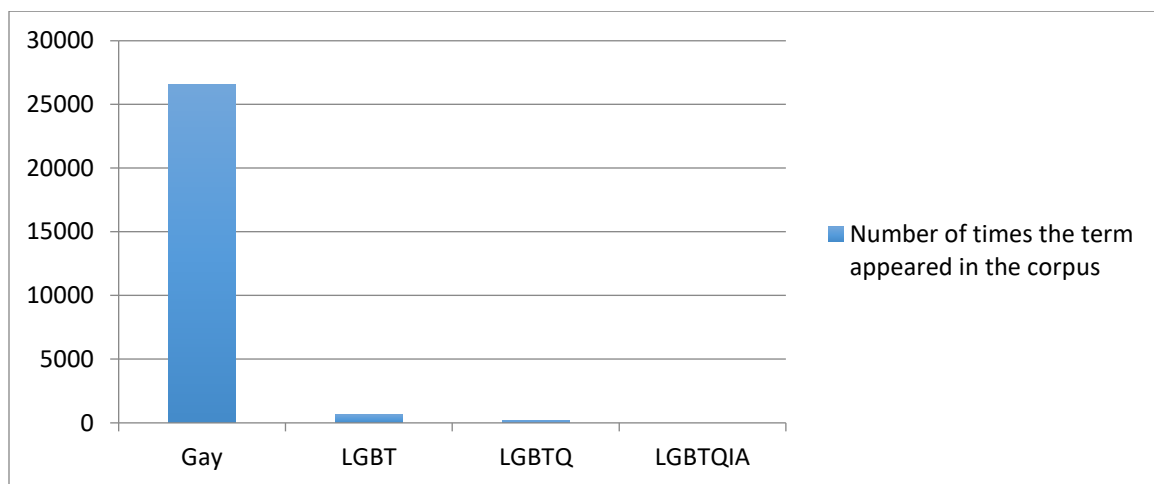


Figure 3. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

112 How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

113 Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this then-unprecedented mass assault by a single person on American soil.²⁵ Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and allies, as well as many gay men.

²⁵ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

114Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁶ Most of the victims were homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

115Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was one of the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”²⁷

²⁶ For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed Sept. 9, 2016).

²⁷ *E.g., Highlights from New York’s Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

116 Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events” all over the world, <https://www.nighttours.com/gaypride/> (last viewed January 25, 2018). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

117 There are also international gay pride events. In 2017, it was World Pride Madrid, celebrating Spain’s leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid’s annual pride celebration was voted “best gay event in the world” by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as “Gay World Pride.”²⁸ The official website described World Pride Madrid as “the biggest Gay Pride Event in the World” during 2017, <http://worldgaypridemadrid2017.com/en/worldpride/> (viewed January 25, 2018). Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use “gay” **both** as a generic, umbrella term for

²⁸ E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

B. “GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND ALLIED PERSONS

118 As illustrated by the accounts of the Orlando “gay bar” and the world-wide “gay pride” events, the term “gay” remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that “gay people,” the generic term, remains the most popular use of the term “gay,” with “gay men” and “gay women” also popular, but much less so.

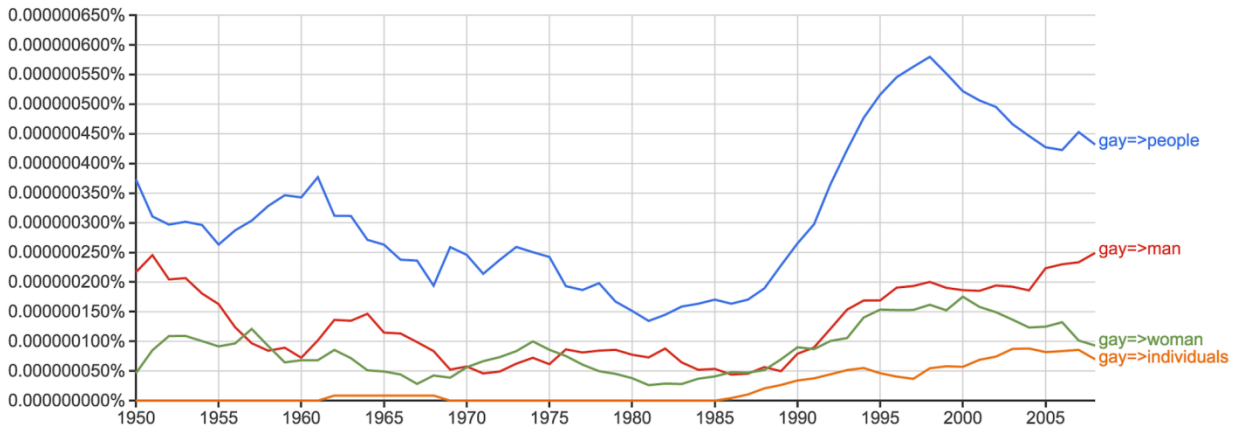


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

119 The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition,

aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing, an impression that is confirmed by the FTI Scope 3 Report, pp. 37-39. As I shall show, the EIU Panel did not browse very extensively.

120 To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Second Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term makes it perfect for an Internet domain (“.gay”) for the community that consists of sexual and gender minorities.

121 Thus, almost all of the CPE Report’s examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay’s claim that “gay” is a “well known short-form or abbreviation for the community.” The EIU Panel objected that dotgay’s analysis “fails to show that when ‘gay’ is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities.” CPE Report, p. 7. Although I do not believe that statement fairly characterized dotgay’s application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

122 Consider the famous “Gay Games,” an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. “The mission of the Federation of Gay Games is to promote equality

through the organization of the premiere international LGBT and gay-friendly sports and cultural event known as the Gay Games.”²⁹ Or: “The Gay Games and its international Federation exist to serve the needs of athletes, artists, and activists. The mission is to promote equality for all, and in particular for lesbian, gay, bi and trans people throughout the world.”³⁰ Notice how the Federation uses the term “gay” as both a generic, umbrella term (“Gay Games”) and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly, LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

123 Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

²⁹ Federation of Gay Games, *Purpose and Mission Statement*, <https://gaygames.org/Mission-&-Vision> (viewed January 25, 2018).

³⁰ Federation of Gay Games, “How We Do It,” <https://gaygames.org/> (viewed January 25, 2018).

124 The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy. CPE Report, p. 7.³¹ “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”³²

125 In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.³³

³¹ See *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (last viewed January 25, 2018) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

³² E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

³³ Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

Gay Star News is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.³⁴

126 Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’.” * * * But, as she affirms, there is a panoply of identities from which to choose in an expansive **gay L.A.**³⁵ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the Applicant Guidebook’s test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

³⁴ Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

³⁵ Faderman & Timmons, *Gay L.A.*, pp. 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

127 Miley Cyrus is a famous singer and celebrity. She views herself as “gender fluid” and “pansexual.” From the perspective of the EIU Panel, she ought not be a person who would consider herself part of a larger “gay community,” but in the last few years she has been sporting t-shirts and caps adorned with the slogan “Make America Gay Again.”³⁶ Her selfie wearing her stylish “Make America Gay Again” t-shirt went viral on Instagram, reaching more than a million viewers.

128 As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. In 2016, my research associates and I ran a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” has become associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

³⁶ Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (last viewed January 25, 2018).

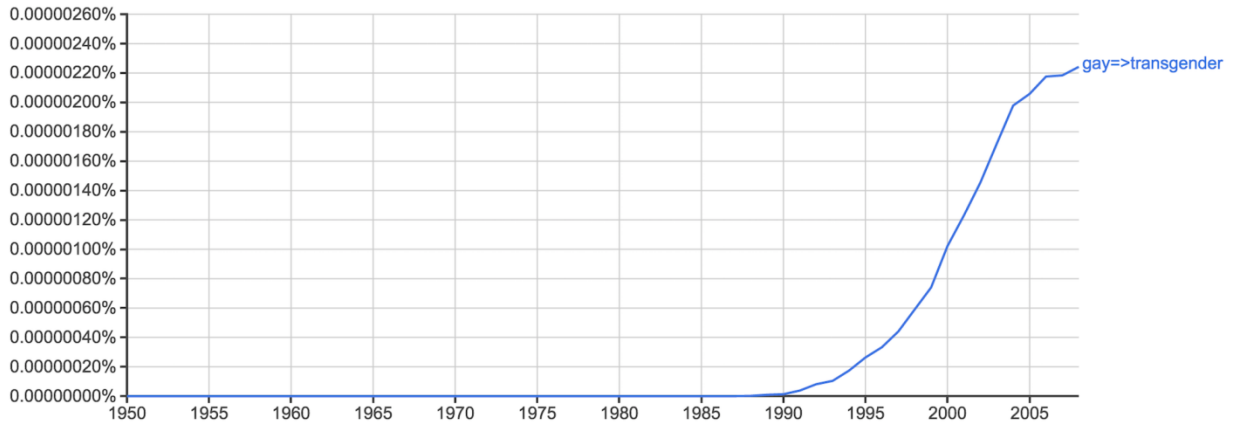


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

129 The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer term, and it is not clear how many intersex persons there are in the world. Most discussion of intersex persons in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon—starting with the ILGA, which strongly supports dotgay’s application and which includes intersex persons and organizations within its membership.

130 Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya

of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.³⁷

131 Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website, *Everyone Is Gay*.³⁸ The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁹ While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

VI. CONCLUSION AND SIGNATURE

132 Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique

³⁷ See Caroline Symons, *Gay Games: A History* (2010) (describing the “Gender in Sport” policy, opening up the Gay Games to intersex and transgender persons on an equal basis).

³⁸ *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (last viewed Sept. 9, 2016).

³⁹ E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (last viewed Sept. 9, 2016).

identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

133 Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Second Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly, ICANN’s requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay’s application. Led by ILGA, the world-wide gay community supports this application as well, which ought to have generated a higher score for community endorsement, Criterion #4 in the Applicant Guidebook.

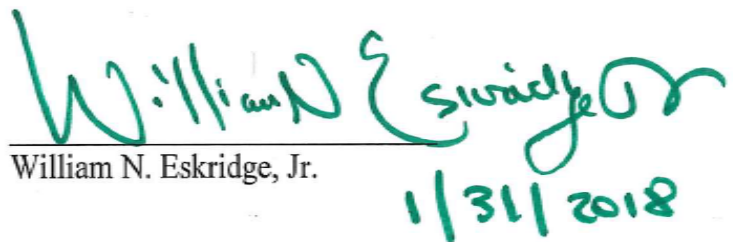
134 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

135 Evaluating dotgay’s application, the EIU Panel has not acted in a completely “open and transparent manner,” nor has it followed “procedures designed to ensure fairness.” To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU’s own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

136 Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and the conclusions reached by FTI in its Scope 2 Report.

Respectfully submitted,

Date: January 31, 2018



William N. Eskridge, Jr.

John A. Garver Professor of Jurisprudence
Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995
Stanford, 1995
Toronto, 1999, 2001
Vanderbilt, 2003
Columbia, 2003
Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011
Fordham, 2008
Pennsylvania, 2018 (expected)

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998
Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 – 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

“Dishonorable Passions”: Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

Dynamic Statutory Interpretation (Harvard 1994)

Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

Legislation: Statutes and the Creation of Public Policy (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

(Selected) Articles

“Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections,” 127 *Yale L.J.* 322 (2017)

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 Hous. L. Rev. 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 Tex. L. Rev. 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 B.U.L. Rev. 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 Wis. L. Rev. 411

“The New Textualism and Normative Canons,” 113 Colum. L. Rev. 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 NYU Rev. L. & Soc. Change 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 St. Louis U.L. Rev. 865 (2012)

“Vetogates and American Public Law,” J.L. Econ. & Org. (April 2012)

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 Geo. L.J. 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 Ga. L. Rev. 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 Washburn L.J. 1 (2010)

“Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 Colum. L. Rev. 1727 (2010) (with Connor N. Raso)

“The California Proposition 8 Case: What Is a Constitution For,” 98 Calif. L. Rev. 1235 (2010)

“Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign,” 57 UCAL L. Rev. 1333 (2010)

“The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy,” Calif. L. Rev. (2009)

“A Pluralist Theory of Equal Protection,” U. Pa. J. Const’l L. (2009)

“Constitutional Horticulture: Deliberation-Respecting Judicial Review,” 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

“Vetogates, Preemption, *Chevron*,” 83 Notre Dame L. Rev. 1441 (2008)

“The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

“America’s Statutory ‘Constitution,’” 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

“No Frills Textualism,” 119 Harv. L. Rev. 2041 (2006) (book review)

“*Chevron* and Agency Norm Entrepreneurship,” 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

“Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

“Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” 114 Yale L.J. 1279 (2005)

“*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism,” 2 Int’l J. Const’l L. 555 (2004)

“*Lawrence*’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics,” 88 Minn. L. Rev. 1021 (2004)

“Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 Mich. L. Rev. 2062 (2002)

“Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,” 87 Cornell L. Rev. 616 (2002)

“Channeling: Identity-Based Social Movements and Public Law,” 150 U. Pa. L. Rev. 419 (2001)

“All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806,” 101 Colum. L. Rev. 999 (2001)

“The Relationship Between Obligations and Rights of Citizens,” 69 Fordham L. Rev. 1721 (2001)

“Super-Statutes,” 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

“Equality Practice: Reflections on the Jurisprudence of Civil Unions,” 64 Alb. L.J. 853 (2001) (Sobota Lecture)

“January 27, 1961: The Birth of Gaylegal Equality Arguments,” 58 NYU Ann. Survey Am. Law 39 (2001)

“No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review,” 75 NYU L. Rev. 1327 (2000)

“Destabilizing Due Process and Evolutive Equal Protection,” 47 UCLA L. Rev. 1183 (2000)

“Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions,” 31 McGeo. L.J. 641 (2000)

“The Circumstances of Politics and the Application of Statutes,” 100 Colum. L. Rev. 558 (2000)

“Multivocal Prejudices and Homo Equality,” 100 Ind. L.J. 558 (1999) (Harris Lecture)

“Norms, Empiricism, and Canons in Statutory Interpretation,” 66 U. Chi. L. Rev. 671 (1999)

“*Hardwick* and Historiography,” 1999 U. Ill. L. Rev. 631 (Baum Lecture)

“Relationships Between Formalism and Functionalism in Separation of Powers Cases,” 22 Harv. J.L. & Pub. Pol’y 21 (1998)

“Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?,” 66 *Geo. Wash. L. Rev.* 1301 (1998)

“Textualism, the Unknown Ideal,” 96 *Mich. L. Rev.* 1509 (1998) (book review)

“A Jurisprudence of ‘Coming Out’: Religion, Sexuality, and Liberty/Equality Collisions in Public Law,” 106 *Yale L.J.* 2411 (1997)

“Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961,” 24 *Fla. St. U.L. Rev.* 703 (1997) (Mason Ladd Lecture)

“Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981,” 25 *Hofstra L. Rev.* 817 (1997) (Visiting Scholar in Residence Lecture)

“Willard Hurst, Master of the Legal Process,” 1997 *Wis. L. Rev.* 1181

“From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945,” 82 *Iowa L. Rev.* (1997) (Murray Lecture)

“Steadying the Court’s ‘Unsteady Path’: A Theory of Judicial Enforcement of Federalism,” 68 *U. So. Cal. L. Rev.* 1447 (1995) (co-authored with Jenna Bednar)

“Virtual Logrolling: How the Court, Congress, and the States Multiply Rights,” 68 *U. So. Cal. L. Rev.* 1545 (1995)

“Regulatory Variables and Statutory Interpretation,” 73 *Wash. U.L.Q.* 1103 (1995) (co-authored with Judith Levi)

“Fetch Some Soupmeat,” 16 *Cardozo L. Rev.* 2209 (1995)

“The Supreme Court, 1993 Term – Foreword: Law as Equilibrium,” 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

“The Elastic Commerce Clause: A Political Theory of American Federalism,” 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

“The Making of ‘The Legal Process,’” 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

“From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct,” 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

“The Economics Epidemic in an AIDS Perspective,” 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

“Gaylegal Narratives,” 46 *Stan. L. Rev.* 607 (1994)

“Post-Enactment Legislative Signals,” 57 *Law & Contemp. Probs.* 75 (Winter 1994)

“The Judicial Review Game,” 88 *Nw. U.L. Rev.* 382 (1993)

“Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet,” 2 *Reconstruction* 52 (1993)

“The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell,” 61 *Geo. Wash. L. Rev.* 1731 (1993)

“A History of Same-Sex Marriage,” 79 *Va. L. Rev.* 1419 (1993)

“The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation,” in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)

“A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda,” 102 *Yale L.J.* 333 (1992) (review essay)

“Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,” 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

“The Article I, Section 7 Game,” 80 *Geo. L.J.* 523 (1992) (co-authored with John Ferejohn)

“Overriding Supreme Court Statutory Interpretation Decisions,” 101 *Yale L.J.* 331 (1991)

“Making the Deal Stick: Enforcing the Original Constitutional Understanding,” *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

“Reneging on History? Playing the Court/Congress/President Civil Rights Game,” 79 *Calif. L. Rev.* 613 (1991)

“The New Public Law Movement: Moderation as a Postmodern Cultural Form,” 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

“The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases,” 88 *Mich. L. Rev.* 2450 (1990)

“Legislative History Values,” 66 *Chi.-Kent L. Rev.* (1990)

“Dynamic Interpretation of Economic Regulatory Statutes,” 21 *L. & Pol'y Int'l Bus.* 663 (1990)

“Gadamer/Statutory Interpretation,” 90 *Colum. L. Rev.* 609 (1990)

“The New Textualism,” 37 *UCLA L. Rev.* 621 (1990)

“Statutory Interpretation as Practical Reasoning,” 42 *Stan. L. Rev.* 321 (1990) (co-authored with Philip Frickey)

“Spinning Legislative Supremacy,” 78 *Geo. L.J.* 319 (1989)

“Public Values in Statutory Interpretation,” 137 *U. Pa. L. Rev.* 1007 (1989)

“Metaprocedure,” 98 *Yale L.J.* 945 (1989) (review essay)

“Interpreting Legislative Inaction,” 87 *Mich. L. Rev.* 67 (1988)

“Overruling Statutory Precedents,” 76 *Geo. L.J.* 1361 (1988)

“Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,” 74 *Va. L. Rev.* 275 (1988)

“Dynamic Statutory Interpretation,” 135 *U. Pa. L. Rev.* 1479 (1987)

“Legislation Scholarship & Pedagogy in the Post-Legal Process Era,” 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

“*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem,” 25 Va. J. Int’l L. 281 (1985)

“One Hundred Years of Ineptitude,” 70 Va. l. Rev. 1083 (1984)

“The Iranian Nationalization Cases,” 22 Harv. Int’l L.J. 525 (1981)

“*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA,” 86 Yale L.J. 885 (1977) (student note)

ENDOWED LECTURES

Sullivan Lecture, Capital University School of Law, “Ohio’s 2004 Super-DOMA and Constitutional Deliberation,” October 2017

Henry J. Miller Lecture, Georgia State University College of Law, “Marriage Equality, 1967-2017,” September 15, 2016

Frankel Lecture, University of Houston Law Center, “Marriage Equality as a Testing Ground for Original Meaning,” November 2014, published as “Marriage Equality and Original Meaning” (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, “Marriage Equality’s Cinderella Moment,” September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, “Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012,” November 15, 2012, published as “Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States” (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as “Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?”

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as “Noah’s Curse and Paul’s Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty” (2012)

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, “Administrative Constitutionalism,” March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as “America’s Statutory constitution” (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as “The Supreme Court’s Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)” (2008)

Center for Religious Studies at Princeton University, November 2005, “Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia”

Lockhart Lecture at University of Minnesota School of Law, “Same-Sex Marriage and Equality Practice,” October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as “Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” Fla. L. Rev. (2005)

President’s Lecture at Davidson College, March 2004, “The Case for Same-Sex Marriage”

Brennan Lecture at Oklahoma City University School of Law, March 2004, “*Lawrence v. Texas* and Constitutional Regime Shifts”

Dean’s Diversity Lecture at Vanderbilt University School of Law, February 2000, “Prejudice and Theories of Equal Protection”

Steintrager Lecture at Wake Forest University, February 1999, “Jeremy Bentham and No Promo Homo Arguments”

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as “Multivocal Prejudices and Homo Equality” (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, “Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law”

Baum Lecture at the University of Illinois School of Law, November 1997, published as “*Hardwick* and Historiography” (1998)

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as “Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981” (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as “Privacy Jurisprudence and the Apartheid of the Closet” (1997)

Murray Lecture at the University of Iowa, January 1996, published as “From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945” (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as “The Many Faces of Sexual Consent” (1995)

Donley Lectures at West Virginia University School of Law, published as “Public Law from the Bottom Up” (1994)

Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

H.R. 1283, The Fairness in Asbestos Compensation Act, House Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1st Sess. (1993)

Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

S. 2279, the Lobbying Disclosure Act of 1992, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

Statutory Interpretation and the Uses of Legislative History, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990)

Adjustable Rate Mortgages (ARMs), Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98th Cong., 2d Sess. (1984)

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008*

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 2. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”*

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

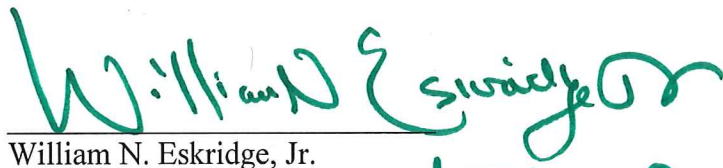
The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by `"=>"` followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click "Search lots of books," and N-gram will produce the chart.

Expert Declaration

The Author makes the following declaration:

1. I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures by any party participating in ICANN's New gTLD Application process;
2. I confirm that all matters upon which I have expressed an opinion are within my area of expertise;
3. I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and to all matters, of which I am aware, which might adversely affect my opinion;
4. I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion; and
5. I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify ICANN, dotgay LLC, and their respective counsel.



William N. Eskridge, Jr.

1/31/2018

Exhibit 12

ARIF HYDER ALI

Contact Information Redacted

January 15, 2018

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: FTI Consulting’s Evaluation and Findings Regarding the Community Priority Evaluation Process

Dear Members of the ICANN Board:

We write on behalf of our client, dotgay LLC (“dotgay”), regarding FTI Consulting’s (“FTI”) recent reports addressing: (1) ICANN’s interactions with the Community Priority Evaluation (“CPE”) Provider;¹ (2) the CPE Provider’s consistency in applying the CPE criteria;² and (3) the reference materials relied upon by the CPE Provider for the eight evaluations with pending reconsideration requests.³ (We refer to FTI’s three reports collectively herein as the “Report.”)

To put it simply, the Report can only be described as a “whitewash.” We strongly urge the Board to review it with a skeptical eye and to not rely on the purported analyses it contains or its conclusions. Basic decency requires this; ICANN’s organizational integrity rests on it; and critical social, cultural, and economic rights that are vital to the gay community could be seriously impaired were the Board to proceed otherwise. Even a cursory review of the Report should lead the Board to conclude that the Report is methodologically flawed and substantively incomplete, and that the FTI personnel who conducted the review did

¹ FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

² FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

³ FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

not have the requisite qualifications to perform certain parts of the review. The lack of transparency that shrouded the purported investigation is equally troubling.

We recall full well the circumstances (*i.e.*, the decision of the IRP Panel in *Dot Registry LLC v. ICANN*) that precipitated the Board's commissioning of the investigation, as well as the fanfare with which ICANN announced that it was conducting "an **independent review**" of the CPE Process.⁴ The following statements by ICANN's General Counsel during a public forum organized at ICANN's March 2017 meeting in Copenhagen are but a few examples of what ICANN stakeholders and affected parties like dotgay were led to believe by ICANN about the investigation:

- FTI will be "digging in very deeply" and that there will be "a full look at the community priority evaluation;"⁵
- ICANN instructed FTI "to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in very deeply and . . . trying to understand the complex process of the new gTLD program and the community priority evaluation process;"⁶ and
- "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."⁷

⁴ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁵ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁶ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁷ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

To put it bluntly: FTI did not “dig[] in very deeply,” or “try to understand the complex process” of the CPE process, or undertake a “full look” at it.

ICANN did not seek any input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation; did not reveal upfront the identity of the investigator so that, for example, the community could provide input on potential conflicts of interest; was not at all transparent about what information would be reviewed by FTI; did not instruct FTI to evaluate the substantive correctness or sufficiency of the research undertaken by the CPE Provider; and did not instruct the investigator to interact with the parties that would be impacted by the outcome of the investigation, or review the information that they provided.

FTI was tasked with performing a “full look” at the CPE Process as part of its independent review.⁸ Its investigative team was required to exercise “diligence, critical analysis, and professional skepticism in discharging professional responsibilities” and to ensure that its conclusions are “supported with evidence that is relevant, reliable and sufficient.”⁹ By any objective measure, this did not happen. Indeed, FTI itself states that it did not: (1) re-evaluate the CPE applications; (2) rely upon the substance of the reference material; (3) assess the propriety or reasonableness of the research undertaken by the CPE Provider; (4) interview the CPE applicants; or (5) take in to consideration the information and materials provided by applicants.

The report reveals that FTI’s investigation was cursory at best; its narrow mandate¹⁰ and evaluation methodology were designed to do little more than vindicate ICANN’s

⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁹ Association of Certified Fraud Examiners, CFE Code of Professional Standards (10 Sep. 2014), p. 2, https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Code-of-Standards-2014.pdf. FTI “followed the internal investigative methodology . . . codified by the Association of Certified Fraud Examiners (ACFE).” Scope 1 Report, p. 3.

¹⁰ FTI failed to address other significant issues with the CPE process, including that: (1) the CPE Provider, the Economist Intelligence Unit (“EIU”), improperly implemented and applied additional processes and CPE criteria *after* receiving the community applications; (2) the EIU acted contrary to the New gTLD Applicant Guidebook (“AGB”) when collecting and interpreting information for the CPE; (3) the EIU permitted third parties to perform substantive tasks in the CPE process for community applications, in contravention of the AGB and the EIU’s own additional processes; (4) the EIU implemented the CPE contrary to human rights principles; (5) the EIU and ICANN failed

administration of the CPE process. FTI received almost no input from the CPE Provider and made no effort to evaluate the substance of the research upon which the CPE Provider relied in drawing its conclusions. Mere cite counting and cite checking is not “digging deeply,” or by any stretch of the imagination a “full look.” Moreover, serious questions must be asked about the qualifications of the individual investigators who undertook the Scope 2 review.

It is evident that FTI engaged in a seemingly advocacy-driven investigation to reach conclusions that would absolve ICANN of the demonstrated and demonstrable problems that afflicted the CPE process.

Accordingly, we request that the ICANN Board take *no* action with respect to the conclusions reached by FTI, until dotgag, and indeed all concerned parties, have had an opportunity to provide comments on the FTI Report and to be heard.

dotgag reserves all of its rights and remedies all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali

AAA

to properly consider documentation supporting community applications, including expert reports; (6) ICANN and the EIU permitted panelists with clear conflicts of interest to participate in the evaluation of community applications; (7) ICANN improperly accepted and adopted the EIU's determinations, with all of the aforementioned problems, without question and without possibility of appeal; (8) the CPE process developed and enforced by ICANN does not conform with ICANN's core principles; and (9) ICANN's actions related to the CPE process violated its own Bylaws.

Exhibit 13

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

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

As amended 22 July 2017

[ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES](#)

[ARTICLE 2 POWERS](#)

[ARTICLE 3 TRANSPARENCY](#)

[ARTICLE 4 ACCOUNTABILITY AND REVIEW](#)

[ARTICLE 5 OMBUDSMAN](#)

[ARTICLE 6 EMPOWERED COMMUNITY](#)

ARTICLE 7 BOARD OF DIRECTORS

ARTICLE 8 NOMINATING COMMITTEE

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

ARTICLE 12 ADVISORY COMMITTEES

ARTICLE 13 OTHER ADVISORY MECHANISMS

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

ARTICLE 15 OFFICERS

ARTICLE 16 POST-TRANSITION IANA (Internet Assigned Numbers Authority)
ENTITY

ARTICLE 17 CUSTOMER STANDING COMMITTEE

ARTICLE 18 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION
REVIEWS

ARTICLE 19 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION
SEPARATION PROCESS

ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES,
AND OTHER AGENTS

ARTICLE 21 GENERAL PROVISIONS

ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND
INDEPENDENT INVESTIGATION

ARTICLE 23 MEMBERS

ARTICLE 24 OFFICES AND SEAL

ARTICLE 25 AMENDMENTS

ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

ARTICLE 27 TRANSITION ARTICLE

ANNEX A: GNSO (Generic Names Supporting Organization) POLICY DEVELOPMENT PROCESS

ANNEX A-1: GNSO (Generic Names Supporting Organization) EXPEDITED POLICY DEVELOPMENT PROCESS

ANNEX A-2: GNSO (Generic Names Supporting Organization) GUIDANCE PROCESS

ANNEX B: CCNSO POLICY-DEVELOPMENT PROCESS

ANNEX C: THE SCOPE OF THE CCNSO

ANNEX D: EC (Empowered Community) MECHANISM

ANNEX E: CARETAKER ICANN (Internet Corporation for Assigned Names and Numbers) BUDGET PRINCIPLES

ANNEX F: CARETAKER IANA (Internet Assigned Numbers Authority) BUDGET PRINCIPLES

ANNEX G-1

ANNEX G-2

ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES

Section 1.1. MISSION

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

- (i) Coordinates the allocation and assignment of names in the root zone of the Domain Name (Domain Name) System ("DNS (Domain Name

System)") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to coordinate the development and implementation of policies:

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

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD (generic Top Level Domain) registrars and registries shall be deemed to be within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS (Domain Name System) root name server system.

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

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not act outside its Mission.

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

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

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

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

(A)

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

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

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

(C) ICANN (Internet Corporation for Assigned Names and Numbers)'s Five-Year Strategic Plan and Five-Year Operating Plan (Five-Year Operating Plan) existing on 10 March 2016.

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

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

Section 1.2. COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) will act in a manner that complies with and reflects ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and respects ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values, each as described below.

(a) **COMMITMENTS**

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

(i) Preserve and enhance the administration of the DNS (Domain Name System) and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS (Domain Name System) and the Internet;

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

(iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN (Internet Corporation for Assigned Names and Numbers)'s activities to matters that are within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and require or significantly benefit from global coordination;

(iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN (Internet Corporation for Assigned Names and Numbers) in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;

(v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

(b) **CORE VALUES**

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN (Internet Corporation for Assigned Names and Numbers) and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of

policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS (Domain Name System) market;

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

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

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

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

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

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN (Internet Corporation for Assigned Names and Numbers)'s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN (Internet Corporation for Assigned Names and

Numbers)'s activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

ARTICLE 2 POWERS

Section 2.1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those Directors present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "of all Directors."

Section 2.2. RESTRICTIONS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not act as a Domain Name (Domain Name) System Registry or Registrar or Internet Protocol (Protocol) Address Registry in competition with entities affected by the policies of ICANN (Internet Corporation for Assigned Names and Numbers). Nothing in this Section 2.2 is intended to prevent ICANN (Internet Corporation for Assigned Names and Numbers) from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Section 2.3. NON-DISCRIMINATORY TREATMENT

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

ARTICLE 3 TRANSPARENCY

Section 3.1. OPEN AND TRANSPARENT

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN (Internet Corporation for Assigned Names and Numbers) shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN (Internet Corporation for Assigned Names and Numbers)'s constituent bodies (including the detailed explanations discussed above).

Section 3.2. WEBSITE

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "**Website**"), which may include, among other things, (a) a calendar of scheduled meetings of the Board, the EC (Empowered Community) (as defined in Section 6.1(a)), Supporting Organizations (Supporting Organizations) (as defined in Section 11.1), and Advisory Committees (Advisory Committees) (as defined in Section 12.1); (b) a docket of all pending policy development matters, including their schedule and current status; (c) specific meeting notices and agendas as described below; (d) information on the ICANN (Internet Corporation for Assigned Names and Numbers) Budget (as defined in Section 22.4(a)(i)), the IANA (Internet Assigned Numbers Authority) Budget (as defined in Section 22.4(b)(i)), annual audit, financial contributors and the amount of their contributions, and related matters; (e) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (f) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the ICANN (Internet Corporation for Assigned Names and Numbers) community; (g) comments received from the community on policies being developed and other matters; (h) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (i) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Section 3.3. MANAGER OF PUBLIC PARTICIPATION

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN (Internet Corporation for Assigned Names and Numbers), including the Website and various other means of communicating with and receiving input from the general community of Internet users.

Section 3.4. MEETING NOTICES AND AGENDAS

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

Section 3.5. MINUTES AND PRELIMINARY REPORTS

- a. All minutes of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary ("Secretary") for posting on the Website. All proceedings of the EC (Empowered Community) Administration (as defined in Section 6.3) and the EC (Empowered Community) shall be provided to the Secretary for posting on the Website.
- b. No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the resolutions made publicly available. The Secretary shall send notice to the Board and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Article 9 through Article 11) and Advisory Committees (Advisory

Committees) (as set forth in Article 12) informing them that the resolutions have been posted.

- c. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 3.5(b) above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.
- d. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes of the Board shall be made publicly available on the Website; provided, however, that any minutes of the Board relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 3.6. NOTICE AND COMMENT ON POLICY ACTIONS

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

- (i) provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- (ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to

those comments (such comment period to be aligned with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment practices), prior to any action by the Board; and

(iii) in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee (Advisory Committee) ("**GAC (Governmental Advisory Committee)**" or "**Governmental Advisory Committee (Advisory Committee)**") and take duly into account any advice timely presented by the Governmental Advisory Committee (Advisory Committee) on its own initiative or at the Board's request.

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS (Domain Name System), financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.

(d) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice (as defined in Section 12.2(a)(x)), the Board shall make a determination whether the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution, in which case the Board shall so indicate in such resolution approving the decision (a "**GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution**") and shall cite the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. To the extent practical, the Board shall ensure that GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolutions only relate to the matters that were the subject of the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and not matters unrelated to the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. For the avoidance of doubt: (i) a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution shall not have the effect of making any other Board resolutions in the same set or series so designated, unless other resolutions are specifically identified as such by the Board; and (ii) a

Board resolution approving an action consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice received during a standard engagement process in which input from all Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) has been requested shall not be considered a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution based solely on that input, unless the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution.

(e) GAC (Governmental Advisory Committee) Carve-out

(i) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and the Board has determined that the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution as described in the relevant GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution, the Governmental Advisory Committee (Advisory Committee) shall not participate as a decision-maker in the EC (Empowered Community)'s exercise of its right to challenge the Board's implementation of such GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. In such cases, the Governmental Advisory Committee (Advisory Committee) may participate in the EC (Empowered Community) in an advisory capacity only with respect to the applicable processes described in Annex D, but its views will not count as support or an objection for purposes of the thresholds needed to convene a community forum or exercise any right of the EC (Empowered Community) ("**GAC (Governmental Advisory Committee) Carve-out**"). In the case of a Board Recall Process (as defined in Section 3.3 of Annex D), the GAC (Governmental Advisory Committee) Carve-out shall only apply if an IRP Panel has found that, in implementing GAC (Governmental Advisory Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles of Incorporation or these Bylaws.

(ii) When the GAC (Governmental Advisory Committee) Carve-out applies (A) any petition notice provided in accordance with Annex D or Approval Action Board Notice (as defined in Section 1.2 of Annex D) shall include a statement that cites the specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution and the line item or provision that implements such specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Statement**"), (B) the Governmental Advisory Committee (Advisory Committee) shall not be

eligible to support or object to any petition pursuant to Annex D or Approval Action (as defined in Section 1.1 of Annex D), and (C) any EC (Empowered Community) Decision (as defined in Section 4.1(a) of Annex D) that requires the support of four or more Decisional Participants (as defined in Section 6.1(a)) pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.

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

Section 3.7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE 4 ACCOUNTABILITY AND REVIEW

Section 4.1. PURPOSE

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

Section 4.2. RECONSIDERATION

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers)

Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors directly.

(b) The EC (Empowered Community) may file a Reconsideration Request (as defined in Section 4.2(c)) if approved pursuant to Section 4.3 of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the EC (Empowered Community) of these Bylaws. The EC (Empowered Community) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the EC (Empowered Community) for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("**Reconsideration Request**") to the extent that the Requestor has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies);

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

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

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

(i) Disputes relating to country code top-level domain ("**ccTLD (Country Code Top Level Domain)**") delegations and re-delegations;

- (ii) Disputes relating to Internet numbering resources; and
- (iii) Disputes relating to protocol parameters.

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

- (i) Evaluate Reconsideration Requests;
- (ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;
- (iii) Evaluate Reconsideration Requests for urgent consideration;
- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties; and
- (vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

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

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

- (i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:
 - (A) for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a

rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

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

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

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

(i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

(j) Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

(k) The Board Accountability Mechanisms Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Accountability Mechanisms Committee may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The Board Accountability Mechanisms Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

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

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

(m) The Board Accountability Mechanisms Committee may ask ICANN (Internet Corporation for Assigned Names and Numbers) Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(n) The Board Accountability Mechanisms Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an opportunity to be heard. The Board Accountability Mechanisms Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

(o) The Board Accountability Mechanisms Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

Any information collected by ICANN (Internet Corporation for Assigned Names and Numbers) from third parties shall be provided to the Requestor.

(p) The Board Accountability Mechanisms Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party.

(q) The Board Accountability Mechanisms Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Accountability Mechanisms Committee shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request. The final recommendation of the Board Accountability Mechanisms Committee shall be documented and promptly (i.e., as soon as practicable) posted on the Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the Board Accountability Mechanisms Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the Board Accountability Mechanisms Committee's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

(r) The Board shall not be bound to follow the recommendations of the Board Accountability Mechanisms Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Accountability Mechanisms Committee within 45 days of receipt of the Board Accountability Mechanisms Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Accountability Mechanisms Committee. The Board's decision on the recommendation shall be

posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Accountability Mechanisms Committee's recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN (Internet Corporation for Assigned Names and Numbers) maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s redaction.

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

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

(u) The Board Accountability Mechanisms Committee shall submit a report to the Board on an annual basis containing at least the following information for the

preceding calendar year:

- (i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;
- (ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;
- (iii) an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
- (iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

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

- (i) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN (Internet Corporation for Assigned Names and Numbers) has failed to enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA (Internet Assigned Numbers Authority) naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

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

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

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

(A)The EC (Empowered Community) is deemed to be materially affected by all Covered Actions. ICANN (Internet Corporation for Assigned Names

and Numbers) shall not assert any defenses of standing or capacity against the EC (Empowered Community) in any forum.

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

(ii) "**Covered Actions**" are defined as any actions or failures to act by or within ICANN (Internet Corporation for Assigned Names and Numbers) committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) "**Disputes**" are defined as:

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

(1) exceeded the scope of the Mission;

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

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

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

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

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

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

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

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

(ii) Claims relating to ccTLD (Country Code Top Level Domain) delegations and re-delegations;

(iii) Claims relating to Internet numbering resources, and

(iv) Claims relating to protocol parameters.

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

(e) Cooperative Engagement Process

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

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

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

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

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

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

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

are to be addressed by the IRP Panel.

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

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

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

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

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

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

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the "**Standing Panel**") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, work, policies, practices, and procedures. Members of

the Standing Panel shall receive at a minimum, training provided by ICANN (Internet Corporation for Assigned Names and Numbers) on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

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

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

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

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

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

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

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

defined in [Section 7.5](#)).

(k) IRP Panel

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

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

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

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

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

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

(m) IRP Provider

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

(n) Rules of Procedure

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

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

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

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

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

(B) Issues relating to joinder, intervention, and consolidation of Claims;

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN (Internet Corporation for Assigned Names and Numbers)'s Response;

(D) Availability and limitations on discovery methods;

(E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;

(F) Procedures if ICANN (Internet Corporation for Assigned Names and Numbers) elects not to respond to an IRP; and

(G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN (Internet Corporation for Assigned Names and Numbers) failed to enforce ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or resolve PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions, as applicable;

(iv) Recommend that ICANN (Internet Corporation for Assigned Names and Numbers) stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

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

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

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

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

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

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

(q) Conflicts of Interest

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

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

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN (Internet Corporation for Assigned Names and Numbers) positions.

(ii) The IRP Provider shall disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(r) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

(s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.

(t) Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

(u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings that could materially and unduly harm participants if conducted publicly. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's

request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding.

(v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.

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

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

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

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

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

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

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

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

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN (Internet Corporation for Assigned Names and Numbers) agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

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

Section 4.4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

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

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will

be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

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

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

Section 4.5. ANNUAL REVIEW

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

Section 4.6. SPECIFIC REVIEWS

(a) Review Teams and Reports

(i) Review teams will be established for each applicable review, which will include both a limited number of members and an open number of observers. The chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) participating in the applicable review shall select a group of up to 21 review team members from among the prospective members nominated by the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), balanced for diversity and skill. In addition, the Board may designate one Director or Liaison to serve as a

member of the review team. Specific guidance on the selection process is provided within the operating standards developed for the conduct of reviews under this Section 4.6 (the "**Operating Standards**"). The Operating Standards shall be developed through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). The Operating Standards must be aligned with the following guidelines:

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

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

(C) If any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) has not nominated at least three prospective review team members, the Chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall be responsible for the determination of whether all 21 SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) member seats shall be filled and, if so, how the seats should be allocated from among those nominated.

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

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

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

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

(vi) Confidential Disclosure to Review Teams

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

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

(2) ICANN (Internet Corporation for Assigned Names and Numbers) may designate certain documents and information as "for review team members only" or for a subset of the review team members based on conflict of interest. ICANN (Internet Corporation for Assigned Names and Numbers)'s designation of documents may also be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

(3) ICANN (Internet Corporation for Assigned Names and Numbers) may require review team members to sign a non-disclosure agreement before accessing documents.

(vii) Reports

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

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

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

(b) Accountability and Transparency Review

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

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

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

(B) assessing the role and effectiveness of the GAC (Governmental Advisory Committee)'s interaction with the Board and with the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and making recommendations for improvement to ensure effective consideration by ICANN (Internet Corporation for Assigned Names and Numbers) of GAC (Governmental Advisory Committee) input on the public policy aspects of the technical coordination of the DNS (Domain Name System);

(C) assessing and improving the processes by which ICANN (Internet Corporation for Assigned Names and Numbers) receives public input (including adequate explanation of decisions taken and the rationale thereof);

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

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

(F) assessing and improving the Independent Review Process.

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

(iv) The Accountability and Transparency Review Team may recommend to the Board the termination or amendment of other periodic reviews required by this Section 4.6, and may recommend to the Board the creation of additional periodic reviews.

(v) The Accountability and Transparency Review Team should issue its final report within one year of convening its first meeting.

(vi) The Accountability and Transparency Review shall be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened.

(c) Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency), and Resiliency (Security Stability & Resiliency (SSR)) Review

(i) The Board shall cause a periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates ("**SSR Review**").

(ii) The issues that the review team for the SSR Review ("**SSR Review Team**") may assess are the following:

(A) security, operational stability and resiliency matters, both physical and network, relating to the coordination of the Internet's system of unique identifiers;

(B) conformance with appropriate security contingency planning framework for the Internet's system of unique identifiers; and

(C) maintaining clear and globally interoperable security processes for those portions of the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates.

(iii) The SSR Review Team shall also assess the extent to which ICANN (Internet Corporation for Assigned Names and Numbers) has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS (Domain Name System), and the extent to which the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS (Domain Name System), consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(iv) The SSR Review Team shall also assess the extent to which prior SSR Review recommendations have been implemented and the extent to which

implementation of such recommendations has resulted in the intended effect.

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

(d) Competition, Consumer Trust and Consumer Choice Review

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

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

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

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

(v) The CCT (Competition, Consumer Choice & Consumer Trust) Review Team shall also assess the extent to which prior CCT (Competition, Consumer Choice & Consumer Trust) Review recommendations have

been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(e) Registration Directory Service Review

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

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

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

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

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

Section 4.7. COMMUNITY MEDIATION

(a) If the Board refuses or fails to comply with a duly authorized and valid EC (Empowered Community) Decision under these Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a mediation process pursuant to this Section 4.7. The Board shall be deemed to have refused or failed to comply with a duly authorized and valid EC (Empowered Community) Decision if the Board has not complied with the EC (Empowered Community) Decision within 30 days of being notified of the relevant EC (Empowered Community) Decision.

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

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

(d) The mediator shall be a licensed attorney with general knowledge of contract law and general knowledge of the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers). The mediator may not have any ongoing business relationship with ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community). The mediator must confirm in

writing that he or she is not, directly or indirectly, and will not become during the term of the mediation, an employee, partner, executive officer, director, consultant or advisor of ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community).

(e) The mediator shall conduct the mediation in accordance with these Bylaws, the laws of California and the rules and procedures of a well-respected international dispute resolution provider, which may be the IRP Provider. The arbitration will be conducted in the English language consistent with the provisions relevant for mediation under the IRP Rules of Procedure and will occur in Los Angeles County, California, unless another location is mutually-agreed between the Mediation Administration and Board Mediation Representatives.

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

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs of the mediator.

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

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

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

ARTICLE 5 OMBUDSMAN

Section 5.1. OFFICE OF OMBUDSMAN

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

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

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

(d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) Budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Section 5.1 shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 5.2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict

resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2 , the Ombudsman shall serve the function expressly provided for in Section 4.2 .

Section 5.3. OPERATIONS

The Office of Ombudsman shall:

(a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;

(b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;

(c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

(d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

(e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

(f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and

(g) comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies.

Section 5.4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

(a) No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

(c) Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

(d) The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet

Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5.5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE 6 EMPOWERED COMMUNITY

Section 6.1. COMPOSITION AND ORGANIZATION OF THE EMPOWERED COMMUNITY

(a) The Empowered Community ("**EC (Empowered Community)**") shall be a nonprofit association formed under the laws of the State of California consisting of the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization) (as defined in Section 10.1), the GNSO (Generic Names Supporting Organization) (as defined in Section 11.1), the ALAC (At-Large Advisory Committee) (as defined in Section 12.2(d)(i)) and the GAC (Governmental Advisory Committee) (each a "**Decisional Participant**" or "associate," and collectively, the "**Decisional Participants**").

(b) This Article 6 shall constitute the articles of association of the EC (Empowered Community) and shall be considered the formational "governing document" (as defined in Section 18008 of the CCC) of the EC (Empowered Community), and the terms contained herein and in these Bylaws relating to the EC (Empowered Community) shall be the EC (Empowered Community)'s "governing principles" (as defined in Section 18010 of the CCC), which may only be amended as set forth in Section 25.2 . Where necessary for purposes of interpretation of these Bylaws, an "associate" shall be deemed to be a "member" of the EC (Empowered Community) as defined in Section 18015 of the CCC. Any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creation of additional Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees)), and any corresponding changes in the voting thresholds for exercise of the EC (Empowered Community)'s rights described in Annex D of these Bylaws, will only be effective following the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D. The EC (Empowered

Community) may not be dissolved except upon the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D.

(c) The sole purpose of the EC (Empowered Community) is to exercise its rights and perform its obligations under ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and these Bylaws, and the EC (Empowered Community) shall have no other powers or rights except as expressly provided therein. The EC (Empowered Community) may only act as provided in these Bylaws. Any act of the EC (Empowered Community) that is not in accordance with these Bylaws shall not be effective.

(d) The EC (Empowered Community) shall not acquire, hold, manage, encumber or transfer any interest in real or personal property, nor have any directors, officers or employees. The EC (Empowered Community) shall not merge with or into another entity nor shall it dissolve, except with the approval of the Board and as part of a Fundamental Bylaw Amendment (as defined in Section 25.2(b)).

(e) Decisional Participants shall not transfer their right to be an associate of the EC (Empowered Community). Any attempted transfer by any Decisional Participant of its right to be an associate of the EC (Empowered Community) shall be void ab initio.

(f) The location and street address of the EC (Empowered Community) shall be the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

(g) Each Decisional Participant shall, except as otherwise provided in Annex D, adopt procedures for exercising the rights of such Decisional Participant pursuant to the procedures set forth in Annex D, including (i) who can submit a petition to such Decisional Participant, (ii) the process for an individual to submit a petition to such Decisional Participant, including whether a petition must be accompanied by a rationale, (iii) how the Decisional Participant determines whether to accept or reject a petition, (iv) how the Decisional Participant determines whether an issue subject to a petition has been resolved, (v) how the Decisional Participant determines whether to support or object to actions supported by another Decisional Participant, and (vi) the process for the Decisional Participant to notify its constituents of relevant matters.

Section 6.2. POWERS AND ACKNOWLEDGMENTS

(a) Pursuant to and in compliance with the terms and conditions of these Bylaws, the EC (Empowered Community) shall have the powers and rights, as set forth more fully elsewhere in these Bylaws, to:

- (i) Appoint and remove individual Directors (other than the President);
- (ii) Recall the entire Board;
- (iii) Reject ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, IANA (Internet Assigned Numbers Authority) Budgets, Operating Plans (as defined in Section 22.5(a)(i)) and Strategic Plans (as defined in Section 22.5(b)(i));
- (iv) Reject Standard Bylaw Amendments (as defined in Section 25.1(a));
- (v) Approve Fundamental Bylaw Amendments, Articles Amendments (as defined in Section 25.2(b)), and Asset Sales (as defined in Article 26(a));
- (vi) Reject PTI Governance Actions (as defined in Section 16.2(d));,
- (vii) Require the ICANN (Internet Corporation for Assigned Names and Numbers) Board to re-review its rejection of IFR Recommendation Decisions (as defined in Section 18.6(d)), Special IFR Recommendation Decisions (as defined in Section 18.12(e)), SCWG Creation Decisions (as defined in Section 19.1(d)) and SCWG Recommendation Decisions (as defined in Section 19.4(d));
- (viii) Initiate a Community Reconsideration Request, mediation or a Community IRP; and
- (ix) Take necessary and appropriate action to enforce its powers and rights, including through the community mechanism contained in Annex D or an action filed in a court of competent jurisdiction.

(b) The EC (Empowered Community) may pursue an action in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) to enforce the EC (Empowered Community)'s rights under these Bylaws. ICANN (Internet Corporation for Assigned Names and Numbers) acknowledges the EC (Empowered Community)'s legal personhood and shall not raise the EC (Empowered Community)'s legal personhood as a defense in any proceeding between ICANN (Internet Corporation for Assigned Names and Numbers) and the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall not assert as a defense that prior filing or completion of a Reconsideration Request or an IRP Claim was a prerequisite to an action in court regarding the EC (Empowered Community)'s power to appoint or remove an individual Director or recall the Board (except to the extent an IRP Panel award is applicable pursuant to Section 3.6(e)).

(c) By nominating a Director for designation by the EC (Empowered Community) or exercising the community mechanism contained in Annex D with respect to any rights granted to the EC (Empowered Community) pursuant to these Bylaws, the EC (Empowered Community) and each of its Decisional Participants agrees and consents to the terms of these Bylaws and intends to be legally bound hereby.

Section 6.3. EC (Empowered Community) ADMINISTRATION

(a) The Decisional Participants shall act through their respective chairs or such other persons as may be designated by the Decisional Participants (collectively, such persons are the "**EC (Empowered Community) Administration**"). Each Decisional Participant shall deliver annually a written certification from its chair or co-chairs to the Secretary designating the individual who shall represent the Decisional Participant on the EC (Empowered Community) Administration.

(b) In representing a Decisional Participant on the EC (Empowered Community) Administration, the representative individual shall act solely as directed by the represented Decisional Participant and in accordance with processes developed by such Decisional Participant in accordance with Section 6.1(g).

(c) In representing the EC (Empowered Community) Administration, the individuals serving thereon shall act as required for the EC (Empowered Community) to follow the applicable procedures in Annex D, and to implement EC (Empowered Community) decisions made in accordance with such procedures.

(d) All communications and notices required or permitted to be given under these Bylaws by a Decisional Participant shall be provided by the Decisional Participant's representative on the EC (Empowered Community) Administration. All communications and notices required or permitted to be given under these Bylaws by the EC (Empowered Community) shall be provided by any member of the EC (Empowered Community) Administration. Where a particular Bylaws notice provision does not require notice to the Secretary, the EC (Empowered Community) and the Decisional Participants shall provide a copy of the notice to the Secretary in accordance with Section 21.5, and ICANN (Internet Corporation for Assigned Names and Numbers) shall post it on the Website.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall be entitled to rely on notices from a Decisional Participant's representative or an individual serving on the EC (Empowered Community) Administration delivered in accordance with Section 21.5 as evidence that the actions set forth therein have been approved by or are the actions of the Decisional Participant, the EC (Empowered Community) or the EC (Empowered Community) Administration, as

applicable, pursuant to and in compliance with the requirements of these Bylaws (including Annex D) .

(f) No person participating in the EC (Empowered Community), the EC (Empowered Community) Administration or a Decisional Participant shall be liable for any debt, obligation or liability of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community), other than in the case of a fraudulent act committed by such person.

Section 6.4. CONSENT TO BOARD-INITIATED REMOVAL OF DIRECTOR WITHOUT CAUSE

In the event the EC (Empowered Community) Administration receives from the Secretary a valid notice as described in Section 7.11(a)(i)(B), indicating that the Board has voted to remove a Director without cause pursuant to Section 7.11(a)(i)(B), the EC (Empowered Community) shall without deliberation consent to such removal, and the EC (Empowered Community) Administration shall provide notice to the Secretary of such consent.

ARTICLE 7 BOARD OF DIRECTORS

Section 7.1. COMPOSITION OF THE BOARD

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board") shall consist of sixteen voting directors ("**Directors**"). In addition, four non-voting liaisons ("**Liaisons**") shall be appointed for the purposes set forth in Section 7.9. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board.

Section 7.2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIR AND VICE-CHAIR

(a) As of the effective date of the amendment and restatement of these Bylaws on 1 October 2016, the EC (Empowered Community) shall be the sole designator of ICANN (Internet Corporation for Assigned Names and Numbers) and shall designate, within the meaning of Section 5220 of the CCC, all Directors except for the President ex officio. The EC (Empowered Community) shall notify promptly the Secretary in writing of the following designations:

- (i) Eight Directors nominated by the Nominating Committee to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seats 1 through 8.

(ii) Two Directors nominated by the ASO (Address Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 9 and Seat 10.

(iii) Two Directors nominated by the ccNSO (Country Code Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 11 and Seat 12.

(iv) Two Directors nominated by the GNSO (Generic Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 13 and Seat 14.

(v) One Director nominated by the At-Large Community to be designated as Directors by the EC (Empowered Community). This seat on the Board is referred to in these Bylaws as Seat 15.

In addition to the Directors designated by the EC (Empowered Community), the President shall serve ex officio as a Director. The seat held by the President on the Board is referred to in these Bylaws as Seat 16.

(b) In carrying out its responsibilities to nominate the Directors for Seats 1 through 8 for designation by the EC (Empowered Community), the Nominating Committee shall ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. At no time when it makes its nomination shall the Nominating Committee nominate a Director to fill any vacancy or expired term whose designation would cause the total number of Directors (not including the President) from countries in any one Geographic Region to exceed five; and the Nominating Committee shall ensure when it makes its nominations that the Board includes at least one Director who is from a country in each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region ("Diversity Calculation"). For purposes of this Section 7.2(b), if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("**Domicile**"), that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this Section 7.2(b), a person can only have one

Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(c) In carrying out their responsibilities to nominate Directors for Seats 9 through 15 for designation by the EC (Empowered Community), the Supporting Organizations (Supporting Organizations) and the At-Large Community shall seek to ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. The Supporting Organizations (Supporting Organizations) shall ensure that, at any given time, no two Directors nominated by a Supporting Organization (Supporting Organization) are citizens from the same country or of countries located in the same Geographic Region. For purposes of this Section 7.2(c), if any candidate for Director maintains citizenship or Domicile of more than one country, that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Supporting Organization (Supporting Organization) or the At-Large Community, as applicable, to use for nomination purposes. For purposes of this Section 7.2(c), a person can only have one Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(d) The Board shall annually elect a Chair and a Vice-Chair from among the Directors, not to include the President.

(e) The EC (Empowered Community) shall designate each person nominated as a Director by the Nominating Committee, the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization), the GNSO (Generic Names Supporting Organization) and the At-Large Community in accordance with this Section 7.2.

(f) As a condition to sitting on the Board, each Director other than the President ex officio shall sign a pre-service letter pursuant to which such Director:

(i) acknowledges and agrees to the EC (Empowered Community)'s right to remove the Director at any time and for any reason following the processes set forth in these Bylaws;

(ii) acknowledges and agrees that serving as a Director shall not establish any employment or other relationship (whether to ICANN (Internet Corporation for Assigned Names and Numbers), the EC (Empowered Community), any body entitled to nominate a Director, or any of their agents) that provides any due process rights related to termination of service as a Director; and

(iii) conditionally and irrevocably resigns as a Director automatically effective upon communication to the Director or, in the case of Board recall, communication to the Board of a final determination of removal following the processes set forth in these Bylaws.

Section 7.3. CRITERIA FOR NOMINATION OF DIRECTORS

Directors shall be:

(a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;

(b) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers) decisions on the global Internet community, and committed to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

(c) Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section 7.3;

(d) Persons who, in the aggregate, have personal familiarity with the operation of gTLD (generic Top Level Domain) registries and registrars; with ccTLD (Country Code Top Level Domain) registries; with IP (Internet Protocol or Intellectual Property) address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; and

(e) Persons who are able to work and communicate in written and spoken English.

Section 7.4. ADDITIONAL QUALIFICATIONS

(a) Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.

(b) No person who serves in any capacity (including as a liaison) on any Supporting Organization (Supporting Organization) Council shall simultaneously serve as a Director or Liaison to the Board. If such a person is identified by, or presents themselves to, the Supporting Organization (Supporting Organization) Council or the At-Large Community for consideration for nomination to serve as a Director, the person shall not thereafter participate in any discussion of, or vote by, the Supporting Organization (Supporting Organization) Council or the committee designated by the At-Large Community relating to the nomination of Directors by the Council or At-Large Community, until the Council or committee(s) specified by the At-Large Community has nominated the full complement of Directors it is responsible for nominating. In the event that a person serving in any capacity on a Supporting Organization (Supporting Organization) Council is considered for nomination to serve as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's nomination process. In the event that a person serving in any capacity on the At-Large Advisory Committee (Advisory Committee) is identified as or accepts a nomination to be considered for nomination by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the At-Large Community's nomination process.

(c) Persons serving in any capacity on the Nominating Committee shall be ineligible for nomination or designation to positions on the Board as provided by Section 8.8.

(d) No person who serves on the EC (Empowered Community) Administration while serving in that capacity shall be considered for nomination or designated to the Board, nor serve simultaneously on the EC (Empowered Community) Administration and as a Director or Liaison to the Board.

Section 7.5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the nomination of Directors by the Nominating Committee, each Supporting Organization (Supporting Organization) and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any memorandum of understanding referred to in these Bylaws concerning the Supporting Organization (Supporting Organization). One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no Geographic Region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "**Geographic Region**": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa;

and (e) North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section 7.5 shall be reviewed by the Board from time to time (and in any event at least once every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

Section 7.6. DIRECTORS' CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers). Each Director shall be responsible for disclosing to ICANN (Internet Corporation for Assigned Names and Numbers) any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the CCC. In addition, each Director shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CCC. The Board shall adopt policies specifically addressing Director, Officer, EC (Empowered Community) and Supporting Organization (Supporting Organization) conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

Section 7.7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and not as representatives of the EC (Empowered Community), the Nominating Committee, Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) that nominated them, as applicable, their employers, or any other organizations or constituencies.

Section 7.8. TERMS OF DIRECTORS

(a) The regular term of office of Director Seats 1 through 15 shall begin as follows:

- (i) The regular terms of Seats 1 through 3 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2003;

(ii) The regular terms of Seats 4 through 6 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2004;

(iii) The regular terms of Seats 7 and 8 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2005;

(iv) The terms of Seats 9 and 12 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2015;

(v) The terms of Seats 10 and 13 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2013; and

(vi) The terms of Seats 11, 14 and 15 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2014.

(b) Each Director holding any of Seats 1 through 15, including a Director nominated and designated to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been designated and qualified or until that Director resigns or is removed in accordance with these Bylaws. For the avoidance of doubt, the new governance provisions effective as of the amendment and restatement of these Bylaws on 1 October 2016 shall not have the effect of shortening or terminating the terms of any Directors serving at the time of the amendment and restatement.

(c) At least two months before the commencement of each annual meeting, the Nominating Committee shall give the EC (Empowered Community) Administration (with a copy to the Decisional Participants and Secretary) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(d) At least six months before the date specified for the commencement of the term as specified in Section 7.8(a)(iv) through Section 7.8(a)(vi) above, any Supporting Organization (Supporting Organization) or the At-Large Community entitled to nominate a Director for a Seat with a term beginning that year shall give the EC (Empowered Community) Administration (with a copy to the

Secretary and the Decisional Participants) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(e) No Director may serve more than three consecutive terms. For these purposes, a person designated to fill a vacancy in a term shall not be deemed to have served that term.

(f) The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

Section 7.9. NON-VOTING LIAISONS

(a) The non-voting Liaisons shall include:

(i) One appointed by the Governmental Advisory Committee (Advisory Committee);

(ii) One appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);

(iii) One appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b); and

(iv) One appointed by the Internet Engineering Task Force.

(b) The Liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a Liaison shall give the Secretary written notice of its appointment.

(c) Each Liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the Liaison resigns or is removed in accordance with these Bylaws.

(d) The Liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but shall otherwise not have any of the rights and

privileges of Directors. Liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section 7.9(d) for the purpose of consulting with their respective committee or organization.

Section 7.10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON

Subject to Section 5226 of the CCC, any Director or Liaison may resign at any time by giving written notice thereof to the Chair of the Board, the President, the Secretary, or the Board. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective.

Section 7.11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON

(a) Directors

(i) Any Director designated by the EC (Empowered Community) may be removed without cause:

(A) by the EC (Empowered Community) pursuant to and in compliance with procedures in Section 3.1 or Section 3.2 of Annex D, as applicable, or

(B) following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that (x) each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director; and (y) such removal shall not be effective until the Secretary has provided notice to the EC (Empowered Community) Administration of the Board's removal vote and the requirements of Section 6.4 have been met.

(ii) The Board may remove any Director who has been declared of unsound mind by a final order of court, or convicted of a felony, or been found by a final order or judgment of any court to have breached any duty under Sections 5230 through 5239 of the CCC, and in the case of such removal, the Secretary shall promptly notify the EC (Empowered Community) Administration in writing, with a copy to the body that nominated such Director, and shall promptly post such notification to the Website. The vacancies created by such removal shall be filled in accordance with Section 7.12(a).

(iii) All Directors (other than the President) may be removed at the same time by the EC (Empowered Community) by the EC (Empowered Community) Administration delivering an EC (Empowered Community) Board Recall Notice to the Secretary pursuant to and in compliance with Section 3.3 of Annex D. The vacancies created by such removal shall be filled by the EC (Empowered Community) in accordance with Section 7.12(b).

(b) With the exception of the Liaison appointed by the Governmental Advisory Committee (Advisory Committee), any Liaison may be removed following notice to that Liaison and to the organization which selected that Liaison, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that Liaison following such notice. The vacancies created by such removal shall be filled in accordance with Section 7.12. The Board may request the Governmental Advisory Committee (Advisory Committee) to consider the replacement of the Governmental Advisory Committee (Advisory Committee) Liaison if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

Section 7.12. VACANCIES

(a) This Section 7.12(a) shall apply to Board vacancies other than those occurring by recall of all Directors (other than the President). A vacancy or vacancies in the Board shall be deemed to exist in the case of the death, resignation, or removal of any Director or Interim Director (as defined in Section 7.12(b)), or if the authorized number of Directors is increased. Vacancies occurring in Seats 1 through 15 shall be filled by the EC (Empowered Community) after nomination as provided in Section 7.2 and Articles 8 through 12. A vacancy in Seat 16 shall be filled as provided in Article 15. A Director designated by the EC (Empowered Community) to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been designated and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.

(b) This Section 7.12(b) shall apply to Board vacancies occurring when all Directors (other than the President) are recalled as provided by Section 7.11(a) (iii). Concurrently with delivery of any EC (Empowered Community) Board Recall Notice (as defined in Section 3.3(f) of Annex D), the EC (Empowered Community) Administration shall provide written notice of the EC (Empowered Community)'s designation of individuals to fill such vacancies (each such individual, an "**Interim Director**") to the Decisional Participants and to the Secretary, who shall cause such notice to be promptly posted to the Website. An Interim Director must meet

the criteria specified in Section 7.3, Section 7.4 and Section 7.5, as applicable. An Interim Director shall hold office until the EC (Empowered Community) designates the Interim Director's successor in accordance with Section 7.12(a), and the successor's designation shall occur within 120 days of the Interim Director's designation. For avoidance of doubt, persons designated as Interim Directors may be eligible for designation as Directors as well.

(c) The organizations selecting the Liaisons identified in Section 7.9 are responsible for determining the existence of, and filling, any vacancies in those positions. Such organizations shall give the Secretary written notice of their appointments to fill any such vacancies, subject to the requirements set forth in Section 7.4, as applicable.

Section 7.13. ANNUAL MEETINGS

Annual meetings of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. Each annual meeting of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers), or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

Section 7.14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7.15. SPECIAL MEETINGS

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the Directors, by the Chair of the Board or the President. A call for a special meeting shall be made by the Secretary. Special meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers) unless otherwise specified in the notice of the meeting.

Section 7.16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and Liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and Liaison at the Director's or Liaison's address as it is shown on the records of ICANN (Internet Corporation for Assigned Names and Numbers). In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section 7.16 to the contrary, notice of a meeting need not be given to any Director or Liaison who signed a waiver of notice or a Director who signed a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

Section 7.17. QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

Section 7.18. ACTIONS BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

Directors and Liaisons may participate in a meeting of the Board or Board Committee (as defined in Section 14.1) through use of (a) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (b) electronic video screen communication or other communication equipment; provided that (i) all Directors participating in such a meeting can speak to and hear one another, (ii) all Directors are provided the means of fully participating in all matters before the Board or Board Committee, and (iii) ICANN (Internet Corporation for Assigned Names and Numbers) adopts and implements means of verifying that (A) a

person participating in such a meeting is a Director or other person entitled to participate in the meeting and (B) all actions of, or votes by, the Board or Board Committee are taken or cast only by Directors and not persons who are not Directors. Participation in a meeting pursuant to this Section 7.18 constitutes presence in person at such meeting. ICANN (Internet Corporation for Assigned Names and Numbers) shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit Directors and Liaisons to participate by telephone.

Section 7.19. ACTION WITHOUT MEETING

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

Section 7.20. ELECTRONIC MAIL

If permitted by applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN (Internet Corporation for Assigned Names and Numbers) shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

Section 7.21. BOARD RIGHTS OF INSPECTION

(a) Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN (Internet Corporation for Assigned Names and Numbers).

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

Section 7.22. COMPENSATION

(a) Except for the President of ICANN (Internet Corporation for Assigned Names and Numbers), who serves ex officio as a Director, each of the Directors shall be entitled to receive compensation for his or her services as a Director. The President shall receive only his or her compensation for service as President and shall not receive additional compensation for service as a Director.

(b) If the Board determines to offer a compensation arrangement to one or more Directors (other than the President) for services to ICANN (Internet Corporation for Assigned Names and Numbers) as Directors, the Board shall follow the process that is calculated to pay an amount for service as a Director that is not an excess benefit under the standards set forth in Section 4958 of the Internal Revenue Code of 1986, as amended (the "**Code**").

(c) As part of the process, the Board shall retain an Independent Valuation Expert (as defined in Section 7.22(g)(i)) to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion (as defined in Section 7.22(g)(ii)) from such expert regarding the ranges of Reasonable Compensation (as defined in Section 7.22(g)(iii)) for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Board Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.

(d) After having reviewed the Independent Valuation Expert's Reasoned Written Opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.

(e) The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

(f) In addition to authorizing payment of compensation for services as Directors as set forth in this Section 7.22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by Liaisons performing their duties as Directors or Liaisons.

(g) As used in this Section 7.22, the following terms shall have the following meanings:

(i) An "**Independent Valuation Expert**" means a person retained by ICANN (Internet Corporation for Assigned Names and Numbers) to value compensation arrangements that: (A) holds itself out to the public as a compensation consultant; (B) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN (Internet

Corporation for Assigned Names and Numbers); (C) is qualified to make valuations of the type of services involved in any engagement by and for ICANN (Internet Corporation for Assigned Names and Numbers); (D) issues to ICANN (Internet Corporation for Assigned Names and Numbers) a Reasoned Written Opinion regarding a particular compensation arrangement; and (E) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (A) through (D) of this definition.

(ii) A "**Reasoned Written Opinion**" means a written opinion of a valuation expert who meets the requirements of Section 7.22(g)(i)(A) through (D). To be reasoned, the opinion must be based upon a full disclosure by ICANN (Internet Corporation for Assigned Names and Numbers) to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

(iii) "**Reasonable Compensation**" shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

(h) Each of the Liaisons, with the exception of the Governmental Advisory Committee (Advisory Committee) Liaison, shall be entitled to receive compensation for his or her services as a Liaison. If the Board determines to offer a compensation arrangement to one or more Liaisons, the Board shall approve that arrangement by a required three-fourths (3/4) vote.

Section 7.23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary immediately after the

adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

Section 7.24 INTERIM BOARD

Except in circumstances in which urgent decisions are needed to protect the security, stability or resilience of the DNS (Domain Name System) or to the extent necessary to comply with its fiduciary obligations under applicable law, a Board that consists of a majority or more of Interim Directors (an "**Interim Board**") shall (a) consult with the chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) before making major decisions and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section 2.3 of Annex D) prior to taking any action that would, if implemented, materially change ICANN (Internet Corporation for Assigned Names and Numbers)'s strategy, policies or management, including replacement of the then-serving President. Interim Directors shall be entitled to compensation as provided in this Article 7.

Section 7.25 COMMUNICATION OF DESIGNATION

Upon its receipt of nominations as provided in Articles 7 through 12, the EC (Empowered Community) Administration, on behalf of the EC (Empowered Community), shall promptly notify the Secretary of the EC (Empowered Community)'s designation of individuals to fill seats on the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall post all such designations promptly to the Website.

ARTICLE 8 NOMINATING COMMITTEE

Section 8.1. DESCRIPTION

There shall be a Nominating Committee of ICANN (Internet Corporation for Assigned Names and Numbers) ("**Nominating Committee**"), responsible for nominating all Directors except the President and those Directors nominated by Decisional Participants; for nominating two directors of PTI (in accordance with the articles of incorporation and bylaws of PTI); and for such other selections as are set forth in these Bylaws. Notification of the Nominating Committee's Director nominations shall be given by the Nominating Committee Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25. Notification of the Nominating Committee's PTI director nomination shall be given to the Secretary.

Section 8.2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

- (a) A non-voting Chair, appointed by the Board;
- (b) A non-voting Chair-Elect, appointed by the Board as a non-voting advisor;
- (c) A non-voting liaison appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);
- (d) A non-voting liaison appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b);
- (e) A non-voting liaison appointed by the Governmental Advisory Committee (Advisory Committee);
- (f) Five voting delegates selected by the At-Large Advisory Committee (Advisory Committee) established by Section 12.2(d);
- (g) Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization (Supporting Organization) established by Article 11, as follows:
 - (i) One delegate from the Registries Stakeholder Group;
 - (ii) One delegate from the Registrars Stakeholder Group;
 - (iii) Two delegates from the Business Constituency, one representing small business users and one representing large business users;
 - (iv) One delegate from the Internet Service Providers and Connectivity Providers Constituency (as defined in Section 11.5(a)(iii));
 - (v) One delegate from the Intellectual Property Constituency; and
 - (vi) One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.
- (h) One voting delegate each selected by the following entities:

- (i) The Council of the Country Code Names Supporting Organization (Supporting Organization) established by Section 10.3;
- (ii) The Council of the Address Supporting Organization (Supporting Organization) established by Section 9.2; and
- (iii) The Internet Engineering Task Force.

(i) A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not serve, temporarily or otherwise, in the place of the Chair.

Section 8.3. TERMS

- (a) Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.
- (b) The regular term of each voting delegate shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the immediately following ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (c) Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the next ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (d) It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.
- (e) Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to Section 8.3(d), or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating

Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 8.2(i).

(f) The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

Section 8.4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee shall be:

(a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;

(b) Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

(c) Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;

(d) Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;

(e) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers)'s activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and

(f) Persons who are able to work and communicate in written and spoken English.

Section 8.5. DIVERSITY

In carrying out its responsibilities to nominate Directors to fill Seats 1 through 8 (and selections to any other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing

membership of the Board (and such other bodies), and seek to ensure that the persons it nominates to serve as Director and selects shall, to the extent feasible and consistent with the other criteria required to be applied by Section 8.4, be guided by Section 1.2(b)(ii).

Section 8.6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

Section 8.7. PROCEDURES

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

Section 8.8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for nomination by any means to any position on the Board or any other ICANN (Internet Corporation for Assigned Names and Numbers) body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

Section 8.9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (Internet Corporation for Assigned Names and Numbers) (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 8.2.

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

Section 9.1. DESCRIPTION

(a) The Address Supporting Organization (Supporting Organization) ("**Address Supporting Organization (Supporting Organization)**") or "**ASO (Address**

Supporting Organization") shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

(b) The ASO (Address Supporting Organization) shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN (Internet Corporation for Assigned Names and Numbers) and the Number Resource Organization ("**NRO (Number Resource Organization)**"), an organization of the existing RIRs.

Section 9.2. ADDRESS COUNCIL

(a) The ASO (Address Supporting Organization) shall have an Address Council, consisting of the members of the NRO (Number Resource Organization) Number Council.

(b) The Address Council shall nominate individuals to fill Seats 9 and 10 on the Board. Notification of the Address Council's nominations shall be given by the Address Council in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

Section 10.1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (Supporting Organization) ("**ccNSO (Country Code Names Supporting Organization)**"), which shall be responsible for:

(a) developing and recommending to the Board global policies relating to country-code top-level domains;

(b) Nurturing consensus across the ccNSO (Country Code Names Supporting Organization)'s community, including the name-related activities of ccTLDs;

(c) Coordinating with other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), committees, and constituencies under ICANN (Internet Corporation for Assigned Names and Numbers);

(d) Nominating individuals to fill Seats 11 and 12 on the Board; and

(e) Other responsibilities of the ccNSO (Country Code Names Supporting Organization) as set forth in these Bylaws.

Policies that apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership are only those policies developed according to Section 10.4(j) and Section 10.4(k). However, the ccNSO (Country Code Names Supporting Organization) may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD (Country Code Top Level Domain) managers, assisting in skills building within the global community of ccTLD (Country Code Top Level Domain) managers, and enhancing operational and technical cooperation among ccTLD (Country Code Top Level Domain) managers.

Section 10.2. ORGANIZATION

The ccNSO (Country Code Names Supporting Organization) shall consist of (a) ccTLD (Country Code Top Level Domain) managers that have agreed in writing to be members of the ccNSO (Country Code Names Supporting Organization) (see Section 10.4(b)) and (b) a ccNSO (Country Code Names Supporting Organization) Council responsible for managing the policy-development process of the ccNSO (Country Code Names Supporting Organization).

Section 10.3. ccNSO (Country Code Names Supporting Organization) COUNCIL

(a) The ccNSO (Country Code Names Supporting Organization) Council shall consist of three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each of ICANN (Internet Corporation for Assigned Names and Numbers)'s Geographic Regions in the manner described in Section 10.4(g) through Section 10.4(i); (ii) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee; (iii) liaisons as described in Section 10.3(b); and (iv) observers as described in Section 10.3(c).

(b) There shall also be one liaison to the ccNSO (Country Code Names Supporting Organization) Council from each of the following organizations, to the extent they choose to appoint such a liaison: (i) the Governmental Advisory Committee (Advisory Committee); (ii) the At-Large Advisory Committee (Advisory Committee); and (iii) each of the Regional Organizations described in Section 10.5. These liaisons shall not be members of or entitled to vote on the ccNSO

(Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. Appointments of liaisons shall be made by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(c) The ccNSO (Country Code Names Supporting Organization) Council may agree with the Council of any other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO (Country Code Names Supporting Organization) Council at any time by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(d) (i) the regular term of each ccNSO (Country Code Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter; (ii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (iii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO (Country Code Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been

selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

(e) A ccNSO (Country Code Names Supporting Organization) Council member may resign at any time by giving written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(f) ccNSO (Country Code Names Supporting Organization) Council members may be removed for not attending three consecutive meetings of the ccNSO (Country Code Names Supporting Organization) Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council.

(g) A vacancy on the ccNSO (Country Code Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO (Country Code Names Supporting Organization) Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selection, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair. Vacancies in the positions of the ccNSO (Country Code Names Supporting Organization) Council members selected by ccNSO (Country Code Names Supporting Organization) members shall be filled for the unexpired term by the procedure described in Section 10.4(g) through (i).

(h) The role of the ccNSO (Country Code Names Supporting Organization) Council is to administer and coordinate the affairs of the ccNSO (Country Code Names Supporting Organization) (including coordinating meetings, including an annual meeting, of ccNSO (Country Code Names Supporting Organization) members as described in Section 10.4(f)) and to manage the development of policy recommendations in accordance with Section 10.6(a). The ccNSO (Country Code Names Supporting Organization) Council shall also undertake such other roles as the members of the ccNSO (Country Code Names Supporting Organization) shall decide from time to time.

(i) The ccNSO (Country Code Names Supporting Organization) Council shall nominate individuals to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such nomination must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. Notification of the ccNSO (Country Code

Names Supporting Organization) Council's nominations shall be given by the ccNSO (Country Code Names Supporting Organization) Council Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(j) The ccNSO (Country Code Names Supporting Organization) Council shall select from among its members the ccNSO (Country Code Names Supporting Organization) Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO (Country Code Names Supporting Organization) Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. The term of office of the ccNSO (Country Code Names Supporting Organization) Council Chair and any Vice Chair(s) shall be as specified by the ccNSO (Country Code Names Supporting Organization) Council at or before the time the selection is made. The ccNSO (Country Code Names Supporting Organization) Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.

(k) The ccNSO (Country Code Names Supporting Organization) Council, subject to direction by the ccNSO (Country Code Names Supporting Organization) members, shall adopt such rules and procedures for the ccNSO (Country Code Names Supporting Organization) as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO (Country Code Names Supporting Organization) membership and operating procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council shall be published on the Website.

(l) Except as provided by Section 10.3(i) and Section 10.3(j), the ccNSO (Country Code Names Supporting Organization) Council shall act at meetings. The ccNSO (Country Code Names Supporting Organization) Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO (Country Code Names Supporting Organization) Council, meetings may be held in person or by other means, provided that all ccNSO (Country Code Names Supporting Organization) Council members are permitted to participate by at least one means described in Section 10.3(n). Except where determined by a majority vote of the members of the ccNSO (Country Code Names Supporting Organization) Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO (Country Code Names Supporting Organization) Council meetings should be held in conjunction with meetings of

the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(m) Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO (Country Code Names Supporting Organization) Council shall be provided to each ccNSO (Country Code Names Supporting Organization) Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO (Country Code Names Supporting Organization) Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

(n) Members of the ccNSO (Country Code Names Supporting Organization) Council may participate in a meeting of the ccNSO (Country Code Names Supporting Organization) Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (i) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting can speak to and hear one another, (ii) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO (Country Code Names Supporting Organization) Council, and (iii) there is a reasonable means of verifying the identity of ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting and their votes. A majority of the ccNSO (Country Code Names Supporting Organization) Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote of the ccNSO (Country Code Names Supporting Organization) Council members present at any meeting at which there is a quorum shall be actions of the ccNSO (Country Code Names Supporting Organization) Council, unless otherwise provided in these Bylaws. The ccNSO (Country Code Names Supporting Organization) Council shall transmit minutes of its meetings to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

Section 10.4. MEMBERSHIP

(a) The ccNSO (Country Code Names Supporting Organization) shall have a membership consisting of ccTLD (Country Code Top Level Domain) managers.

Any ccTLD (Country Code Top Level Domain) manager that meets the membership qualifications stated in Section 10.4(b) shall be entitled to be members of the ccNSO (Country Code Names Supporting Organization). For purposes of this Article 10, a ccTLD (Country Code Top Level Domain) manager is the organization or entity responsible for managing an ISO (International Organization for Standardization) 3166 country-code top-level domain, or under any later variant, for that country-code top-level domain.

(b) Any ccTLD (Country Code Top Level Domain) manager may become a ccNSO (Country Code Names Supporting Organization) member by submitting an application to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive applications. The application shall be in writing in a form designated by the ccNSO (Country Code Names Supporting Organization) Council. The application shall include the ccTLD (Country Code Top Level Domain) manager's recognition of the role of the ccNSO (Country Code Names Supporting Organization) within the ICANN (Internet Corporation for Assigned Names and Numbers) structure as well as the ccTLD (Country Code Top Level Domain) manager's agreement, for the duration of its membership in the ccNSO (Country Code Names Supporting Organization), (i) to adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (ii) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (ii) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). A ccNSO (Country Code Names Supporting Organization) member may resign from membership at any time by giving written notice to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive notices of resignation. Upon resignation the ccTLD (Country Code Top Level Domain) manager ceases to agree to (A) adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (B) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (C) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). In the absence of designation by the ccNSO (Country Code Names Supporting Organization) Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall notify the ccNSO (Country Code Names Supporting Organization) Council of receipt of any such applications and notices.

(c) Neither membership in the ccNSO (Country Code Names Supporting Organization) nor membership in any Regional Organization described in Section 10.5 shall be a condition for access to or registration in the IANA (Internet Assigned Numbers Authority) database. Any individual relationship a ccTLD (Country Code Top Level Domain) manager has with ICANN (Internet Corporation for Assigned Names and Numbers) or the ccTLD (Country Code Top Level Domain) manager's receipt of IANA (Internet Assigned Numbers Authority) services is not in any way contingent upon membership in the ccNSO (Country Code Names Supporting Organization).

(d) The Geographic Regions of ccTLDs shall be as described in Section 7.5. For purposes of this Article 10, managers of ccTLDs within a Geographic Region that are members of the ccNSO (Country Code Names Supporting Organization) are referred to as ccNSO (Country Code Names Supporting Organization) members "within" the Geographic Region, regardless of the physical location of the ccTLD (Country Code Top Level Domain) manager. In cases where the Geographic Region of a ccNSO (Country Code Names Supporting Organization) member is unclear, the ccTLD (Country Code Top Level Domain) member should self-select according to procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council.

(e) Each ccTLD (Country Code Top Level Domain) manager may designate in writing a person, organization, or entity to represent the ccTLD (Country Code Top Level Domain) manager. In the absence of such a designation, the ccTLD (Country Code Top Level Domain) manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA (Internet Assigned Numbers Authority) database.

(f) There shall be an annual meeting of ccNSO (Country Code Names Supporting Organization) members, which shall be coordinated by the ccNSO (Country Code Names Supporting Organization) Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD (Country Code Top Level Domain) managers that are not members of the ccNSO (Country Code Names Supporting Organization) as well as other non-members of the ccNSO (Country Code Names Supporting Organization) to address the meeting. To the extent practicable, annual meetings of the ccNSO (Country Code Names Supporting Organization) members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(g) The ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting

Organization) members from each Geographic Region (see Section 10.3(a)(i)) shall be selected through nomination, and if necessary election, by the ccNSO (Country Code Names Supporting Organization) members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO (Country Code Names Supporting Organization)-member-selected member of the ccNSO (Country Code Names Supporting Organization) Council, or upon the occurrence of a vacancy in the seat of such a ccNSO (Country Code Names Supporting Organization) Council member, the ccNSO (Country Code Names Supporting Organization) Council shall establish a nomination and election schedule, which shall be sent to all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region and posted on the Website.

(h) Any ccNSO (Country Code Names Supporting Organization) member may nominate an individual to serve as a ccNSO (Country Code Names Supporting Organization) Council member representing the ccNSO (Country Code Names Supporting Organization) member's Geographic Region. Nominations must be seconded by another ccNSO (Country Code Names Supporting Organization) member from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO (Country Code Names Supporting Organization) Council agree to support the policies committed to by ccNSO (Country Code Names Supporting Organization) members.

(i) If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO (Country Code Names Supporting Organization) Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO (Country Code Names Supporting Organization) Council. Otherwise, an election by written ballot (which may be by e-mail) shall be held to select the ccNSO (Country Code Names Supporting Organization) Council members from among those nominated (with seconds and acceptances), with ccNSO (Country Code Names Supporting Organization) members from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO (Country Code Names Supporting Organization) members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast by ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. The ccNSO (Country Code Names Supporting Organization) Council Chair shall provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary prompt written notice of the selection of ccNSO (Country Code Names Supporting Organization) Council members under this paragraph.

(j) Subject to Section 10.4(k), ICANN (Internet Corporation for Assigned Names and Numbers) policies shall apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership to the extent, and only to the extent, that the policies (i) only address issues that are within scope of the ccNSO (Country Code Names Supporting Organization) according to Section 10.6(a) and Annex C; (ii) have been developed through the ccPDP as described in Section 10.6, and (iii) have been recommended as such by the ccNSO (Country Code Names Supporting Organization) to the Board, and (iv) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD (Country Code Top Level Domain) manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN (Internet Corporation for Assigned Names and Numbers) in its activities concerning ccTLDs.

(k) A ccNSO (Country Code Names Supporting Organization) member shall not be bound if it provides a declaration to the ccNSO (Country Code Names Supporting Organization) Council stating that (i) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)), and (ii) failure to implement the policy would not impair DNS (Domain Name System) operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO (Country Code Names Supporting Organization) Council will provide a response to the ccNSO (Country Code Names Supporting Organization) member's declaration. If there is a ccNSO (Country Code Names Supporting Organization) Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's agreement with the declaration. If the ccNSO (Country Code Names Supporting Organization) Council disagrees, the ccNSO (Country Code Names Supporting Organization) Council shall review the situation after a six-month period. At the end of that period, the ccNSO (Country Code Names Supporting Organization) Council shall make findings as to (A) whether the ccNSO (Country Code Names Supporting Organization) members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)) and (B) whether failure to implement the policy would impair DNS (Domain Name System) operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO (Country Code Names Supporting Organization) Council shall proceed by consensus, which may be demonstrated

by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council.

Section 10.5. REGIONAL ORGANIZATIONS

The ccNSO (Country Code Names Supporting Organization) Council may designate a Regional Organization for each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council and shall be subject to review according to procedures established by the Board.

Section 10.6. ccNSO (Country Code Names Supporting Organization) POLICY-DEVELOPMENT PROCESS AND SCOPE

(a) The scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

(b) In developing global policies within the scope of the ccNSO (Country Code Names Supporting Organization) and recommending them to the Board, the ccNSO (Country Code Names Supporting Organization) shall follow the ccNSO (Country Code Names Supporting Organization) Policy-Development Process ("ccPDP"). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Section 10.7. STAFF SUPPORT AND FUNDING

(a) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, a member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff may be assigned to support the ccNSO (Country Code Names Supporting Organization) and shall be designated as the ccNSO (Country Code Names Supporting Organization) Staff Manager. Alternatively, the ccNSO (Country Code Names Supporting Organization) Council may designate, at ccNSO (Country Code Names Supporting Organization) expense, another person

to serve as ccNSO (Country Code Names Supporting Organization) Staff Manager. The work of the ccNSO (Country Code Names Supporting Organization) Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO (Country Code Names Supporting Organization) Council, and may include the duties of ccPDP Issue Manager.

(b) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the ccNSO (Country Code Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by ccNSO (Country Code Names Supporting Organization) participants for travel to any meeting of the ccNSO (Country Code Names Supporting Organization) or for any other purpose. The ccNSO (Country Code Names Supporting Organization) Council may make provision, at ccNSO (Country Code Names Supporting Organization) expense, for administrative and operational support in addition or as an alternative to support provided by ICANN (Internet Corporation for Assigned Names and Numbers).

(c) The ccNSO (Country Code Names Supporting Organization) Council shall establish fees to be paid by ccNSO (Country Code Names Supporting Organization) members to defray ccNSO (Country Code Names Supporting Organization) expenses as described in Section 10.7(a) and Section 10.7(b), as approved by the ccNSO (Country Code Names Supporting Organization) members.

(d) Written notices given to the Secretary under this Article 10 shall be permanently retained, and shall be made available for review by the ccNSO (Country Code Names Supporting Organization) Council on request. The Secretary shall also maintain the roll of members of the ccNSO (Country Code Names Supporting Organization), which shall include the name of each ccTLD (Country Code Top Level Domain) manager's designated representative, and which shall be posted on the Website.

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

Section 11.1. DESCRIPTION

There shall be a policy-development body known as the Generic Names Supporting Organization (Supporting Organization) (the "**Generic Names Supporting Organization (Supporting Organization)**") or "**GNSO (Generic**

Names Supporting Organization", and collectively with the ASO (Address Supporting Organization) and ccNSO (Country Code Names Supporting Organization), the "**Supporting Organizations (Supporting Organizations)**"), which shall be responsible for developing and recommending to the Board substantive policies relating to generic top-level domains and other responsibilities of the GNSO (Generic Names Supporting Organization) as set forth in these Bylaws.

Section 11.2. ORGANIZATION

The GNSO (Generic Names Supporting Organization) shall consist of:

- (a) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 11.5;
- (b) Four Stakeholder Groups organized within Houses as described in Section 11.5;
- (c) Two Houses within the GNSO (Generic Names Supporting Organization) Council as described in Section 11.3(h);
- (d) A GNSO (Generic Names Supporting Organization) Council responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization), as described in Section 11.3; and
- (e) Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the Board.

Section 11.3. GNSO (Generic Names Supporting Organization) COUNCIL

(a) Subject to Section 11.5, the GNSO (Generic Names Supporting Organization) Council shall consist of:

- (i) three representatives selected from the Registries Stakeholder Group;
- (ii) three representatives selected from the Registrars Stakeholder Group;
- (iii) six representatives selected from the Commercial Stakeholder Group;
- (iv) six representatives selected from the Non-Commercial Stakeholder Group; and

(v) three representatives selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO (Generic Names Supporting Organization) Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee appointee voting representative shall be assigned to each House (as described in Section 11.3(h)) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO (Generic Names Supporting Organization) Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO (Generic Names Supporting Organization) Council is as diverse as possible and practicable, including considerations of geography, GNSO (Generic Names Supporting Organization) Constituency, sector, ability and gender.

There may also be liaisons to the GNSO (Generic Names Supporting Organization) Council from other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and/or Advisory Committees (Advisory Committees), from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO (Generic Names Supporting Organization) Council by providing written notice to the Chair of the GNSO (Generic Names Supporting Organization) Council and to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO (Generic Names Supporting Organization) Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO (Generic Names Supporting Organization) Council.

(b) The regular term of each GNSO (Generic Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the

Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO (Generic Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a "special circumstance," such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve more than two consecutive terms, in such a special circumstance a Council member may serve one additional term. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member. A "special circumstance" is defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

(c) A vacancy on the GNSO (Generic Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO (Generic Names Supporting Organization) Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO (Generic Names Supporting Organization) Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO (Generic Names Supporting Organization) Council member selected by the Nominating Committee may be removed for cause: (i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or (ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non-voting Nominating Committee appointee (see Section 11.3(h)). Such removal shall be subject to reversal by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on appeal by the affected GNSO (Generic Names Supporting Organization) Council member.

(d) The GNSO (Generic Names Supporting Organization) Council is responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization). It shall adopt such procedures (the "**GNSO (Generic Names Supporting Organization) Operating Procedures**") as it sees fit to carry out that responsibility, provided that such procedures are approved by a

majority vote of each House. The GNSO (Generic Names Supporting Organization) Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO (Generic Names Supporting Organization) Council, the applicable procedures shall be as set forth in Section 11.6.

(e) No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO (Generic Names Supporting Organization) Council at any given time.

(f) The GNSO (Generic Names Supporting Organization) shall nominate by written ballot or by action at a meeting individuals to fill Seats 13 and 14 on the Board. Each of the two voting Houses of the GNSO (Generic Names Supporting Organization), as described in Section 11.3(h), shall make a nomination to fill one of two Board seats, as outlined below; any such nomination must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:

(i) the Contracted Parties House (as described in Section 11.3(h)(i)) shall select a representative to fill Seat 13; and

(ii) the Non-Contracted Parties House (as described in Section 11.3(h)(ii)) shall select a representative to fill Seat 14.

Election procedures are defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

Notification of the Board seat nominations shall be given by the GNSO (Generic Names Supporting Organization) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(g) The GNSO (Generic Names Supporting Organization) Council shall select the GNSO (Generic Names Supporting Organization) Chair for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. Each House (as described in Section 11.3(h)) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO (Generic Names Supporting Organization) Council, for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO (Generic Names Supporting Organization) Operating Procedures. In the event that the

GNSO (Generic Names Supporting Organization) Council has not elected a GNSO (Generic Names Supporting Organization) Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO (Generic Names Supporting Organization) Co-Chairs until a successful election can be held.

(h) Except as otherwise required in these Bylaws, for voting purposes, the GNSO (Generic Names Supporting Organization) Council (see Section 11.3(a)) shall be organized into a bicameral House structure as described below:

(i) the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee for a total of seven voting members; and

(ii) the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before the GNSO (Generic Names Supporting Organization) Council.

(i) Except as otherwise specified in these Bylaws, Annex A, Annex A-1 or Annex A-2 hereto, or the GNSO (Generic Names Supporting Organization) Operating Procedures, the default threshold to pass a GNSO (Generic Names Supporting Organization) Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization) actions:

(i) Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

(ii) Initiate a Policy Development Process ("**PDP (Policy Development Process)**") Within Scope (as described in Annex A): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(iii) Initiate a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of GNSO (Generic Names Supporting Organization) Supermajority (as defined in Section 11.3(i)(xix)).

(iv) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(v) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(vi) Changes to an Approved PDP (Policy Development Process) Team Charter: For any PDP (Policy Development Process) Team Charter approved under (iv) or (v) above, the GNSO (Generic Names Supporting Organization) Council may approve an amendment to the Charter through a simple majority vote of each House.

(vii) Terminate a PDP (Policy Development Process): Once initiated, and prior to the publication of a Final Report, the GNSO (Generic Names Supporting Organization) Council may terminate a PDP (Policy Development Process) only for significant cause, upon a motion that passes with a GNSO (Generic Names Supporting Organization) Supermajority Vote in favor of termination.

(viii) Approve a PDP (Policy Development Process) Recommendation Without a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO (Generic Names Supporting Organization) Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

(ix) Approve a PDP (Policy Development Process) Recommendation With a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority,

(x) Approve a PDP (Policy Development Process) Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence

of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xi) Modification of Approved PDP (Policy Development Process)
Recommendation: Prior to Final Approval by the Board, an Approved PDP (Policy Development Process) Recommendation may be modified or amended by the GNSO (Generic Names Supporting Organization) Council with a GNSO (Generic Names Supporting Organization) Supermajority vote.

(xii) Initiation of an Expedited Policy Development Process ("**EPDP**"):
requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiii) Approve an EPDP Team Charter: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiv) Approval of EPDP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xv) Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xvi) Initiation of a GNSO (Generic Names Supporting Organization) Guidance Process ("**GGP**"):
requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(xvii) Rejection of Initiation of a GGP Requested by the Board: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xviii) Approval of GGP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xix) A "**GNSO (Generic Names Supporting Organization) Supermajority**" shall mean: (A) two-thirds (2/3) of the Council members of each House, or (B) three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House.

Section 11.4. STAFF SUPPORT AND FUNDING

(a) A member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff shall be assigned to support the GNSO (Generic Names Supporting Organization), whose work on substantive matters shall be assigned by the Chair of the GNSO (Generic Names Supporting Organization) Council, and shall be designated as the GNSO (Generic Names Supporting Organization) Staff Manager ("**Staff Manager**").

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the GNSO (Generic Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by GNSO (Generic Names Supporting Organization) participants for travel to any meeting of the GNSO (Generic Names Supporting Organization) or for any other purpose. ICANN (Internet Corporation for Assigned Names and Numbers) may, at its discretion, fund travel expenses for GNSO (Generic Names Supporting Organization) participants under any travel support procedures or guidelines that it may adopt from time to time.

Section 11.5. STAKEHOLDER GROUPS

(a) The following "**Stakeholder Groups**" are hereby recognized as representative of a specific group of one or more "**Constituencies**" or interest groups:

(i) Registries Stakeholder Group representing all gTLD (generic Top Level Domain) registries under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(ii) Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(iii) Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet ("**Commercial Stakeholder Group**"), which includes the Business Constituency ("**Business Constituency**"), Intellectual Property Constituency ("**Intellectual Property Constituency**") and the Internet Service Providers and Connectivity Providers Constituency ("**Internet Service Providers and Connectivity Providers Constituency**"); and

(iv) Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

(b) Each Stakeholder Group is assigned a specific number of GNSO (Generic Names Supporting Organization) Council seats in accordance with Section 11.3(a).

(c) Each Stakeholder Group identified in Section 11.3(a) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

(d) Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the Non-Contracted Parties House. Any such petition shall contain:

- (i) A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO (Generic Names Supporting Organization) to carry out its policy-development responsibilities;
- (ii) A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;
- (iii) A recommendation for organizational placement within a particular Stakeholder Group; and
- (iv) A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

(e) The Board may create new Constituencies as described in Section 11.5(c) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN (Internet Corporation for Assigned Names and Numbers). In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final

decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO (Generic Names Supporting Organization) Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

Section 11.6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO (Generic Names Supporting Organization) shall be as stated in Annex A to these Bylaws. These procedures may be supplemented or revised in the manner stated in Section 11.3(d).

ARTICLE 12 ADVISORY COMMITTEES

Section 12.1. GENERAL

The Board may create one or more "**Advisory Committees (Advisory Committees)**" in addition to those set forth in this Article 12. Advisory Committee (Advisory Committee) membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees (Advisory Committees) shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 12.2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees (Advisory Committees):

(a) Governmental Advisory Committee (Advisory Committee)

(i) The Governmental Advisory Committee (Advisory Committee) should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues.

(ii) Membership in the Governmental Advisory Committee (Advisory Committee) shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and

multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee (Advisory Committee) through its Chair.

(iii) The Governmental Advisory Committee (Advisory Committee) may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

(iv) The chair of the Governmental Advisory Committee (Advisory Committee) shall be elected by the members of the Governmental Advisory Committee (Advisory Committee) pursuant to procedures adopted by such members.

(v) Each member of the Governmental Advisory Committee (Advisory Committee) shall appoint one accredited representative to the Governmental Advisory Committee (Advisory Committee). The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.

(vi) The Governmental Advisory Committee (Advisory Committee) shall annually appoint one Liaison to the Board, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee.

(vii) The Governmental Advisory Committee (Advisory Committee) may designate a non-voting liaison to each of the Supporting Organization (Supporting Organization) Councils and Advisory Committees (Advisory Committees), to the extent the Governmental Advisory Committee (Advisory Committee) deems it appropriate and useful to do so.

(viii) The Board shall notify the Chair of the Governmental Advisory Committee (Advisory Committee) in a timely manner of any proposal raising public policy issues on which it or any of the Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

(ix) The Governmental Advisory Committee (Advisory Committee) may 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.

(x) The advice of the Governmental Advisory Committee (Advisory Committee) on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the Board determines to take an action that is not consistent with Governmental Advisory Committee (Advisory Committee) advice, it shall so inform the Governmental Advisory Committee (Advisory Committee) and state the reasons why it decided not to follow that advice. Any Governmental Advisory Committee (Advisory Committee) advice approved by a full Governmental Advisory Committee (Advisory Committee) consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Advice**"), may only be rejected by a vote of no less than 60% of the Board, and the Governmental Advisory Committee (Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. The Governmental Advisory Committee (Advisory Committee) will state whether any advice it gives to the Board is GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

(xi) If GAC (Governmental Advisory Committee) Consensus (Consensus) Advice is rejected by the Board pursuant to Section 12.2(a)(x) and if no such mutually acceptable solution can be found, the Board will state in its final decision the reasons why the Governmental Advisory Committee (Advisory Committee) advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee (Advisory Committee) members with regard to public policy issues falling within their responsibilities.

(b) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)

(i) The role of the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) ("**Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)**") or "**SSAC (Security and Stability Advisory Committee)**") is to advise the ICANN (Internet

Corporation for Assigned Names and Numbers) community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

(A) To communicate on security matters with the Internet technical community and the operators and managers of critical DNS (Domain Name System) infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The SSAC (Security and Stability Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS (Domain Name System) and address allocation and those engaged in operations planning.

(B) To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community accordingly. The SSAC (Security and Stability Advisory Committee) shall recommend any necessary audit activity to assess the current status of DNS (Domain Name System) and address allocation security in relation to identified risks and threats.

(C) To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (as defined in Section 12.2(c)(i)), RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities. The SSAC (Security and Stability Advisory Committee) shall monitor these activities and inform the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on their progress, as appropriate.

(D) To report periodically to the Board on its activities.

(E) To make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The SSAC (Security and Stability Advisory Committee)'s chair and members shall be appointed by the Board. SSAC (Security and Stability Advisory Committee) membership appointment shall be for a three-year

term, commencing on 1 January and ending the second year thereafter on 31 December. The chair and members may be re-appointed, and there are no limits to the number of terms the chair or members may serve. The SSAC (Security and Stability Advisory Committee) chair may provide recommendations to the Board regarding appointments to the SSAC (Security and Stability Advisory Committee). The SSAC (Security and Stability Advisory Committee) chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC (Security and Stability Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove SSAC (Security and Stability Advisory Committee) appointees as recommended by or in consultation with the SSAC (Security and Stability Advisory Committee).

(iii) The SSAC (Security and Stability Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(c) Root Server System Advisory Committee (Advisory Committee)

(i) The role of the Root Server System Advisory Committee (Advisory Committee) ("**Root Server System Advisory Committee (Advisory Committee)**" or "**RSSAC (Root Server System Advisory Committee)**") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System. It shall have the following responsibilities:

(A) Communicate on matters relating to the operation of the Root Servers (Root Servers) and their multiple instances with the Internet technical community and the ICANN (Internet Corporation for Assigned Names and Numbers) community. The RSSAC (Root Server System Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNS (Domain Name System) servers.

(B) Communicate on matters relating to the administration of the Root Zone (Root Zone) with those who have direct responsibility for that administration. These matters include the processes and procedures for the production of the Root Zone (Root Zone) File.

(C) Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the

current status of root servers and the root zone.

(D) Respond to requests for information or opinions from the Board.

(E) Report periodically to the Board on its activities.

(F) Make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The RSSAC (Root Server System Advisory Committee) shall be led by two co-chairs. The RSSAC (Root Server System Advisory Committee)'s chairs and members shall be appointed by the Board.

(A) RSSAC (Root Server System Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms the members may serve. The RSSAC (Root Server System Advisory Committee) chairs shall provide recommendations to the Board regarding appointments to the RSSAC (Root Server System Advisory Committee). If the Board declines to appoint a person nominated by the RSSAC (Root Server System Advisory Committee), then it will provide the rationale for its decision. The RSSAC (Root Server System Advisory Committee) chairs shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC (Root Server System Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove RSSAC (Root Server System Advisory Committee) appointees as recommended by or in consultation with the RSSAC (Root Server System Advisory Committee).

(B) The RSSAC (Root Server System Advisory Committee) shall recommend the appointment of the chairs to the Board following a nomination process that it devises and documents.

(iii) The RSSAC (Root Server System Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(d) At-Large Advisory Committee (Advisory Committee)

(i) The At-Large Advisory Committee (Advisory Committee) ("**At-Large Advisory Committee (Advisory Committee)**" or "**ALAC (At-Large Advisory Committee)**") is the primary organizational home within ICANN (Internet Corporation for Assigned Names and Numbers) for individual

Internet users. The role of the ALAC (At-Large Advisory Committee) shall be to consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers), insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations), as well as the many other issues for which community input and advice is appropriate. The ALAC (At-Large Advisory Committee), which plays an important role in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, also coordinates some of ICANN (Internet Corporation for Assigned Names and Numbers)'s outreach to individual Internet users.

(ii) The ALAC (At-Large Advisory Committee) shall consist of (A) two members selected by each of the Regional At-Large Organizations ("**RALOs**") established according to Section 12.2(d)(vii), and (B) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to Section 7.5.

(iii) The regular terms of members of the ALAC (At-Large Advisory Committee) shall be as follows:

(A) The term of one member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an even-numbered year.

(B) The term of the other member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an odd-numbered year.

(C) The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even-numbered year.

(D) The regular term of each member shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the term began.

(iv) The Chair of the ALAC (At-Large Advisory Committee) shall be elected by the members of the ALAC (At-Large Advisory Committee) pursuant to procedures adopted by the ALAC (At-Large Advisory Committee).

(v) The ALAC (At-Large Advisory Committee) shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region) to the Nominating Committee.

(vi) The At-Large Advisory Committee (Advisory Committee) may designate non-voting liaisons to each of the ccNSO (Country Code Names Supporting Organization) Council and the GNSO (Generic Names Supporting Organization) Council.

(vii) There shall be one RALO for each Geographic Region established according to Section 7.5. Each RALO shall serve as the main forum and coordination point for public input to ICANN (Internet Corporation for Assigned Names and Numbers) in its Geographic Region and shall be a non-profit organization certified by ICANN (Internet Corporation for Assigned Names and Numbers) according to criteria and standards established by the Board based on recommendations of the At-Large Advisory Committee (Advisory Committee). An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) addressing the respective roles and responsibilities of ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO regarding the process for selecting ALAC (At-Large Advisory Committee) members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures ("**At-Large Structures**").

(viii) Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) according to Section 12.2(d)(ix). If so provided by its Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers), a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

(ix) Membership in the At-Large Community

(A) The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC (At-Large Advisory Committee) and shall be stated in the Memorandum of Understanding between ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO for each Geographic Region.

(B) The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

(C) Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.

(D) To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.

(E) Once the criteria and standards have been established as provided in this Section 12.2(d)(ix), the ALAC (At-Large Advisory Committee), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.

(F) Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC (At-Large Advisory Committee) in its rules of procedure, save always that any changes made to the rules of procedure in respect of an At-Large Structure applications shall be subject to review by the RALOs and by the Board.

(G) Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.

(H) On an ongoing basis, the ALAC (At-Large Advisory Committee) may also give advice as to whether a prospective At-Large Structure meets the

applicable criteria and standards.

(x) The ALAC (At-Large Advisory Committee) is also responsible, working in conjunction with the RALOs, for coordinating the following activities:

(A) Nominating individuals to fill Seat 15 on the Board. Notification of the At-Large Community's nomination shall be given by the ALAC (At-Large Advisory Committee) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(B) Keeping the community of individual Internet users informed about the significant news from ICANN (Internet Corporation for Assigned Names and Numbers);

(C) Distributing (through posting or otherwise) an updated agenda, news about ICANN (Internet Corporation for Assigned Names and Numbers), and information about items in the ICANN (Internet Corporation for Assigned Names and Numbers) policy-development process;

(D) Promoting outreach activities in the community of individual Internet users;

(E) Developing and maintaining on-going information and education programs, regarding ICANN (Internet Corporation for Assigned Names and Numbers) and its work;

(F) Establishing an outreach strategy about ICANN (Internet Corporation for Assigned Names and Numbers) issues in each RALO's Geographic Region;

(G) Participating in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development processes and providing input and advice that accurately reflects the views of individual Internet users;

(H) Making public, and analyzing, ICANN (Internet Corporation for Assigned Names and Numbers)'s proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;

(I) Offering Internet-based mechanisms that enable discussions among members of At-Large Structures; and

(xi) Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN (Internet Corporation for Assigned Names and Numbers) decision-making, so interested individuals can share their views on pending ICANN (Internet Corporation for Assigned Names and Numbers) issues.

Section 12.3. PROCEDURES

Each Advisory Committee (Advisory Committee) shall determine its own rules of procedure and quorum requirements; provided that each Advisory Committee (Advisory Committee) shall ensure that the advice provided to the Board by such Advisory Committee (Advisory Committee) is communicated in a clear and unambiguous written statement, including the rationale for such advice. The Board will respond in a timely manner to formal advice from all Advisory Committees (Advisory Committees) explaining what action it took and the rationale for doing so.

Section 12.4. TERM OF OFFICE

The chair and each member of an Advisory Committee (Advisory Committee) shall serve until his or her successor is appointed, or until such Advisory Committee (Advisory Committee) is sooner terminated, or until he or she is removed, resigns, or otherwise ceases to qualify as a member of the Advisory Committee (Advisory Committee).

Section 12.5. VACANCIES

Vacancies on any Advisory Committee (Advisory Committee) shall be filled in the same manner as provided in the case of original appointments.

Section 12.6. COMPENSATION

Advisory Committee (Advisory Committee) members shall receive no compensation for their services as a member of such Advisory Committee (Advisory Committee). The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by Advisory Committee (Advisory Committee) members, including Directors, performing their duties as Advisory Committee (Advisory Committee) members.

ARTICLE 13 OTHER ADVISORY MECHANISMS

Section 13.1. EXTERNAL EXPERT ADVICE

(a) Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN (Internet Corporation for Assigned Names and Numbers) to take advantage of existing expertise that resides in the public or private sector but outside of ICANN (Internet Corporation for Assigned Names and Numbers). In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.

(b) Types of Expert Advisory Panels

(i) On its own initiative or at the suggestion of any ICANN (Internet Corporation for Assigned Names and Numbers) body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of Section 13.1(c) shall apply.

(ii) In addition, in accordance with Section 13.1(c), the Board may refer issues of public policy pertinent to matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission to a multinational governmental or treaty organization.

(c) Process for Seeking Advice: Public Policy Matters

(i) The Governmental Advisory Committee (Advisory Committee) may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above.

(ii) In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee (Advisory Committee) regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

(iii) The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee (Advisory

Committee), with the suggestion that the request be transmitted by the Governmental Advisory Committee (Advisory Committee) to the multinational governmental or treaty organization.

(d) Process for Seeking and Advice: Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with Section 13.1(b)(i) shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.

(e) Receipt of Expert Advice and its Effect. External advice pursuant to this Section 13.1 shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body in carrying out its responsibilities.

(f) Opportunity to Comment. The Governmental Advisory Committee (Advisory Committee), in addition to the Supporting Organizations (Supporting Organizations) and other Advisory Committees (Advisory Committees), shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

Section 13.2. TECHNICAL LIAISON GROUP

(a) Purpose. The quality of ICANN (Internet Corporation for Assigned Names and Numbers)'s work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group ("**TLG**") shall connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities.

(b) TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI (European Telecommunications Standards Institute)), the International Telecommunications Union's Telecommunication Standardization Sector (ITU (International Telecommunication Union)-T), the World Wide Web Consortium (W3C (World Wide Web Consortium)), and the Internet Architecture Board ("**IAB (Internet Architecture Board)**").

(c) Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN (Internet Corporation for Assigned Names and Numbers) entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:

(i) In response to a request for information, to connect the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) seeks an authoritative answer to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization.

(ii) As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN (Internet Corporation for Assigned Names and Numbers) actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) is unaware of a new development, and would therefore otherwise not realize that a question should be asked.

(d) TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.

(e) Technical Work with the IETF (Internet Engineering Task Force). The TLG shall have no involvement with ICANN (Internet Corporation for Assigned Names and Numbers)'s work for the Internet Engineering Task Force (IETF (Internet Engineering Task Force)), Internet Research Task Force, or the Internet Architecture Board (IAB (Internet Architecture Board)), as described in the IETF (Internet Engineering Task Force)-ICANN (Internet Corporation for Assigned Names and Numbers) Memorandum of Understanding Concerning the Technical

Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000 and any supplemental agreements thereto.

(f) Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. These 8 experts shall be available as necessary to determine, through an exchange of e-mail messages, where to direct a technical question from ICANN (Internet Corporation for Assigned Names and Numbers) when ICANN (Internet Corporation for Assigned Names and Numbers) does not ask a specific TLG organization directly.

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

Section 14.1. BOARD COMMITTEES

The Board may establish one or more committees of the Board (each, a "**Board Committee**"), which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board; provided, that a Liaison may be appointed as a liaison to a Committee of the Board consistent with their non-voting capacity. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all Directors; provided, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all Directors.

Section 14.2. POWERS OF BOARD COMMITTEES

(a) The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:

- (i) The filling of vacancies on the Board or on any committee;
- (ii) The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
- (iii) The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;

- (iv) The appointment of committees of the Board or the members thereof;
- (v) The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CCC;
- (vi) The approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget required by Section 22.4 or the Operating Plan or Strategic Plan required by Section 22.5; or
- (vii) The compensation of any Officer described in Article 15.

(b) The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings of committees shall be governed by the provisions of Article 7 applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

Section 14.3. TEMPORARY COMMITTEES

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees.

ARTICLE 15 OFFICERS

Section 15.1. OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) (each, an "**Officer**") shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN (Internet Corporation for Assigned Names and Numbers) may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.2. ELECTION OF OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chair of the Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

Section 15.3. REMOVAL OF OFFICERS

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all Directors. Should any vacancy occur in any office as a result of death, resignation, removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected.

Section 15.4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

Section 15.5. SECRETARY

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board.

Section 15.6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("**CFO**") shall be the chief financial officer of ICANN (Internet Corporation for Assigned Names and Numbers). If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN (Internet Corporation for Assigned Names and Numbers) and shall keep or cause to be kept, in books belonging to ICANN (Internet Corporation for Assigned Names and Numbers), full and accurate amounts of all receipts and disbursements, and shall

deposit all money and other valuable effects in the name of ICANN (Internet Corporation for Assigned Names and Numbers) in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN (Internet Corporation for Assigned Names and Numbers) as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN (Internet Corporation for Assigned Names and Numbers). The CFO shall be responsible for ICANN (Internet Corporation for Assigned Names and Numbers)'s financial planning and forecasting and shall assist the President in the preparation of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, the IANA (Internet Assigned Numbers Authority) Budget and Operating Plan. The CFO shall coordinate and oversee ICANN (Internet Corporation for Assigned Names and Numbers)'s funding, including any audits or other reviews of ICANN (Internet Corporation for Assigned Names and Numbers) or its Supporting Organizations (Supporting Organizations). The CFO shall be responsible for all other matters relating to the financial operation of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.7. ADDITIONAL OFFICERS

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

Section 15.8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN (Internet Corporation for Assigned Names and Numbers) shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

Section 15.9. CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 16 POST-TRANSITION IANA (Internet Assigned Numbers Authority) ENTITY

Section 16.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain as a separate legal entity a California nonprofit public benefit corporation (["PTI"]) for the purpose of providing IANA (Internet Assigned Numbers Authority) services, including providing IANA (Internet Assigned Numbers Authority) naming function services pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, as well as other services as determined by ICANN (Internet Corporation for Assigned Names and Numbers) in coordination with the direct and indirect customers of the IANA (Internet Assigned Numbers Authority) functions. ICANN (Internet Corporation for Assigned Names and Numbers) shall at all times be the sole member of PTI as that term is defined in Section 5056 of the CCC ("Member"). For the purposes of these Bylaws, the "IANA (Internet Assigned Numbers Authority) naming function" does not include the Internet Protocol (Protocol) numbers and Autonomous System numbers services (as contemplated by Section 1.1(a)(iii)), the protocol ports and parameters services and the root zone maintainer function.

Section 16.2. PTI Governance

(a) ICANN (Internet Corporation for Assigned Names and Numbers), in its capacity as the sole Member of PTI, shall elect the directors of PTI in accordance with the articles of incorporation and bylaws of PTI and have all other powers of a sole Member under the CCC except as otherwise provided in these Bylaws.

(b) No amendment or modification of the articles of incorporation of PTI shall be effective unless approved by the EC (Empowered Community) (pursuant to the procedures applicable to Articles Amendments described in Section 25.2, as if such Article Amendment referenced therein refers to an amendment of PTI's articles of incorporation).

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not amend or modify the bylaws of PTI in a manner that would effect any of the matters set forth in clauses (i) through (xiv) below (a "PTI Bylaw Amendment") if such PTI Bylaw Amendment has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e):

(i) any change to the corporate form of PTI to an entity that is not a California nonprofit public benefit corporation organized under the CCC or

any successor statute;

(ii) any change in the corporate mission of PTI that is materially inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as set forth in these Bylaws;

(iii) any change to the status of PTI as a corporation with members;

(iv) any change in the rights of ICANN (Internet Corporation for Assigned Names and Numbers) as the sole Member of PTI, including voting, classes of membership, rights, privileges, preferences, restrictions and conditions;

(v) any change that would grant rights to any person or entity (other than ICANN (Internet Corporation for Assigned Names and Numbers)) with respect to PTI as designators or otherwise to: (A) elect or designate directors of PTI; or (B) approve any amendments to the articles of incorporation or bylaws of PTI;

(vi) any change in the number of directors of the board of directors of PTI (the "**PTI Board**");

(vii) any changes in the allocation of directors on the PTI Board between independent directors and employees of ICANN (Internet Corporation for Assigned Names and Numbers) or employees of PTI or to the definition of "independent" (as used in PTI's bylaws) for purposes of determining whether a director of PTI is independent;

(viii) the creation of any committee of the PTI Board with the power to exercise the authority of the PTI Board;

(ix) any change in the procedures for nominating independent PTI directors;

(x) the creation of classes of PTI directors or PTI directors with different terms or voting rights;

(xi) any change in PTI Board quorum requirements or voting requirements;

(xii) any change to the powers and responsibilities of the PTI Board or the PTI officers;

(xiii) any change to the rights to exculpation and indemnification that is adverse to the exculpated or indemnified party, including with respect to

advancement of expenses and insurance, provided to directors, officers, employees or other agents of PTI; or

(xiv) any change to the requirements to amend the articles of incorporation or bylaws of PTI.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall not take any of the following actions (together with the PTI Bylaw Amendments, "**PTI Governance Actions**") if such PTI Governance Action has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e).

(i) Any resignation by ICANN (Internet Corporation for Assigned Names and Numbers) as sole Member of PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of its membership in PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of any right arising from its membership in PTI.

(ii) Any sale, transfer or other disposition of PTI's assets, other than (A) in the ordinary course of PTI's business, (B) in connection with an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process (as defined in Section 19.1(a)) that has been approved in accordance with Article 19 or (C) the disposition of obsolete, damaged, redundant or unused assets.

(iii) Any merger, consolidation, sale or reorganization of PTI.

(iv) Any dissolution, liquidation or winding-up of the business and affairs of PTI or the commencement of any other voluntary bankruptcy proceeding of PTI.

(e) Promptly after the Board approves a PTI Governance Action (a "**PTI Governance Action Approval**"), the Secretary shall provide a notice of the Board's decision to the EC (Empowered Community) Administration and the Decisional Participants ("**Board Notice**"), which Board Notice shall enclose a copy of the PTI Governance Action that is the subject of the PTI Governance Action Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC

(Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A PTI Governance Action shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice (as defined in Section 2.2(c)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant (as defined in Section 2.2(c)(i) of Annex D) to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice (as defined in Section 2.2(c)(ii) of Annex D) is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Period (as defined in Section 2.2(b) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition (as defined in Section 2.2(d)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period (as defined in Section 2.2(d)(i) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice (as defined in Section 2.4(b) of Annex D) is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the

Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period (as defined in Section 2.4(a) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(ii) A PTI Governance Action that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(iii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a PTI Governance Action, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the PTI Governance Action in determining whether or not to develop a new PTI Governance Action and the substance of such new PTI Governance Action, which shall be subject to the procedures of this Section 16.2.

Section 16.3. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION CONTRACT

(a) On or prior to 1 October 2016, ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with PTI for the performance of the IANA (Internet Assigned Numbers Authority) naming function (as it may be amended or modified, the "**IANA (Internet Assigned Numbers Authority) Naming Function Contract**") and a related statement of work (the "**IANA (Internet Assigned Numbers Authority) Naming Function SOW**"). Except as to implement any modification, waiver or amendment to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW related to an IFR Recommendation or Special IFR Recommendation approved pursuant to Section 18.6 or an SCWG Recommendation approved pursuant to Section 19.4 (which, for the avoidance of doubt, shall not be subject to this Section 16.3(a)), ICANN (Internet Corporation for Assigned Names and Numbers) shall not agree to modify, amend or waive any Material Terms (as defined below) of the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW if a majority of

each of the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils reject the proposed modification, amendment or waiver. The following are the "**Material Terms**" of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW:

- (i) The parties to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (ii) The initial term and renewal provisions of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (iii) The manner in which the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW may be terminated;
- (iv) The mechanisms that are available to enforce the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (v) The role and responsibilities of the CSC (as defined in Section 17.1), escalation mechanisms and/or the IFR (as defined in Section 18.1);
- (vi) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's provisions requiring that fees charged by PTI be based on direct costs and resources incurred by PTI;
- (vii) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's prohibition against subcontracting;
- (viii) The availability of the IRP as a point of escalation for claims of PTI's failure to meet defined service level expectations;
- (ix) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's audit requirements; and
- (x) The requirements related to ICANN (Internet Corporation for Assigned Names and Numbers) funding of PTI.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function

Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW.

ARTICLE 17 CUSTOMER STANDING COMMITTEE

Section 17.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall establish a Customer Standing Committee ("**CSC**") to monitor PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

The mission of the CSC is to ensure continued satisfactory performance of the IANA (Internet Assigned Numbers Authority) naming function for the direct customers of the naming services. The direct customers of the naming services are top-level domain registry operators as well as root server operators and other non-root zone functions.

The CSC will achieve this mission through regular monitoring of the performance of the IANA (Internet Assigned Numbers Authority) naming function against the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and through mechanisms to engage with PTI to remedy identified areas of concern.

The CSC is not authorized to initiate a change in PTI through a Special IFR (as defined in Section 18.1), but may escalate a failure to correct an identified deficiency to the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), which might then decide to take further action using consultation and escalation processes, which may include a Special IFR. The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) may address matters escalated by the CSC, pursuant to their operating rules and procedures.

Section 17.2. COMPOSITION, APPOINTMENT, TERM AND REMOVAL

(a) The CSC shall consist of:

- (i) Two individuals representing gTLD (generic Top Level Domain) registry operators appointed by the Registries Stakeholder Group;
- (ii) Two individuals representing ccTLD (Country Code Top Level Domain) registry operators appointed by the ccNSO (Country Code Names

Supporting Organization); and

(iii) One individual liaison appointed by PTI,

each appointed in accordance with the rules and procedures of the appointing organization; provided that such individuals should have direct experience and knowledge of the IANA (Internet Assigned Numbers Authority) naming function.

(b) If so determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), the CSC may, but is not required to, include one additional member: an individual representing top-level domain registry operators that are not considered a ccTLD (Country Code Top Level Domain) or gTLD (generic Top Level Domain), who shall be appointed by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization). Such representative shall be required to submit a letter of support from the registry operator it represents.

(c) Each of the following organizations may also appoint one liaison to the CSC in accordance with the rules and procedures of the appointing organization: (i) GNSO (Generic Names Supporting Organization) (from the Registrars Stakeholder Group or the Non-Contracted Parties House), (ii) ALAC (At-Large Advisory Committee), (iii) either the NRO (Number Resource Organization) or ASO (Address Supporting Organization) (as determined by the ASO (Address Supporting Organization)), (iv) GAC (Governmental Advisory Committee), (v) RSSAC (Root Server System Advisory Committee), (vi) SSAC (Security and Stability Advisory Committee) and (vii) any other Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) established under these Bylaws.

(d) The GNSO (Generic Names Supporting Organization) and ccNSO (Country Code Names Supporting Organization) shall approve the initial proposed members and liaisons of the CSC, and thereafter, the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall approve each annual slate of members and liaisons being recommended for a new term.

(e) The CSC members and liaisons shall select from among the CSC members who will serve as the CSC's liaison to the IFRT (as defined in Section 18.1) and any Separation Cross-Community Working Group ("**SCWG**").

(f) Any CSC member or liaison may be removed and replaced at any time and for any reason or no reason by the organization that appointed such member or liaison.

(g) In addition, the Chair of the CSC may recommend that a CSC member or liaison be removed by the organization that appointed such member or liaison, upon any of the following: (i) (A) for not attending without sufficient cause a minimum of nine CSC meetings in a one-year period (or at least 75% of all CSC meetings in a one-year period if less than nine meetings were held in such one-year period) or (B) if such member or liaison has been absent for more than two consecutive meetings without sufficient cause; or (ii) for grossly inappropriate behavior.

(h) A vacancy on the CSC shall be deemed to exist in the event of the death, resignation or removal of any CSC member or liaison. Vacancies shall be filled by the organization(s) that appointed such CSC member or liaison. The appointing organization(s) shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the Chair of the CSC. The organization(s) responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 17.3.CSC CHARTER; PERIODIC REVIEW

(a) The CSC shall act in accordance with its charter (the "**CSC Charter**").

(b) The effectiveness of the CSC shall be reviewed two years after the first meeting of the CSC; and then every three years thereafter. The method of review will be determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) and the findings of the review will be published on the Website.

(c) The CSC Charter shall be reviewed by a committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations. This review shall commence one year after the first meeting of the CSC. Thereafter, the CSC Charter shall be reviewed by such committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations at the request of the CSC, ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization), the Board and/or the PTI Board and/or by an IFRT in connection with an IFR.

(d) Amendments to the CSC Charter shall not be effective unless ratified by the vote of a simple majority of each of the ccNSO (Country Code Names Supporting

Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to each such organizations' procedures. Prior to any action by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), any recommended changes to the CSC Charter shall be subject to a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). Notwithstanding the foregoing, to the extent any provision of an amendment to the CSC Charter conflicts with the terms of the Bylaws, the terms of the Bylaws shall control.

Section 17.4. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the CSC to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the CSC.

ARTICLE 18 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEWS

Section 18.1. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEW

The Board, or an appropriate committee thereof, shall cause periodic and/or special reviews (each such review, an "**IFR**") of PTI's performance of the IANA (Internet Assigned Numbers Authority) naming function against the contractual requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW to be carried out by an IANA (Internet Assigned Numbers Authority) Function Review Team ("**IFRT**") established in accordance with Article 18, as follows:

- (a) Regularly scheduled periodic IFRs, to be conducted pursuant to Section 18.2 below ("**Periodic IFRs**"); and
- (b) IFRs that are not Periodic IFRs, to be conducted pursuant to Section 18.12 below ("**Special IFRs**").

Section 18.2. FREQUENCY OF PERIODIC IFRS

- (a) The first Periodic IFR shall be convened no later than [1 October 2018].

(b) Periodic IFRs after the first Periodic IFR shall be convened no less frequently than every five years, measured from the date the previous IFRT for a Periodic IFR was convened.

(c) In the event a Special IFR is ongoing at the time a Periodic IFR is required to be convened under this Section 18.2, the Board shall cause the convening of the Periodic IFR to be delayed if such delay is approved by the vote of (i) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (ii) a GNSO (Generic Names Supporting Organization) Supermajority. Any decision by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) to delay a Periodic IFR must identify the period of delay, which should generally not exceed 12 months after the completion of the Special IFR.

Section 18.3. IFR RESPONSIBILITIES

For each Periodic IFR, the IFRT shall:

(a) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract in relation to the needs of its direct customers and the expectations of the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and determine whether to make any recommendations with respect to PTI's performance;

(b) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(c) Review the IANA (Internet Assigned Numbers Authority) Naming Function SOW and determine whether to recommend any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW to account for the needs of the direct customers of the naming services and/or the community at large;

(d) Review and evaluate the openness and transparency procedures of PTI and any oversight structures for PTI's performance, including reporting requirements and budget transparency;

(e) Review and evaluate the performance and effectiveness of the EC (Empowered Community) with respect to actions taken by the EC (Empowered Community), if any, pursuant to Section 16.2, Section 18.6, Section 18.12, Section 19.1, Section 19.4, Section 22.4(b) and Annex D;

(f) Review and evaluate the performance of the IANA (Internet Assigned Numbers Authority) naming function according to established service level expectations during the IFR period being reviewed and compared to the immediately preceding Periodic IFR period;

(g) Review and evaluate whether there are any systemic issues that are impacting PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(h) Initiate public comment periods and other processes for community input on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (such public comment periods shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers));

(i) Consider input from the CSC and the community on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(j) Identify process or other areas for improvement in the performance of the IANA (Internet Assigned Numbers Authority) naming function under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and the performance of the CSC and the EC (Empowered Community) as it relates to oversight of PTI; and

(k) Consider and assess any changes implemented since the immediately preceding IFR and their implications for the performance of PTI under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

Section 18.4. IFR REQUIRED INPUTS

In conducting an IFR, the IFRT shall review and analyze the following information:

(a) Reports provided by PTI pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and/or IANA (Internet Assigned Numbers Authority) Naming Function SOW;

Authority) Naming Function SOW during the IFR period being reviewed, any portion of which may be redacted pursuant to the Confidential Disclosure Framework set forth in the Operating Standards in accordance with Section 4.6(a)(vi);

(b) Reports provided by the CSC in accordance with the CSC Charter during the IFR period being reviewed;

(c) Community inputs through public consultation procedures as reasonably determined by the IFRT, including, among other things, public comment periods, input provided at in-person sessions during ICANN (Internet Corporation for Assigned Names and Numbers) meetings, responses to public surveys related to PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW, and public inputs during meetings of the IFRT;

(d) Recommendations for technical, process and/or other improvements relating to the mandate of the IFR provided by the CSC or the community; and

(e) Results of any site visit conducted by the IFRT, which shall be conducted in consultation with ICANN (Internet Corporation for Assigned Names and Numbers) (i) upon reasonable notice, (ii) in a manner so as to not affect PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW and (iii) pursuant to procedures and requirements reasonably developed by ICANN (Internet Corporation for Assigned Names and Numbers) and reasonably acceptable to the IFRT. Any such site visit shall be limited to matters reasonably related to the IFRT's responsibilities pursuant to Section 18.3.

Section 18.5. IFR RESULTS AND RECOMMENDATIONS

(a) The results of the IFR are not limited and could include a variety of recommendations or no recommendation; provided, however, that any recommendations must directly relate to the matters discussed in Section 18.3 and comply with this Section 18.5.

(b) Any IFRT recommendations should identify improvements that are supported by data and associated analysis about existing deficiencies and how they could be addressed. Each recommendation of the IFRT shall include proposed remedial procedures and describe how those procedures are expected to address such issues. The IFRT's report shall also propose timelines for implementing the IFRT's recommendations. The IFRT shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(c) In any case where a recommendation of an IFRT focuses on a service specific to gTLD (generic Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the Registries Stakeholder Group. In any case where a recommendation of an IFRT focuses on a service specific to ccTLD (Country Code Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the ccNSO (Country Code Names Supporting Organization).

(d) Notwithstanding anything herein to the contrary, the IFRT shall not have the authority to review or make recommendations relating to policy or contracting issues that are not included in the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW, including, without limitation, policy development, adoption processes or contract enforcement measures between contracted registries and ICANN (Internet Corporation for Assigned Names and Numbers).

Section 18.6.Recommendations to Amend the IANA (Internet Assigned Numbers Authority) Naming Function contract, iana naming function SOW or CSC charter

(a) The IFRT may recommend, among other things to the extent reasonably related to the IFR responsibilities set forth in Section 18.3, amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW and/or the CSC Charter. The IFRT shall, at a minimum, take the following steps before an amendment to either the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW or CSC Charter is proposed:

(i) Consult with the Board (such consultation to be conducted in parallel with other processes set forth in this Section 18.6(a)) and PTI;

(ii) Consult with the CSC;

(iii) Conduct a public input session for ccTLD (Country Code Top Level Domain) and gTLD (generic Top Level Domain) registry operators; and

(iv) Seek public comment on the amendments that are under consideration by the IFRT through a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(b) A recommendation of an IFRT for a Periodic IFR that would amend the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall only become effective if, with respect to each such recommendation (each, an "**IFR Recommendation**"), each of the following occurs:

(i) The IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the IFR Recommendation pursuant to and in compliance with Section 18.6(d).

(c) If the Board (x) rejects an IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.6(b)(i) or (y) does not resolve to either accept or reject an IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.6(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.6(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum (as defined in Section

2.3(a) of Annex D), which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants (as defined in Section 2.2(d)(i) of Annex D) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the IFR Recommendation or approve the IFR Recommendation (either, a "**Post-Forum IFR Recommendation Decision**").

(A) If the Board resolves to approve the IFR Recommendation, such IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an IFR Recommendation (an "**IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IFR Recommendation that is the subject of the IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such IFR Recommendation Decision.

(ii) An IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) For the avoidance of doubt, Section 18.6(d) shall not apply when the Board acts in a manner that is consistent with an IFR Recommendation unless such IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

(f) Timelines for implementing any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall be reasonably agreed between the IFRT, ICANN (Internet Corporation for Assigned Names and Numbers) and PTI.

(g) A recommendation of an IFRT that would amend the CSC Charter shall only become effective if approved pursuant to Section 17.3(d).

Section 18.7. COMPOSITION OF IFR TEAMS

Each IFRT shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(a) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(b) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs), and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(c) Two representatives appointed by the Registries Stakeholder Group;

(d) One representative appointed by the Registrars Stakeholder Group;

(e) One representative appointed by the Commercial Stakeholder Group;

(f) One representative appointed by the Non-Commercial Stakeholder Group;

(g) One representative appointed by the GAC (Governmental Advisory Committee);

(h) One representative appointed by the SSAC (Security and Stability Advisory Committee);

- (i) One representative appointed by the RSSAC (Root Server System Advisory Committee);
- (j) One representative appointed by the ALAC (At-Large Advisory Committee);
- (k) One liaison appointed by the CSC;
- (l) One liaison who may be appointed by the ASO (Address Supporting Organization); and
- (m) One liaison who may be appointed by the IAB (Internet Architecture Board).
- (n) The IFRT shall also include an unlimited number of non-member, non-liaison participants.
- (o) The IFRT shall not be a standing body. A new IFRT shall be constituted for each IFR and the IFRT shall automatically dissolve following the end of the process for approving such IFRT's IFR Recommendations pursuant to Section 18.6.

Section 18.8. MEMBERSHIP; ELECTION OF CO-CHAIRS, AND LIAISONS

- (a) All candidates for appointment to the IFRT as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison to the IFRT, which shall state: (i) why the candidate is interested in becoming involved in the IFRT, (ii) what particular skills the candidate would bring to the IFRT, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) functions, (iv) the candidate's understanding of the purpose of the IFRT, and (v) that the candidate understands the time necessary to participate in the IFR process and can commit to the role.
- (b) Members, liaisons and participants of the IFRT shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the IFRT any conflicts of interest with a specific complaint or issue under review. The IFRT may exclude from the discussion of a specific complaint or issue any member deemed by the majority of IFRT members to have a conflict of interest. The co-chairs of the IFRT shall record any such conflict of interest in the minutes of the IFRT.
- (c) To the extent reasonably possible, the appointing organizations for the IFRT members and liaisons shall work together to achieve an IFRT that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews;

provided, that the IFRT should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region.

(d) The IFRT shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (c)-(f) of Section 18.7 and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (a)-(b) of Section 18.7.

(e) The PTI Board shall select a PTI staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and PTI. The Board shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and ICANN (Internet Corporation for Assigned Names and Numbers).

(f) Liaisons to the IFRT are not members of or entitled to vote on any matters before the IFRT, but otherwise are entitled to participate on equal footing with members of the IFRT.

(g) Other participants are entitled to participate in the IFRT, but are not entitled to vote.

(h) Removal and Replacement of IFRT Members and Liaisons

(i) The IFRT members and liaisons may be removed from the IFRT by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the IFRT.

(ii) A vacancy on the IFRT shall be deemed to exist in the event of the death, resignation or removal of any IFRT member or liaison. Vacancies shall be filled by the organization that appointed such IFRT member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the IFRT co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 18.9. MEETINGS

- (a) All actions of the IFRT shall be taken by consensus of the IFRT, which is where a small minority may disagree, but most agree. If consensus cannot be reached with respect to a particular issue, actions by the majority of all of the members of the IFRT shall be the action of the IFRT.
- (b) Any members of the IFRT not in favor of an action (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such action, which shall be included in the IFRT minutes and/or report, as applicable.
- (c) IFRT meetings, deliberations and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The IFRT shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each IFRT meeting. Recordings and transcripts of meetings, as well as mailing lists, shall also be posted to the Website.

Section 18.10. COMMUNITY REVIEWS AND REPORTS

- (a) The IFRT shall seek community input as to the issues relevant to the IFR through one or more public comment periods that shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers) and through discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.
- (b) The IFRT shall provide a draft report of its findings and recommendations to the community for public comment. The public comment period is required to comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).
- (c) After completion of the IFR, the IFRT shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall thereafter promptly post the IFRT's final report on the Website.

Section 18.11. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for each IFRT to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the IFRT.

Section 18.12. SPECIAL IFRS

(a) A Special IFR may be initiated outside of the cycle for the Periodic IFRs to address any deficiency, problem or other issue that has adversely affected PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (a "PTI Performance Issue"), following the satisfaction of each of the following conditions:

(i) The Remedial Action Procedures of the CSC set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such procedures shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(ii) The IANA (Internet Assigned Numbers Authority) Problem Resolution Process set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such process shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(iii) The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall have considered the outcomes of the processes set forth in the preceding clauses (i) and (ii) and shall have conducted meaningful consultation with the other Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) with respect to the PTI Performance Issue and whether or not to initiate a Special IFR; and

(iv) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), if a public comment period is requested by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization), a Special IFR shall have

been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or if such procedures do not define a supermajority, two-thirds (2/3) of the Council members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority.

(b) Each Special IFR shall be conducted by an IFRT and shall follow the same procedures and requirements applicable to Periodic IFRs as set forth in this Section 18, except that:

(i) The scope of the Special IFR and the related inputs that are required to be reviewed by the IFRT shall be focused primarily on the PTI Performance Issue, its implications for overall IANA (Internet Assigned Numbers Authority) naming function performance by PTI and how to resolve the PTI Performance Issue;

(ii) The IFRT shall review and analyze the information that is relevant to the scope of the Special IFR; and

(iii) Each recommendation of the IFRT relating to the Special IFR, including but not limited to any recommendation to initiate an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process, must be related to remediating the PTI Performance Issue or other issue with PTI's performance that is related to the IFRT responsibilities set forth in Section 18.3, shall include proposed remedial procedures and describe how those procedures are expected to address the PTI Performance Issue or other relevant issue with PTI's performance.

(c) A recommendation of an IFRT for a Special IFR shall only become effective if, with respect to each such recommendation (each, a "**Special IFR Recommendation**"), each of the following occurs:

(i) The Special IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the Special IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the Special IFR Recommendation pursuant to and in compliance with Section 18.12(e).

(d) If the Board (x) rejects a Special IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.12(c)(i) or (y) does not resolve to either accept or reject a Special IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.12(c)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.12(c)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable Special IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the Special IFR Recommendation or approve the Special IFR

Recommendation (either, a "**Post-Forum Special IFR Recommendation Decision**").

(A) If the Board resolves to approve the Special IFR Recommendation, such Special IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the Special IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum Special IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(e) Promptly after the Board approves a Special IFR Recommendation (a "**Special IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Special IFR Recommendation that is the subject of the Special IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A Special IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such Special IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary

pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Special IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Special IFR Recommendation Decision.

(ii) A Special IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(f) For the avoidance of doubt, Section 18.12(e) shall not apply when the Board acts in a manner that is consistent with a Special IFR Recommendation unless such Special IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

Section 18.13. PROPOSED SEPARATION PROCESS

The IFRT conducting either a Special IFR or Periodic IFR may, upon conclusion of a Special IFR or Periodic IFR, as applicable, determine that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and, if so, it shall recommend the creation of an SCWG pursuant to Article 19.

ARTICLE 19 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION SEPARATION PROCESS

Section 19.1. ESTABLISHING AN SCWG

(a) An "**IANA (Internet Assigned Numbers Authority) Naming Function Separation Process**" is the process initiated in accordance with this Article 19

pursuant to which PTI may cease to perform the IANA (Internet Assigned Numbers Authority) naming function including, without limitation, the initiation of a request for proposal to select an operator to perform the IANA (Internet Assigned Numbers Authority) naming function instead of PTI ("**IANA (Internet Assigned Numbers Authority) Naming Function RFP**"), the selection of an IANA (Internet Assigned Numbers Authority) naming function operator other than PTI, termination or non-renewal of the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and/or divestiture, or other reorganization of PTI by ICANN (Internet Corporation for Assigned Names and Numbers).

(b) The Board shall establish an SCWG if each of the following occurs:

(i) The IFRT conducting either a Special IFR or Periodic IFR, upon conclusion of a Special IFR or Periodic IFR, as applicable, has recommended that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and has recommended the creation of an SCWG (an "**SCWG Creation Recommendation**");

(ii) The SCWG Creation Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(iii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Creation Recommendation. A determination by the Board to not approve an SCWG Creation Recommendation, where such creation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.1(b)(ii), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iv) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Creation Recommendation pursuant to and in compliance with Section 19.1(d).

(c) If the Board (x) rejects an SCWG Creation Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.1(b)(ii) or (y) does not resolve to either accept or reject an SCWG Creation Recommendation within 45 days of the later of (1) the date that the condition in Section 19.1(b)(ii) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.1(b)(iii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable SCWG Creation Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Creation Recommendation or approve the SCWG Creation Recommendation (either, a "**Post-Forum SCWG Creation Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Creation Recommendation, such SCWG Creation Recommendation will be subject to Section 19.1(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Creation Recommendation as a result of the Rejection Action Community Forum.

(C)The Board's Post-Forum SCWG Creation Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Creation Recommendation (an "**SCWG Creation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Creation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Creation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Creation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Creation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC

(Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Creation Decision.

(ii) An SCWG Creation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

Section 19.2. SCWG RESPONSIBILITIES

The responsibilities of the SCWG shall be as follows:

(a) The SCWG shall determine how to resolve the PTI Performance Issue(s) which the IFRT that conducted the Special IFR or Periodic IFR, as applicable, identified as triggering formation of this SCWG.

(b) If the SCWG recommends the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall:

(i) Develop IANA (Internet Assigned Numbers Authority) Naming Function RFP guidelines and requirements for the performance of the IANA (Internet Assigned Numbers Authority) naming function, in a manner consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s publicly available procurement guidelines (as in effect immediately prior to the formation of the SCWG); and

(ii) Solicit input from ICANN (Internet Corporation for Assigned Names and Numbers) as well as the global Internet community (through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) on requirements to plan and participate in the IANA (Internet Assigned Numbers Authority) Naming Function RFP process.

(c) If an SCWG Recommendation (as defined in Section 19.4(b)) to issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP is approved pursuant to Section 19.4(b) and the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), the SCWG, in consultation with ICANN (Internet Corporation for Assigned Names and Numbers), shall:

(i) Issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP;

(ii) Review responses from interested candidates to the IANA (Internet Assigned Numbers Authority) Naming Function RFP, which may be received from PTI and/or any other entity or person; and

(iii) Recommend the entity that ICANN (Internet Corporation for Assigned Names and Numbers) should contract with to perform the IANA (Internet Assigned Numbers Authority) naming function.

(d) If the SCWG recommends an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process other than the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall develop recommendations to be followed with respect to that process and its implementation consistent with the terms of this Article 19. The SCWG shall monitor and manage the implementation of such IANA (Internet Assigned Numbers Authority) Naming Function Separation Process.

Section 19.3. COMMUNITY REVIEWS AND REPORTS

(a) The SCWG shall seek community input through one or more public comment periods (such public comment period shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) and may recommend discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.

(b) The SCWG shall provide a draft report of its findings and recommendations to the community after convening of the SCWG, which such draft report will be posted for public comment on the Website. The SCWG may post additional drafts of its report for public comment until it has reached its final report.

(c) After completion of its review, the SCWG shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the SCWG's final report on the Website.

Section 19.4. SCWG RECOMMENDATIONS

(a) The recommendations of the SCWG are not limited and could include a variety of recommendations or a recommendation that no action is required;

provided, however, that any recommendations must directly relate to the matters discussed in Section 19.2 and comply with this Section 19.4.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not implement an SCWG recommendation (including an SCWG recommendation to issue an IANA (Internet Assigned Numbers Authority) Naming Function RFP) unless, with respect to each such recommendation (each, an "**SCWG Recommendation**"), each of the following occurs:

(i) The SCWG Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Recommendation. A determination by the Board to not approve an SCWG Recommendation, where such SCWG Recommendation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.4(b)(i), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Recommendation pursuant to and in compliance with Section 19.4(d).

(c) If the Board (x) rejects an SCWG Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.4(b)(i) or (y) does not resolve to either accept or reject an SCWG Recommendation within 45 days of the later of (1) the date that the condition in Section 19.4(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.4(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which

Board Notice shall enclose a copy of the applicable SCWG Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Recommendation or approve the SCWG Recommendation (either, a "**Post-Forum SCWG Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Recommendation, such SCWG Recommendation will be subject to Section 19.4(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum SCWG Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Recommendation (an "**SCWG Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Recommendation that is

the subject of the SCWG Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Recommendation Decision.

(ii) An SCWG Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the costs relating to recommendations made by the SCWG, including, without limitation, costs related to the process of selecting or potentially selecting a new operator for the IANA (Internet Assigned Numbers Authority) naming function and the operating costs of the successor operator that are necessary for the successor operator's performance of the IANA (Internet Assigned Numbers Authority) naming function as ICANN (Internet Corporation for Assigned Names and Numbers)'s independent contractor. ICANN (Internet Corporation for Assigned Names and Numbers) shall not be authorized to raise fees from any TLD (Top Level Domain) registry operators to cover the costs associated with implementation of any SCWG Recommendations that specifically relate to the transition to a successor operator. For avoidance of doubt, this restriction shall not apply to collecting appropriate fees necessary to maintain the ongoing performance of the IANA (Internet Assigned Numbers Authority) naming function, including those relating to the operating costs of the successor operator.

(f) In the event that (i) an SCWG Recommendation that selects an entity (other than PTI) as a new operator of the IANA (Internet Assigned Numbers Authority) naming function is approved pursuant to Section 19.4(b) and (ii) the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with the new operator on substantially the same terms recommended by the SCWG and approved as part of such SCWG Recommendation.

(g) As promptly as practical following an SCWG Recommendation Decision becoming final in accordance with this Section 19.4, ICANN (Internet Corporation for Assigned Names and Numbers) shall take all steps reasonably necessary to effect such SCWG Recommendation Decision as soon as practicable.

Section 19.5. SCWG COMPOSITION

(a) Each SCWG shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(i) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(ii) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs) and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(iii) Three representatives appointed by the Registries Stakeholder Group;

(iv) One representative appointed by the Registrars Stakeholder Group;

(v) One representative appointed by the Commercial Stakeholder Group;

(vi) One representative appointed by the Non-Commercial Stakeholder Group;

(vii) One representative appointed by the GAC (Governmental Advisory Committee);

(viii) One representative appointed by the SSAC (Security and Stability Advisory Committee);

(ix) One representative appointed by the RSSAC (Root Server System Advisory Committee);

(x) One representative appointed by the ALAC (At-Large Advisory Committee);

(xi) One liaison appointed by the CSC;

(xii) One liaison appointed by the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, who shall be named in the IFRT's recommendation to convene the Special IFR;

(xiii) One liaison who may be appointed by the ASO (Address Supporting Organization);

(xiv) One liaison who may be appointed by the IAB (Internet Architecture Board); and

(xv) One liaison who may be appointed by the Board.

(xvi) The SCWG may also include an unlimited number of non-member, non-liaison participants.

(b) All candidates for appointment to the SCWG as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison, which shall state (i) why the candidate is interested in becoming involved in the SCWG, (ii) what particular skills the candidate would bring to the SCWG, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) naming function, (iv) the candidate's understanding of the purpose of the SCWG, and (v) that the candidate understands the time necessary to participate in the SCWG process and can commit to the role.

(c) Members and liaisons of the SCWG shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG any conflicts of interest with a specific complaint or issue under review. The SCWG may exclude from the discussion of a specific complaint or issue any member, liaison or participant deemed by the majority of SCWG members to have a conflict of interest. The co-chairs of the SCWG shall record any such conflict of interest in the minutes of the SCWG.

(d) To the extent reasonably possible, the appointing organizations for SCWG members and liaisons shall work together to:

(i) achieve an SCWG that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews; provided, that the SCWG should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region;

(ii) ensure that the SCWG is comprised of individuals who are different from those individuals who comprised the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, other than the liaison to the IFRT appointed by the CSC; and

(iii) seek to appoint as representatives of the SCWG as many individuals as practicable with experience managing or participating in RFP processes.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member and a PTI staff member to serve as points of contact to facilitate formal lines of communication between the SCWG and ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG and PTI. Communications between the SCWG and the ICANN (Internet Corporation for Assigned Names and Numbers) and PTI points of contact shall be communicated by the SCWG co-chairs.

(f) The SCWG shall not be a standing body. Each SCWG shall be constituted when and as required under these Bylaws and shall dissolve following the end of the process for approving such SCWG's SCWG Recommendations pursuant to Section 19.4(d).

Section 19.6. ELECTION OF CO-CHAIRS AND LIAISONS

(a) The SCWG shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (iii)-(vi) of Section 19.5(a) and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (i)-(ii) of Section 19.5(a).

(b) Liaisons to the SCWG shall not be members of or entitled to vote on any matters before the SCWG, but otherwise shall be entitled to participate on equal footing with SCWG members.

(c) Removal and Replacement of SCWG Members and Liaisons

(i) The SCWG members and liaisons may be removed from the SCWG by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the SCWG.

(ii) A vacancy on the SCWG shall be deemed to exist in the event of the death, resignation or removal of any SCWG member or liaison. Vacancies

shall be filled by the organization that appointed such SCWG member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the SCWG co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 19.7. MEETINGS

- (a) The SCWG shall act by consensus, which is where a small minority may disagree, but most agree.
- (b) Any members of the SCWG not in favor of an action may record a minority dissent to such action, which shall be included in the SCWG minutes and/or report, as applicable.
- (c) SCWG meetings and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The SCWG shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each SCWG meeting, and no later than five business days following the meeting.
- (e) Except as otherwise provided in these Bylaws, the SCWG shall follow the guidelines and procedures applicable to ICANN (Internet Corporation for Assigned Names and Numbers) Cross Community Working Groups that will be publicly available and may be amended from time to time.

Section 19.8. ADMINISTRATIVE SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the SCWG to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the SCWG.

Section 19.9. CONFLICTING PROVISIONS

In the event any SCWG Recommendation that is approved in accordance with this Article 19 requires ICANN (Internet Corporation for Assigned Names and Numbers) to take any action that is inconsistent with a provision of the Bylaws (including any action taken in implementing such SCWG Recommendation), the requirements of such provision of these Bylaws shall not apply to the extent of that inconsistency.

ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

Section 20.1. INDEMNIFICATION GENERALLY

ICANN (Internet Corporation for Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN (Internet Corporation for Assigned Names and Numbers), provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. For purposes of this Article 20, an "agent" of ICANN (Internet Corporation for Assigned Names and Numbers) includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (Internet Corporation for Assigned Names and Numbers) (including a member of the EC (Empowered Community), the EC (Empowered Community) Administration, any Supporting Organization (Supporting Organization), any Advisory Committee (Advisory Committee), the Nominating Committee, any other ICANN (Internet Corporation for Assigned Names and Numbers) committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN (Internet Corporation for Assigned Names and Numbers) as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN (Internet Corporation for Assigned Names and Numbers) against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN (Internet Corporation for Assigned Names and Numbers) would have the power to indemnify the agent against that liability under the provisions of this Article 20.

Section 20.2. INDEMNIFICATION WITH RESPECT TO DIRECTOR REMOVAL

If a Director initiates any proceeding in connection with his or her removal or recall pursuant to the Bylaws, to which a person who is a member of the leadership council (or equivalent body) of a Decisional Participant or representative of a Decisional Participant in the EC (Empowered Community) Administration is a party or is threatened to be made a party (as a party or witness) (a "**Director Removal Proceeding**"), ICANN (Internet Corporation for

Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify any such person, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such person in connection with such Director Removal Proceeding, for actions taken by such person in his or her representative capacity within his or her Decisional Participant pursuant to the processes and procedures set forth in these Bylaws, provided that all such actions were taken by such person in good faith and in a manner that such person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. The actual and reasonable legal fees of a single firm of counsel and other expenses actually and reasonably incurred by such person in defending against a Director Removal Proceeding shall be paid by ICANN (Internet Corporation for Assigned Names and Numbers) in advance of the final disposition of such Director Removal Proceeding, provided, however, that such expenses shall be advanced only upon delivery to the Secretary of an undertaking (which shall be in writing and in a form provided by the Secretary) by such person to repay the amount of such expenses if it shall ultimately be determined that such person is not entitled to be indemnified by ICANN (Internet Corporation for Assigned Names and Numbers). ICANN (Internet Corporation for Assigned Names and Numbers) shall not be obligated to indemnify such person against any settlement of a Director Removal Proceeding, unless such settlement is approved in advance by the Board in its reasonable discretion. Notwithstanding Section 20.1, the indemnification provided in this Section 20.2 shall be ICANN (Internet Corporation for Assigned Names and Numbers)'s sole indemnification obligation with respect to the subject matter set forth in this Section 20.2.

ARTICLE 21 GENERAL PROVISIONS

Section 21.1. CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN (Internet Corporation for Assigned Names and Numbers), and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind ICANN (Internet Corporation for Assigned Names and Numbers) or to render it liable for any debts or obligations.

Section 21.2. DEPOSITS

All funds of ICANN (Internet Corporation for Assigned Names and Numbers) not otherwise employed shall be deposited from time to time to the credit of ICANN (Internet Corporation for Assigned Names and Numbers) in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

Section 21.3. CHECKS

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN (Internet Corporation for Assigned Names and Numbers) shall be signed by such Officer or Officers, agent or agents, of ICANN (Internet Corporation for Assigned Names and Numbers) and in such a manner as shall from time to time be determined by resolution of the Board.

Section 21.4. LOANS

No loans shall be made by or to ICANN (Internet Corporation for Assigned Names and Numbers) and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN (Internet Corporation for Assigned Names and Numbers) to its Directors or Officers.

Section 21.5. NOTICES

All notices to be given to the EC (Empowered Community) Administration, the Decisional Participants, or the Secretary pursuant to any provision of these Bylaws shall be given either (a) in writing at the address of the appropriate party as set forth below or (b) via electronic mail as provided below, unless that party has given a notice of change of postal or email address, as provided in this Section 21.5. Any change in the contact information for notice below will be given by the party within 30 days of such change. Any notice required by these Bylaws will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via electronic mail, upon confirmation of receipt by the recipient's email server, provided that such notice via electronic mail shall be followed by a copy sent by regular postal mail service within three days. In the event other means of notice become practically achievable, such as notice via a secure website, the EC (Empowered Community) Administration, the Decisional Participants, and ICANN (Internet Corporation for Assigned Names and Numbers) will work together to implement such notice means.

If to ICANN (Internet Corporation for Assigned Names and Numbers), addressed to:

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

USA

Email: []

Attention: Secretary

If to a Decisional Participant or the EC (Empowered Community) Administration, addressed to the contact information available at [insert Website reference].

ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND INDEPENDENT INVESTIGATION

Section 22.1. ACCOUNTING

The fiscal year end of ICANN (Internet Corporation for Assigned Names and Numbers) shall be determined by the Board.

Section 22.2. AUDIT

At the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

Section 22.3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement, a description of any payments made by ICANN (Internet Corporation for Assigned Names and Numbers) to Directors (including reimbursements of expenses) and a description of ICANN (Internet Corporation for Assigned Names and Numbers)'s progress towards the obligations imposed under the Bylaws as revised on 1 October 2016 and the Operating Plan and Strategic Plan. ICANN (Internet Corporation for Assigned Names and Numbers) shall cause the annual report and the annual statement of

certain transactions as required by the CCC to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN (Internet Corporation for Assigned Names and Numbers)'s fiscal year.

Section 22.4. BUDGETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) Budget

(i) In furtherance of its Commitment to transparent and accountable budgeting processes, at least forty-five (45) days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed annual operating plan and budget of ICANN (Internet Corporation for Assigned Names and Numbers) for the next fiscal year (the "**ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which shall be posted on the Website. The ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item.

(ii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the ICANN (Internet Corporation for Assigned Names and Numbers) Budget development process, and comply with the requirements of this Section 22.4(a).

(iii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, a draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an ICANN (Internet Corporation for Assigned Names and Numbers) Budget (an "ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date (as defined in Section 2.2(a) of Annex D) relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the ICANN (Internet

Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in determining the substance of such new ICANN (Internet Corporation for Assigned Names and Numbers) Budget, which shall be subject to the procedures of this Section 22.4(a).

(ix) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has not come into full force and effect pursuant to this Section 22.4(a) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex E hereto ("**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be effective until such time as an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(a).

(b) IANA (Internet Assigned Numbers Authority) Budget

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) shall prepare and submit to the Board a proposed annual operating plan and budget of PTI and the IANA (Internet Assigned Numbers Authority) department, which budget shall include itemization of the direct costs for ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department, all costs for PTI, direct costs for shared resources between ICANN (Internet Corporation for Assigned Names and Numbers) and PTI and support functions provided by ICANN (Internet Corporation for Assigned Names and Numbers) to PTI and ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department for the next fiscal year (the "**IANA (Internet Assigned Numbers Authority) Budget**"), which shall be posted on the Website. Separately and in addition to the general ICANN (Internet Corporation for Assigned Names and Numbers) planning process, ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to prepare and submit to the PTI Board a proposed annual operating plan and budget for PTI's performance of the IANA (Internet Assigned Numbers Authority) functions for the next fiscal year ("**PTI Budget**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, the IAB (Internet Architecture Board) and RIRs, during the PTI Budget development process, and shall seek public comment on the draft PTI Budget prior to approval of the PTI Budget by PTI. ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to submit the PTI Budget to ICANN (Internet Corporation for Assigned Names and Numbers) as an input prior to and for the purpose

of being included in the proposed Operating Plan (as defined in Section 22.5(a)) and ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(ii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, IAB (Internet Architecture Board) and RIRs, during the IANA (Internet Assigned Numbers Authority) Budget development process, and comply with the requirements of this Section 22.4(b).

(iii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, a draft of the IANA (Internet Assigned Numbers Authority) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the IANA (Internet Assigned Numbers Authority) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an IANA (Internet Assigned Numbers Authority) Budget (an "**IANA (Internet Assigned Numbers Authority) Budget Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An IANA (Internet Assigned Numbers Authority) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of

the Rejection Action Decision Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An IANA (Internet Assigned Numbers Authority) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an IANA (Internet Assigned Numbers Authority) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the IANA (Internet Assigned Numbers Authority) Budget in determining the substance of such new IANA (Internet Assigned Numbers Authority) Budget, which shall be subject to the procedures of this Section 22.4(b).

(ix) If an IANA (Internet Assigned Numbers Authority) Budget has not come into full force and effect pursuant to this Section 22.4(b) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex F hereto ("**Caretaker IANA (Internet Assigned Numbers Authority) Budget**"), which Caretaker IANA (Internet Assigned Numbers Authority) Budget shall be effective until such time as an IANA (Internet Assigned Numbers Authority) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(b).

(c) If an IANA (Internet Assigned Numbers Authority) Budget does not receive an EC (Empowered Community) Rejection Notice but an ICANN (Internet Corporation for Assigned Names and Numbers) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not alter the expenditures allocated for the IANA (Internet Assigned Numbers Authority) Budget.

(d) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget does not receive an EC (Empowered Community) Rejection Notice but an IANA

(Internet Assigned Numbers Authority) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised IANA (Internet Assigned Numbers Authority) Budget shall, once approved, be deemed to automatically modify the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in a manner determined by the Board without any further right of the EC (Empowered Community) to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(e) Under all circumstances, the Board will have the ability to make out-of-budget funding decisions for unforeseen expenses necessary to maintaining ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or to fulfilling ICANN (Internet Corporation for Assigned Names and Numbers)'s pre-existing legal obligations and protecting ICANN (Internet Corporation for Assigned Names and Numbers) from harm or waste.

(f) To maintain ongoing operational excellence and financial stability of the IANA (Internet Assigned Numbers Authority) functions (so long as they are performed by ICANN (Internet Corporation for Assigned Names and Numbers) or pursuant to contract with ICANN (Internet Corporation for Assigned Names and Numbers)) and PTI, ICANN (Internet Corporation for Assigned Names and Numbers) shall be required to plan for and allocate funds to ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of the IANA (Internet Assigned Numbers Authority) functions and to PTI, as applicable, that are sufficient to cover future expenses and contingencies to ensure that the performance of those IANA (Internet Assigned Numbers Authority) functions and PTI in the future are not interrupted due to lack of funding.

(g) The ICANN (Internet Corporation for Assigned Names and Numbers) Budget and the IANA (Internet Assigned Numbers Authority) Budget shall be published on the Website.

Section 22.5. PLANS

(a) Operating Plan

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed operating plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Operating Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Operating Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the

Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Operating Plan development process, and comply with the requirements of this [Section 22.5\(a\)](#).

(iii) Prior to approval of the Operating Plan by the Board, a draft of the Operating Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Operating Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an Operating Plan (an "**Operating Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Operating Plan that is the subject of the Operating Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in [Article 2](#) of Annex D.

(vi) An Operating Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating

to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An Operating Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an Operating Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Operating Plan in

determining the substance of such new Operating Plan, which shall be subject to the procedures of this Section 22.5(a).

(b) Strategic Plan

(i) At least 45 days prior to the commencement of each five fiscal year period, with the first such period covering fiscal years 2021 through 2025, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed strategic plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Strategic Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Strategic Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Strategic Plan development process, and comply with the requirements of this Section 22.5(b).

(iii) Prior to approval of the Strategic Plan by the Board, a draft of the Strategic Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Strategic Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves a Strategic Plan (a "**Strategic Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Strategic Plan that is the subject of the Strategic Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and

comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) A Strategic Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further

challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) A Strategic Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a Strategic Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Strategic Plan in determining the substance of such new Strategic Plan, which shall be subject to the procedures of this Section 22.5(b).

Section 22.6. FEES AND CHARGES

The Board may set fees and charges for the services and benefits provided by ICANN (Internet Corporation for Assigned Names and Numbers), with the goal of fully recovering the reasonable costs of the operation of ICANN (Internet Corporation for Assigned Names and Numbers) and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN (Internet Corporation for Assigned Names and Numbers). Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

Section 22.7. INSPECTION

(a) A Decisional Participant (the "**Inspecting Decisional Participant**") may request to inspect the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers), as interpreted pursuant to the provisions of Section 6333 of the CCC, and the minutes of the Board or any Board Committee for a purpose reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). The Inspecting Decisional Participant shall make such a request by providing written notice from the chair of the Inspecting Decisional Participant to the Secretary stating the nature of the documents the Inspecting Decisional Participant seeks to inspect ("**Inspection Request**"). Any Inspection Request must be limited to the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers) relevant to the operation of ICANN (Internet Corporation for Assigned Names and Numbers) as a whole, and

shall not extend to the underlying sources of such accounting books or records or to documents only relevant to a small or isolated aspect of ICANN (Internet Corporation for Assigned Names and Numbers)'s operations or that relate to the minutiae of ICANN (Internet Corporation for Assigned Names and Numbers)'s financial records or details of its management and administration (the "**Permitted Scope**"). Unless ICANN (Internet Corporation for Assigned Names and Numbers) declines such request (as provided below), ICANN (Internet Corporation for Assigned Names and Numbers) shall make the records requested under an Inspection Request available for inspection by such Inspecting Decisional Participant within 30 days of the date the Inspection Request is received by the Secretary or as soon as reasonably practicable thereafter. All materials and information made available by ICANN (Internet Corporation for Assigned Names and Numbers) for inspection pursuant to an Inspection Request may only be used by the Inspecting Decisional Participant for purposes reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall post all Inspection Requests to the Website.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) may decline an Inspection Request on the basis that such Inspection Request (i) is motivated by a Decisional Participant's financial, commercial or political interests, or those of one or more of its constituents, (ii) relates to documents that are not reasonably related to the purpose specified in the Inspection Request or the Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community), (iii) requests identical records provided in a prior request of such Decisional Participant, (iv) is not within the Permitted Scope, (v) relates to personnel records, (vi) relates to documents or communications covered by attorney-client privilege, work product doctrine or other legal privilege or (vii) relates to documents or communications that ICANN (Internet Corporation for Assigned Names and Numbers) may not make available under applicable law because such documents or communications contain confidential information that ICANN (Internet Corporation for Assigned Names and Numbers) is required to protect. If an Inspection Request is overly broad, ICANN (Internet Corporation for Assigned Names and Numbers) may request a revised Inspection Request from the Inspecting Decisional Participant.

(c) Any such inspections shall be conducted at the times and locations reasonably determined by ICANN (Internet Corporation for Assigned Names and Numbers) and shall not be conducted in a manner that unreasonably interferes with ICANN (Internet Corporation for Assigned Names and Numbers)'s operations. All such inspections shall be subject to reasonable procedures established by ICANN (Internet Corporation for Assigned Names and Numbers), including, without limitation, the number of individuals authorized to conduct any

such inspection on behalf of the Inspecting Decisional Participant. ICANN (Internet Corporation for Assigned Names and Numbers) may require the inspectors to sign a non-disclosure agreement. The Inspecting Decisional Participant may, at its own cost, copy or otherwise reproduce or make a record of materials inspected. ICANN (Internet Corporation for Assigned Names and Numbers) may redact or determine not to provide requested materials on the same basis that such information is of a category or type described in Section 22.7(b), in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Inspecting Decisional Participant a written rationale for such redactions or determination.

(d) The inspection rights provided to the Decisional Participants pursuant to this Section 22.7 are granted to the Decisional Participants and are not granted or available to any other person or entity. Notwithstanding the foregoing, nothing in this Section 22.7 shall be construed as limiting the accessibility of ICANN (Internet Corporation for Assigned Names and Numbers)'s document information disclosure policy ("**DIDP**").

(e) If the Inspecting Decisional Participant believes that ICANN (Internet Corporation for Assigned Names and Numbers) has violated the provisions of this Section 22.7, the Inspecting Decisional Participant may seek one or more of the following remedies: (i) appeal such matter to the Ombudsman and/or the Board for a ruling on the matter, (ii) initiate the Reconsideration Request process in accordance with Section 4.2, (iii) initiate the Independent Review Process in accordance with Section 4.3, or (iv) petition the EC (Empowered Community) to initiate (A) a Community IRP pursuant to Section 4.2 of Annex D or (B) a Board Recall Process pursuant to Section 3.3 of Annex D. Any determination by the Ombudsman is not binding on ICANN (Internet Corporation for Assigned Names and Numbers) staff, but may be submitted by the Inspecting Decisional Participant when appealing to the Board for a determination, if necessary.

Section 22.8. INDEPENDENT INVESTIGATION

If three or more Decisional Participants deliver to the Secretary a joint written certification from the respective chairs of each such Decisional Participant that the constituents of such Decisional Participants have, pursuant to the internal procedures of such Decisional Participants, determined that there is a credible allegation that ICANN (Internet Corporation for Assigned Names and Numbers) has committed fraud or that there has been a gross mismanagement of ICANN (Internet Corporation for Assigned Names and Numbers)'s resources, ICANN (Internet Corporation for Assigned Names and Numbers) shall retain a third-party, independent firm to investigate such alleged fraudulent activity or gross mismanagement. ICANN (Internet Corporation for Assigned Names and

Numbers) shall post all such certifications to the Website. The independent firm shall issue a report to the Board. The Board shall consider the recommendations and findings set forth in such report. Such report shall be posted on the Website, which may be in a redacted form as determined by the Board, in order to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential, in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Decisional Participants that submitted the certification a written rationale for such redactions.

ARTICLE 23 MEMBERS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not have members, as contemplated by Section 5310 of the CCC, notwithstanding the use of the term "member" in these Bylaws, in any ICANN (Internet Corporation for Assigned Names and Numbers) document, or in any action of the Board or staff. For the avoidance of doubt, the EC (Empowered Community) is not a member of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 24 OFFICES AND SEAL

Section 24.1. OFFICES

The principal office for the transaction of the business of ICANN (Internet Corporation for Assigned Names and Numbers) shall be in the County of Los Angeles, State of California, United States of America. ICANN (Internet Corporation for Assigned Names and Numbers) may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

Section 24.2. SEAL

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

ARTICLE 25 AMENDMENTS

Section 25.1. AMENDMENTS TO THE STANDARD BYLAWS

(a) Except as otherwise provided in the Articles of Incorporation or these Bylaws, these Bylaws may be altered, amended, or repealed and new Bylaws adopted only upon approval by a two-thirds vote of all Directors and in compliance with the terms of this Section 25.1 (a "**Standard Bylaw Amendment**").

(b) Prior to approval of a Standard Bylaw Amendment by the Board, a draft of the Standard Bylaw Amendment shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Standard Bylaw Amendment and may conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of a Standard Bylaw Amendment ("**Standard Bylaw Amendment Approval**"), the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and the Board's rationale for adopting such amendment, and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 2 of Annex D shall then be followed.

(e) A Standard Bylaw Amendment shall become effective upon the earliest to occur of the following:

(i) (A) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the 30th day following the Rejection Action Board Notification Date relating to such Standard Bylaw Amendment Approval and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(ii) (A) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered

Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; or

(iii) (A) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(f) If an EC (Empowered Community) Rejection Notice is timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and compliance with Section 2.4 of Annex D, the Standard Bylaw Amendment contained in the Board Notice shall be deemed to have been rejected by the EC (Empowered Community). A Standard Bylaw Amendment that has been rejected by the EC (Empowered Community) shall be null and void and shall not become part of these Bylaws, notwithstanding its approval by the Board.

(g) The Secretary shall promptly inform the Board of the receipt and substance of any Rejection Action Petition, Rejection Action Supported Petition or EC (Empowered Community) Rejection Notice delivered by the Rejection Action Petitioning Decisional Participant or the EC (Empowered Community) Administration, as applicable, to the Secretary hereunder.

(h) Following receipt of an EC (Empowered Community) Rejection Notice pertaining to a Standard Bylaw Amendment, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Standard Bylaw

Amendment in determining whether or not to develop a new Standard Bylaw Amendment and the substance of such new Standard Bylaw Amendment, which shall be subject to the procedures of this Section 25.1.

Section 25.2. AMENDMENTS TO THE FUNDAMENTAL BYLAWS AND ARTICLES OF INCORPORATION

(a) Article 1; Sections 4.2, 4.3 and 4.7; Article 6; Sections 7.1 through 7.5, inclusive, and Sections 7.8, 7.11, 7.12, 7.17, 7.24 and 7.25; those portions of Sections 8.1, 9.2(b), 10.3(i), 11.3(f) and 12.2(d)(x)(A) relating to the provision to the EC (Empowered Community) of nominations of Directors by the nominating body, Articles 16, 17, 18 and 19, Sections 22.4, 22.5, 22.7 and 22.8, Article 26, Section 27.1; Annexes D, E and F; and this Article 25 are each a "**Fundamental Bylaw**" and, collectively, are the "**Fundamental Bylaws**".

(b) Notwithstanding any other provision of these Bylaws, a Fundamental Bylaw or the Articles of Incorporation may be altered, amended, or repealed (a "**Fundamental Bylaw Amendment**" or an "**Articles Amendment**"), only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Section 25.2.

(c) Prior to approval of a Fundamental Bylaw Amendment, or an Articles Amendment by the Board, a draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(e) Within seven days after the Board's approval of a Fundamental Bylaw Amendment or Articles Amendment, as applicable, the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(f) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice (as defined in Section 1.4(b) of Annex D), the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and, as applicable, (i) such Fundamental Bylaw Amendment shall be in full force and effect as part of these Bylaws as of the date immediately following the Secretary's receipt of the EC (Empowered Community) Approval Notice; or (ii) the Secretary shall cause such Articles Amendment promptly to be certified by the appropriate officers of ICANN (Internet Corporation for Assigned Names and Numbers) and filed with the California Secretary of State. In the event of such approval, neither the Fundamental Bylaw Amendment nor the Articles Amendment shall be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(g) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, the Fundamental Bylaw Amendment shall not be part of these Bylaws and the Articles Amendment shall not be filed with the Secretary of State.

(h) If a Fundamental Bylaw Amendment or Articles Amendment, as applicable, is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to develop a new Fundamental Bylaws Amendment or Articles Amendment, as applicable, and the substance thereof, which shall be subject to the procedures of this Section 25.2.

Section 25.3. AMENDMENTS RESULTING FROM A POLICY DEVELOPMENT PROCESS

The Board shall not combine an amendment of these Bylaws that was the result of a policy development process of a Supporting Organization (Supporting Organization) (a "**PDP (Policy Development Process) Amendment**") with any other amendment. The Board shall indicate in the applicable Board Notice whether such amendment is a PDP (Policy Development Process) Amendment.

Section 25.4. OTHER AMENDMENTS

For the avoidance of doubt, these Bylaws can only be amended as set forth in this Article 25. Neither the EC (Empowered Community), the Decisional Participants, the Supporting Organizations (Supporting Organizations), the Advisory Committees (Advisory Committees) nor any other entity or person shall have the power to directly propose amendments to these Bylaws.

ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) may consummate a transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN (Internet Corporation for Assigned Names and Numbers)'s assets (an "**Asset Sale**") only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Article 26.

(b) Prior to approval of an Asset Sale by the Board, a draft of the definitive Asset Sale agreement (an "**Asset Sale Agreement**"), shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Asset Sale Agreement, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of an Asset Sale the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the Asset Sale Agreement and (ii) post the Board Notice on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(e) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice for the Asset Sale pursuant to and in compliance with the procedures and requirements of Section 1.4(b) of Annex D, the Asset Sale set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and the Asset Sale may be consummated by ICANN (Internet Corporation for Assigned Names and Numbers), but only under the terms set forth in the Asset Sale Agreement. In the event of such approval, the

Asset Sale shall not be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(f) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Asset Sale set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) shall not consummate the Asset Sale.

(g) If an Asset Sale is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to consider a new Asset Sale, and the substance thereof, which shall be subject to the procedures of this Article 26.

ARTICLE 27 TRANSITION ARTICLE

Section 27.1. WORK STREAM 2

(a) The Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability ("**CCWG-Accountability**") was established pursuant to a charter dated 3 November 2014 ("**CCWG-Accountability Charter**"). The CCWG-Accountability Charter was subsequently adopted by the GNSO (Generic Names Supporting Organization), ALAC (At-Large Advisory Committee), ccNSO (Country Code Names Supporting Organization), GAC (Governmental Advisory Committee), ASO (Address Supporting Organization) and SSAC (Security and Stability Advisory Committee) ("**CCWG Chartering Organizations**"). The CCWG-Accountability Charter as in effect on 3 November 2014 shall remain in effect throughout Work Stream 2 (as defined therein).

(b) The CCWG-Accountability recommended in its Supplemental Final Proposal on Work Stream 1 Recommendations to the Board, dated 23 February 2016 ("**CCWG-Accountability Final Report**") that the below matters be reviewed and developed following the adoption date of these Bylaws ("**Work Stream 2 Matters**"), in each case, to the extent set forth in the CCWG-Accountability Final Report:

(i) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s standards for diversity at all levels;

- (ii) ICANN (Internet Corporation for Assigned Names and Numbers) staff accountability;
- (iii) Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;
- (iv) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency, focusing on enhancements to ICANN (Internet Corporation for Assigned Names and Numbers)'s existing DIDP, transparency of ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with governments, improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s whistleblower policy and transparency of Board deliberations;
- (v) Developing and clarifying the FOI-HR (as defined in Section 27.2);
- (vi) Addressing jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability;
- (vii) Considering enhancements to the Ombudsman's role and function;
- (viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual Directors; and
- (ix) Reviewing the CEP (as set forth in Section 4.3).

(c) As provided in the CCWG-Accountability Charter and the Board's 2014.10.16.16 resolution, the Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters ("**Work Stream 2 Recommendations**") with the same process and criteria it committed to using to consider the CCWG-Accountability recommendations in the CCWG-Accountability Final Report ("**Work Stream 1 Recommendations**"). For the avoidance of doubt, that process and criteria includes:

- (i) All Work Stream 2 Recommendations must further the following principles:
 - (A) Support and enhance the multistakeholder model;

(B) Maintain the security, stability and resiliency of the DNS (Domain Name System);

(C) Meet the needs and expectations of the global customers and partners of the IANA (Internet Assigned Numbers Authority) services;

(D) Maintain the openness of the Internet; and

(E) Not result in ICANN (Internet Corporation for Assigned Names and Numbers) becoming a government-led or an inter-governmental organization.

(ii) If the Board determines, by a vote of a two-thirds majority of the Board, that it is not in the global public interest to implement a Work Stream 2 Recommendation, it must initiate a dialogue with the CCWG-Accountability.

(iii) The Board shall provide detailed rationale to accompany the initiation of dialogue. The Board and the CCWG-Accountability shall mutually agree upon the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. Discussions shall be held in good faith and in a timely and efficient manner in an effort to find a mutually acceptable solution.

(iv) The CCWG-Accountability shall have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG-Accountability shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.

If a Work Stream 2 Recommendation is modified by the CCWG-Accountability, the CCWG-Accountability shall submit the modified Work Stream 2 Recommendation to the Board for further consideration along with detailed rationale on how the modification addresses the concerns raised by the Board.

(v) If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2

Recommendation until such time as the CCWG-Accountability and the Board reach agreement.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide adequate support for work on Work Stream 2 Matters, within budgeting processes and limitations reasonably acceptable to the CCWG-Accountability.

(e) The Work Stream 2 Matters specifically referenced in Section 27.1(b) shall be the only matters subject to this Section 27.1 and any other accountability enhancements should be developed through ICANN (Internet Corporation for Assigned Names and Numbers)'s other procedures.

(f) The outcomes of each Work Stream 2 Matter are not limited and could include a variety of recommendations or no recommendation; provided, however, that any resulting recommendations must directly relate to the matters discussed in Section 27.1(b).

Section 27.2. HUMAN RIGHTS

(a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("**FOI-HR**") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations.>

(b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN (Internet Corporation for Assigned Names and Numbers) or the Board that occurred prior to the effectiveness of the FOI-HR.

Section 27.3. EXISTING GROUPS AND TASK FORCES

Notwithstanding the adoption or effectiveness of these Bylaws, task forces and other groups in existence prior to the date of these Bylaws shall continue unchanged in membership, scope, and operation unless and until changes are made by ICANN (Internet Corporation for Assigned Names and Numbers) in compliance with the Bylaws.

Section 27.4. CONTRACTS WITH ICANN (Internet Corporation for Assigned Names and Numbers)

Notwithstanding the adoption or effectiveness of these Bylaws, all agreements, including employment and consulting agreements, entered into by ICANN (Internet Corporation for Assigned Names and Numbers) shall continue in effect according to their terms.

Annex A: GNSO (Generic Names Supporting Organization) Policy Development Process

The following process shall govern the GNSO (Generic Names Supporting Organization) policy development process ("**PDP (Policy Development Process)**") until such time as modifications are recommended to and approved by the Board. The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are not intended to result in a Consensus (Consensus) Policy, the Council may act through other processes.

Section 1. Required Elements of a Policy Development Process

The following elements are required at a minimum to form Consensus (Consensus) Policies as defined within ICANN (Internet Corporation for Assigned Names and Numbers) contracts, and any other policies for which the GNSO (Generic Names Supporting Organization) Council requests application of this Annex A:

- a. Final Issue Report requested by the Board, the GNSO (Generic Names Supporting Organization) Council ("Council") or Advisory Committee (Advisory Committee), which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the issue, and c) how that party is affected by the issue;
- b. Formal initiation of the Policy Development Process by the Council;
- c. Formation of a Working Group or other designated work method;
- d. Initial Report produced by a Working Group or other designated work method;
- e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;

- f. Council approval of PDP (Policy Development Process) Recommendations contained in the Final Report, by the required thresholds;
- g. PDP (Policy Development Process) Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
- h. Board approval of PDP (Policy Development Process) Recommendations.

Section 2. **Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a Policy Development Process Manual ("**PDP (Policy Development Process) Manual**") within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The PDP (Policy Development Process) Manual shall contain specific additional guidance on completion of all elements of a PDP (Policy Development Process), including those elements that are not otherwise defined in these Bylaws. The PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. **Requesting an Issue Report**

Board Request. The Board may request an Issue Report by instructing the GNSO (Generic Names Supporting Organization) Council ("Council") to begin the process outlined the PDP (Policy Development Process) Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

Council Request. The GNSO (Generic Names Supporting Organization) Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

Advisory Committee (Advisory Committee) Request. An Advisory Committee (Advisory Committee) may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSO (Generic Names Supporting Organization) Council.

Section 4. **Creation of an Issue Report**

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO (Generic Names Supporting Organization) Council; or (iii) a properly supported motion from an Advisory Committee (Advisory Committee), the Staff Manager will create a report (a "**Preliminary Issue Report**"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the request for the Issue Report;
- c. How that party is affected by the issue, if known;
- d. Support for the issue to initiate the PDP (Policy Development Process), if known;
- e. The opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization) as set forth in the Bylaws.
- f. The opinion of ICANN (Internet Corporation for Assigned Names and Numbers) Staff as to whether the Council should initiate the PDP (Policy Development Process) on the issue.

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the Website for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO (Generic Names Supporting Organization) Council for consideration for initiation of a PDP (Policy Development Process).

Section 5. **Initiation of the PDP (Policy Development Process)**

The Council may initiate the PDP (Policy Development Process) as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP (Policy Development Process) Manual, shall initiate a PDP (Policy Development Process). No vote is required for such action.

GNSO (Generic Names Supporting Organization) Council or Advisory Committee (Advisory Committee) Requests: The Council may only initiate the PDP (Policy Development Process) by a vote of the Council. Initiation of a PDP (Policy Development Process) requires a vote as set forth in Section 11.3(i)(ii) and Section 11.3(i)(iii) in favor of initiating the PDP (Policy Development Process).

Section 6. Reports

An Initial Report should be delivered to the GNSO (Generic Names Supporting Organization) Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), which time may be extended in accordance with the PDP (Policy Development Process) Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

Section 7. Council Deliberation

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

The Council approval process is set forth in Section 11.3(i)(iv) through Section 11.3(vii), as supplemented by the PDP (Policy Development Process) Manual.

Section 8. Preparation of the Board Report

If the PDP (Policy Development Process) recommendations contained in the Final Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 9. Board Approval Processes

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Council recommendation as soon as feasible, but preferably not

later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the PDP (Policy Development Process) Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO (Generic Names Supporting Organization) Supermajority Vote or less than a GNSO (Generic Names Supporting Organization) Supermajority vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "**Supplemental Recommendation**") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers)

community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 10. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO (Generic Names Supporting Organization) Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

Section 11. **Maintenance of Records**

Throughout the PDP (Policy Development Process), from policy suggestion to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each PDP (Policy Development Process) issue. Such status page will outline the completed and upcoming steps in the PDP (Policy Development Process) process, and contain links to key resources (e.g. Reports, Comments Fora, WG (Working Group) Discussions, etc.).

Section 12. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the PDP (Policy Development Process) will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO (Generic Names Supporting Organization) Council.

"Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the PDP (Policy Development Process).

"GNSO (Generic Names Supporting Organization) Supermajority Vote" shall have the meaning set forth in the Bylaws.

Section 13. **Applicability**

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP (Policy Development Process). If the Council determines that any ongoing PDP (Policy Development Process) cannot be feasibly transitioned to these updated procedures, the PDP (Policy Development Process) shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

Annex A-1: GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following process shall govern the specific instances where the GNSO (Generic Names Supporting Organization) Council invokes the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process ("EPDP"). The GNSO (Generic Names Supporting Organization) Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP (Policy Development Process) that was not initiated; (b) as part of a previous PDP (Policy Development Process) that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the Board. Where a conflict arises in relation to an EPDP between the PDP (Policy Development Process) Manual (see Annex 2 of the GNSO (Generic Names Supporting Organization) Operating Procedures) and the procedures described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus (Consensus) Policy;

however, in all cases where the GNSO (Generic Names Supporting Organization) is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following elements are required at a minimum to develop expedited GNSO (Generic Names Supporting Organization) policy recommendations, including recommendations that could result in amendments to an existing Consensus (Consensus) Policy, as part of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process:

- a. Formal initiation of the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process by the GNSO (Generic Names Supporting Organization) Council, including an EPDP scoping document;
- b. Formation of an EPDP Team or other designated work method;
- c. Initial Report produced by an EPDP Team or other designated work method;
- d. Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;
- e. GNSO (Generic Names Supporting Organization) Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f. EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g. Board approval of EPDP Recommendation(s).

Section 2. Expedited Policy Development Process Manual

The GNSO (Generic Names Supporting Organization) shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO (Generic Names Supporting Organization) Policy Development Process Manual (PDP (Policy Development Process) Manual), described in Annex 5 of the GNSO (Generic Names Supporting Organization) Operating Procedures. The EPDP Manual shall contain specific additional guidance on completion of all elements of

an EPDP, including those elements that are not otherwise defined in these Bylaws. The E PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d) .

Section 3. **Initiation of the EPDP**

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in Section 11.3(i)(xii) of these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C;
2. Origin of issue (e.g. previously completed PDP (Policy Development Process));
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO (Generic Names Supporting Organization) policy issue that had been scoped previously as part of a PDP (Policy Development Process) that was not completed or other similar effort, including relevant supporting information in either case;
5. If not provided as part of item 4, the opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel as to whether the issue proposed for consideration is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization);
6. Proposed EPDP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers);
7. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;

8. Decision-making methodology for EPDP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
9. Target completion date.

Section 4. **Council Deliberation**

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in Section 11.3(i)(xiv) and (xv), as supplemented by the PDP (Policy Development Process) Manual.

Section 5. **Preparation of the Board Report**

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendation(s) Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any EPDP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of

the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. Implementation of Approved Policies

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the EPDP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

Section 9. **Applicability**

The procedures of this Annex A-1 shall be applicable from 28 September 2015 onwards.

Annex A-2: GNSO (Generic Names Supporting Organization) Guidance Process

The following process shall govern the GNSO (Generic Names Supporting Organization) guidance process ("GGP") until such time as modifications are recommended to and approved by the Board . The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are intended to result in a Consensus (Consensus) Policy, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Guidance Process

The following elements are required at a minimum to develop GNSO (Generic Names Supporting Organization) guidance:

1. Formal initiation of the GNSO (Generic Names Supporting Organization) Guidance Process by the Council, including a GGP scoping document;
2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team or other designated work method;

5. Final GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s) Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
8. Board approval of GGP Recommendation(s).

Section 2. **GNSO (Generic Names Supporting Organization) Guidance Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a GNSO (Generic Names Supporting Organization) Guidance Process (GGP Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. **Initiation of the GGP**

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Initiation of a GGP requires a vote as set forth in Section 11.3(i)(xvi) in favor of initiating the GGP. In the case of a GGP requested by the Board, a GGP will automatically be initiated unless the GNSO (Generic Names Supporting Organization) Council votes against the initiation of a GGP as set forth in Section 11.3(i)(xvii).

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C
2. Origin of issue (e.g., board request)

3. Scope of the effort (detailed description of the issue or question that the GGP is expected to address)
4. Proposed GGP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers)
5. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
6. Decision-making methodology for GGP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
7. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

Section 4. Council Deliberation

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

The Council approval process is set forth in Section 11.3(xviii) as supplemented by the GGP Manual.

Section 5. Preparation of the Board Report

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. Board Approval Processes

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any GGP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO (Generic Names Supporting Organization) Guidance recommendation(s) adopted by a GNSO (Generic Names Supporting Organization) Supermajority Vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. Implementation of Approved GNSO (Generic Names Supporting Organization) Guidance

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the GNSO (Generic Names Supporting Organization) Guidance. If deemed necessary, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to work

with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the GGP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

Section 9. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments Fora" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the GGP will be posted.

"GGP Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the GGP.

Annex B: ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP)

The following process shall govern the ccNSO (Country Code Names Supporting Organization) policy-development process ("PDP (Policy Development Process)").

1. Request for an Issue Report

An Issue Report may be requested by any of the following:

- a. *Council.* The ccNSO (Country Code Names Supporting Organization) Council (in this Annex B, the **"Council"**) may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting by e-mail.
- b. *Board.* The Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.
- c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN (Internet Corporation for Assigned

Names and Numbers) recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

- d. ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee). An ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or an ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committee (Advisory Committee) may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- e. Members of the ccNSO (Country Code Names Supporting Organization). The members of the ccNSO (Country Code Names Supporting Organization) may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO (Country Code Names Supporting Organization) present at any meeting or voting by e-mail.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation for the purpose of determining whether or not the requested Issue Report should be created.

2. Creation of the Issue Report and Initiation Threshold

Within seven days after an affirmative vote as outlined in Item 1(a) above or the receipt of a request as outlined in Items 1 (b), (c), or (d) above the Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (Internet Corporation for Assigned Names and Numbers) (in which case the costs of the Issue Manager shall be borne by ICANN (Internet Corporation for Assigned Names and Numbers)) or such other person or persons selected by the Council (in which case the ccNSO (Country Code Names Supporting Organization) shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the issue;

- c. How that party is affected by the issue;
- d. Support for the issue to initiate the PDP (Policy Development Process);
- e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP (Policy Development Process) for this issue (the "**Manager Recommendation**"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) policy process and within the scope of the ccNSO (Country Code Names Supporting Organization). In coming to his or her opinion, the General Counsel shall examine whether:
 - 1) The issue is within the scope of the Mission;
 - 2) Analysis of the relevant factors according to Section 10.6(b) and Annex C affirmatively demonstrates that the issue is within the scope of the ccNSO (Country Code Names Supporting Organization);

In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:

- 3) Implicates or affects an existing ICANN (Internet Corporation for Assigned Names and Numbers) policy;
- 4) Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this Annex B) or to the scope of the ccNSO (Country Code Names Supporting Organization) (Annex C) shall be within the scope of ICANN (Internet Corporation for Assigned Names and Numbers) and the ccNSO (Country Code Names Supporting Organization).

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO (Country Code Names Supporting Organization) Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Section 10.6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO (Country Code Names Supporting Organization) shall inform the Issue Manager

accordingly. General Counsel and the ccNSO (Country Code Names Supporting Organization) Council shall engage in a dialogue according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO (Country Code Names Supporting Organization) then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSO (Country Code Names Supporting Organization) shall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP (Policy Development Process) including both the opinion and analysis of General Counsel and Council in the Issues Report.

f. In the event that the Manager Recommendation is in favor of initiating the PDP (Policy Development Process), a proposed time line for conducting each of the stages of PDP (Policy Development Process) outlined herein ("**PDP (Policy Development Process) Time Line**").

g. g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty. Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP (Policy Development Process).

3. Initiation of PDP (Policy Development Process)

The Council shall decide whether to initiate the PDP (Policy Development Process) as follows:

- a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP (Policy Development Process). Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.
- b. A vote of ten or more Council members in favor of initiating the PDP (Policy Development Process) shall be required to initiate the PDP (Policy Development Process) provided that the Issue Report states that the issue is properly within the scope of the Mission and the ccNSO (Country Code Names Supporting Organization) Scope.

4. Decision Whether to Appoint Task Force; Establishment of Time Line

At the meeting of the Council where the PDP (Policy Development Process) has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

- a. In favor of convening a task force, it shall do so in accordance with Item 7 below.
- b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP (Policy Development Process) Time Line set out in the Issue Report.

5. Composition and Selection of Task Forces

- a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see Section 10.5) to appoint two individuals to participate in the task force (the "**Representatives**"). Additionally, the Council may appoint up to three advisors (the "**Advisors**") from outside the ccNSO (Country Code Names Supporting Organization) and, following formal request for GAC (Governmental Advisory Committee) participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee (Advisory Committee) to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.
- b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.
- c. The Council may also pursue other actions that it deems appropriate to assist in the PDP (Policy Development Process), including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP (Policy Development Process) Time Line.

6. Public Notification of Initiation of the PDP (Policy Development Process) and Comment Period

After initiation of the PDP (Policy Development Process), ICANN (Internet Corporation for Assigned Names and Numbers) shall post a notification of such action to the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. The Issue Manager, or some other designated Council representative shall review the comments and incorporate them into a report (the "**Comment Report**") to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

7. Task Forces

a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO (Country Code Names Supporting Organization) members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the "**Charter**") within the time designated in the PDP (Policy Development Process) Time Line. Such Charter shall include:

1. The issue to be addressed by the task force, as such issue was articulated for the vote before the Council that initiated the PDP (Policy Development Process);
2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and

3. Any specific instructions from the Council for the task force, including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of Section 10.3(n) shall apply to Council actions under this Item 7(b).

c. Appointment of Task Force Chair. The Issue Manager shall convene the first meeting of the task force within the time designated in the PDP (Policy Development Process) Time Line. At the initial meeting, the task force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. Collection of Information.

1. Regional Organization Statements. The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the ccNSO (Country Code Names Supporting Organization) members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a "**Regional Statement**") within the time designated in the PDP (Policy Development Process) Time Line. Every Regional Statement shall include at least the following:

- (i) If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;
- (ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;
- (iii) A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) A statement of the position on the issue of any ccNSO (Country Code Names Supporting Organization) members that are not members of the Regional Organization;

(v) An analysis of how the issue would affect the Region, including any financial impact on the Region; and

(vi) An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP (Policy Development Process) Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("**Preliminary Task Force Report**") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP (Policy Development Process) Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "**Task Force Report**") and post it on the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). Each Task Force Report must include:

1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;
3. An analysis of how the issue would affect each Region, including any financial impact on the Region;

4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

8. Procedure if No Task Force is Formed

- a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP (Policy Development Process) Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- b. The Council may, in its discretion, take other steps to assist in the PDP (Policy Development Process), including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- c. The Council shall formally request the Chair of the GAC (Governmental Advisory Committee) to offer opinion or advice.
- d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP (Policy Development Process) Time Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

9. Comments to the Task Force Report or Initial Report

- a. A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.
- b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable

discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "**Final Report**". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

- c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP (Policy Development Process) Time Line.

10. Council Deliberation

- a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP (Policy Development Process) Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC (Governmental Advisory Committee) Chair an invitation to the GAC (Governmental Advisory Committee) to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.
- b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.
- c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

11. Recommendation of the Council

In considering whether to make a recommendation on the issue (a "**Council Recommendation**"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all

viewpoints expressed by Council members during the PDP (Policy Development Process) must be included in the Members Report.

12. Council Report to the Members

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "**Members Report**"). The Members Report must contain at least the following:

- a. A clear statement of the Council's recommendation;
- b. The Final Report submitted to the Council; and
- c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP (Policy Development Process) Time Line, the ccNSO (Country Code Names Supporting Organization) members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP (Policy Development Process) Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO (Country Code Names Supporting Organization) members, will be employed if at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO (Country Code Names Supporting Organization) Recommendation.

14. Board Report

The Issue Manager shall within seven days after a ccNSO (Country Code Names Supporting Organization) Recommendation being made in accordance with Item 13 incorporate the ccNSO (Country Code Names Supporting Organization) Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "**Board Report**"). The Board Report must contain at least the following:

- a. A clear statement of the ccNSO (Country Code Names Supporting Organization) recommendation;
- b. The Final Report submitted to the Council; and
- c. the Members' Report.

15. Board Vote

a. The Board shall meet to discuss the ccNSO (Country Code Names Supporting Organization) Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

b. The Board shall adopt the ccNSO (Country Code Names Supporting Organization) Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or of ICANN (Internet Corporation for Assigned Names and Numbers).

1. In the event that the Board determines not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to

reflect the view of the Council (the Council's "**Supplemental Recommendation**"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13 . In the event that more than 66% of the votes cast by ccNSO (Country Code Names Supporting Organization) Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.

4. In the event that the Board does not accept the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("**Supplemental Board Statement**").
5. In the event the Board determines not to accept a ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO (Country Code Names Supporting Organization) shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

16. Implementation of the Policy

Upon adoption by the Board of a ccNSO (Country Code Names Supporting Organization) Recommendation or ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the policy.

17. Maintenance of Records

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

- a. Issue Report;
- b. PDP (Policy Development Process) Time Line;
- c. Comment Report;
- d. Regional Statement(s);
- e. Preliminary Task Force Report;
- f. Task Force Report;
- g. Initial Report;
- h. Final Report;
- i. Members' Report;
- j. Board Report;
- k. Board Statement;
- l. Supplemental Members' Report; and
- m. Supplemental Board Statement.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

Annex C: The Scope of the ccNSO (Country Code Names Supporting Organization)

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role. As provided in Section 10.6(b) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO (Country Code Names Supporting Organization)'s authority and responsibilities must recognize the complex relation between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers/registries with regard to policy issues. This annex shall assist the ccNSO (Country Code Names Supporting Organization), the ccNSO (Country Code Names Supporting Organization) Council, and the Board and staff in delineating relevant global policy issues.

Policy areas

The ccNSO (Country Code Names Supporting Organization)'s policy role should be based on an analysis of the following functional model of the DNS (Domain Name System):

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD (Top Level Domain) name servers.

Within a **TLD (Top Level Domain)** two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database ("**Data Entry Function**") and
2. Maintaining and ensuring upkeep of name-servers for the TLD (Top Level Domain) ("**Name Server Function**").

These two core functions must be performed at the ccTLD (Country Code Top Level Domain) registry level as well as at a higher level (IANA (Internet Assigned Numbers Authority) function and root servers) and at lower levels of the DNS (Domain Name System) hierarchy. This mechanism, as RFC (Request for Comments) 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

The Core Functions

1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

- a. under which data will be collected and entered into a database or data changed (at the TLD (Top Level Domain) level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.
- b. for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

2. The Name-Server Function (NSF (National Science Foundation (USA)))

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD (Country Code Top Level Domain) level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD (Country Code Top Level Domain) registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC (Request for Comments) 1591.

Respective Roles with Regard to Policy, Responsibilities, and Accountabilities

It is in the interest of ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers to ensure the stable and proper functioning of the domain name system. ICANN (Internet Corporation for Assigned Names and Numbers) and the ccTLD (Country Code Top Level Domain) registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO (Country Code Names Supporting Organization) cannot be established without reaching a common understanding of the allocation of authority between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this

presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to be defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO (Country Code Names Supporting Organization) with regard to developing policies. The scope is limited to the policy role of the ccNSO (Country Code Names Supporting Organization) policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

Name Server Function (as to ccTLDs)

Level 1: Root Name Servers

Policy role: IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: Root Server System Operators

Accountability role: RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Level 2: ccTLD (Country Code Top Level Domain) Registry Name Servers in respect to interoperability

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers)), for best practices a ccNSO (Country Code Names Supporting Organization) process can be organized

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: part ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority)), part Local Internet Community, including local government

Level 3: User's Name Servers

Policy role: ccTLD (Country Code Top Level Domain) Manager, IETF (Internet Engineering Task Force) (RFC (Request for Comments))

Executive role: Registrant (Registrant)

Accountability role: ccTLD (Country Code Top Level Domain) Manager

Data Entry Function (as to ccTLDs)

Level 1: Root Level Registry

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority))

Accountability role: ICANN (Internet Corporation for Assigned Names and Numbers) community, ccTLD (Country Code Top Level Domain) Managers, (national authorities in some cases)

Level 2: ccTLD (Country Code Top Level Domain) Registry

Policy role: Local Internet Community, including local government, and/or ccTLD (Country Code Top Level Domain) Manager according to local structure

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: Local Internet Community, including national authorities in some cases

Level 3: Second and Lower Levels

Policy role: Registrant (Registrant)

Executive role: Registrant (Registrant)

Accountability role: Registrant (Registrant), users of lower-level domain names

ANNEX D: EC (Empowered Community) MECHANISM

ARTICLE 1 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO APPROVE APPROVAL ACTIONS

Section 1.1. APPROVAL ACTIONS

The processes set forth in this Article 1 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to approve the following (each, an "**Approval Action**") under the Bylaws:

- a. Fundamental Bylaw Amendments, as contemplated by Section 25.2 of the Bylaws;
- b. Articles Amendments, as contemplated by Section 25.2 of the Bylaws; and
- c. Asset Sales, as contemplated by Article 26 of the Bylaws.

Section 1.2. APPROVAL PROCESS

Following the delivery of a Board Notice for an Approval Action ("**Approval Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and the Decisional Participants (which delivery date shall be referred to herein as the "**Approval Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Approval Action Board Notice. Any Approval Action Board Notice relating to a Fundamental Bylaw Amendment or Articles Amendment shall include a statement, if applicable, that the Fundamental Bylaw Amendment or Articles Amendment, as applicable, is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Fundamental Bylaw Amendment or Articles Amendment subject to the Approval Action Board Notice that implements such PDP (Policy Development Process) (as applicable, a "**PDP (Policy Development Process) Fundamental Bylaw Statement**" or "**PDP (Policy Development Process) Articles Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Fundamental Bylaw Amendment or Articles Amendment, as applicable (as applicable, the "**Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant**" or "**Articles Amendment PDP (Policy Development Process) Decisional Participant**"). The process set forth in this Section 1.2 of this Annex D as it relates to a particular Approval Action is referred to herein as the "**Approval Process.**"

Section 1.3. APPROVAL ACTION COMMUNITY FORUM

- a. ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Approval Action (an "**Approval Action Community Forum**").
- b. If the EC (Empowered Community) Administration requests a publicly-available conference call by providing a notice to the Secretary, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Approval Action Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- c. The Approval Action Community Forum shall be convened and concluded during the period beginning upon the Approval Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s

principal office) on the 30th day after the Approval Action Board Notification Date ("**Approval Action Community Forum Period**"). If the EC (Empowered Community) Administration requests that the Approval Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the Approval Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the EC (Empowered Community) Administration. If the Approval Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the Approval Action Board Notification Date, the Approval Action Community Forum Period for the Approval Action shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

- d. The Approval Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Approval Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Approval Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Approval Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Approval Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and

questions on the Approval Action prior to the convening of and during the Approval Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Approval Action Community Forum in order to address any questions or concerns regarding the Approval Action.
- h. For the avoidance of doubt, the Approval Action Community Forum is not a decisional body.
- i. During the Approval Action Community Forum Period, an additional one or two Community Forums may be held at the discretion of the Board or the EC (Empowered Community) Administration. If the Board decides to hold an additional one or two Approval Action Community Forums, it shall provide a rationale for such decision, which rationale ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Approval Action Community Forum and shall promptly post on the Website a public record of the Approval Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Approval Action Community Forum.

Section 1.4. DECISION WHETHER TO APPROVE AN APPROVAL ACTION

(a) Following the expiration of the Approval Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Approval Action Community Forum Period (such period, the "**Approval Action Decision Period**"), with respect to each Approval Action, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Approval Action, (ii) objects to such Approval Action or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Approval Action), and each Decisional Participant

shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Approval Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Approval Action Decision Period).

(b) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver a written notice ("**EC (Empowered Community) Approval Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 1 of this Annex D, the EC (Empowered Community) has approved the Approval Action if:

(i) The Approval Action does not relate to a Fundamental Bylaw Amendment or Articles Amendment and is (A) supported by three or more Decisional Participants and (B) not objected to by more than one Decisional Participant;

(ii) The Approval Action relates to a Fundamental Bylaw Amendment and is (A) supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Fundamental Bylaw Statement) and (B) not objected to by more than one Decisional Participant; or

(iii) The Approval Action relates to an Articles Amendment and is (A) supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Articles Statement) and (B) not objected to by more than one Decisional Participant.

(c) If the Approval Action does not obtain the support required by Section 1.4(b) (i), (ii) or (iii) of this Annex D, as applicable, the Approval Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver to the Secretary a notice certifying that the Approval Process has been terminated with respect to the Approval Action ("**Approval Process Termination Notice**").

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Approval Action Board Notice, (ii) EC (Empowered Community) Approval Notice, (iii) Approval Process Termination Notice, (iv) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (v) other notices the Secretary receives under this Article 1.

ARTICLE 2 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REJECT SPECIFIED ACTIONS

Section 2.1. Rejection Actions

The processes set forth in this Article 2 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to reject the following (each, a "**Rejection Action**") under the Bylaws:

- a. PTI Governance Actions, as contemplated by Section 16.2(d) of the Bylaws;
- b. IFR Recommendation Decisions, as contemplated by Section 18.6(d) of the Bylaws;
- c. Special IFR Recommendation Decisions, as contemplated by Section 18.12(e) of the Bylaws;
- d. SCWG Creation Decisions, as contemplated by Section 19.1(d) of the Bylaws;
- e. SCWG Recommendation Decisions, as contemplated by Section 19.4(d) of the Bylaws;
- f. ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, as contemplated by Section 22.4(a)(v) of the Bylaws;
- g. IANA (Internet Assigned Numbers Authority) Budgets, as contemplated by Section 22.4(b)(v) of the Bylaws;
- h. Operating Plans, as contemplated by Section 22.5(a)(v) of the Bylaws;
- i. Strategic Plans, as contemplated by Section 22.5(b)(v) of the Bylaws; and
- j. Standard Bylaw Amendments, as contemplated by Section 25.1(e) of the Bylaws.

Section 2.2. PETITION PROCESS FOR SPECIFIED ACTIONS

(a) Following the delivery of a Board Notice for a Rejection Action ("**Rejection Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and Decisional Participants (which delivery date shall be referred to herein as the "**Rejection Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Rejection Action Board Notice. The process set forth in this Section 2.2 of this Annex D as it relates to a particular Rejection Action is referred to herein as the "**Rejection Process**."

(b) During the period beginning on the Rejection Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Rejection Action Board Notification Date (as it relates to a particular Rejection Action, the "**Rejection Action Petition Period**"), subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant, seeking to reject the Rejection Action and initiate the Rejection Process (a "**Rejection Action Petition**").

(c) A Decisional Participant that has received a Rejection Action Petition shall either accept or reject such Rejection Action Petition; provided that a Decisional Participant may only accept such Rejection Action Petition if it was received by such Decisional Participant during the Rejection Action Petition Period.

(i) If, in accordance with the requirements of Section 2.2(c) of this Annex D, a Decisional Participant accepts a Rejection Action Petition during the Rejection Action Petition Period, the Decisional Participant shall promptly provide to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary written notice ("**Rejection Action Petition Notice**") of such acceptance (such Decisional Participant, the "**Rejection Action Petitioning Decisional Participant**"), and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Petition Notice on the Website. The Rejection Action Petition Notice shall also include:

(A) the rationale upon which rejection of the Rejection Action is sought. Where the Rejection Action Petition Notice relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, an IANA (Internet Assigned Numbers Authority) Budget, an Operating Plan or a Strategic Plan, the Rejection Action Petition Notice shall not be valid and shall not be accepted by the EC (Empowered Community) Administration unless the rationale set forth in the Rejection Action Petition Notice is based on one or more significant issues that were specifically raised in the applicable public

comment period(s) relating to perceived inconsistencies with the Mission, purpose and role set forth in ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, the global public interest, the needs of ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders, financial stability, or other matter of concern to the community; and

(B) where the Rejection Action Petition Notice relates to a Standard Bylaw Amendment, a statement, if applicable, that the Standard Bylaw Amendment is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Standard Bylaw Amendment subject to the Board Notice that implements such PDP (Policy Development Process) ("**PDP (Policy Development Process) Standard Bylaw Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Standard Bylaw Amendment ("**Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant**").

The Rejection Process shall thereafter continue pursuant to Section 2.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Rejection Action Petition Notice pursuant to Section 2.2(c)(i) of this Annex D during the Rejection Action Petition Period, the Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Period, deliver to the Secretary a notice certifying that the Rejection Process has been terminated with respect to the Rejection Action contained in the Approval Notice ("**Rejection Process Termination Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Process Termination Notice on the Website.

(d) Following the delivery of a Rejection Action Petition Notice to the EC (Empowered Community) Administration pursuant to Section 2.2(c)(i) of this Annex D, the Rejection Action Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Rejection Action Petition. The Rejection Action Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Rejection Action Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Rejection Action Supporting Decisional Participant**") during the period beginning upon the expiration of the Rejection Action Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Rejection Action Petition Period (the "**Rejection Action Petition Support Period**"), the Rejection Action Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Rejection Action Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Rejection Action Supporting Decisional Participant, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Supported Petition on the Website. Each Rejection Action Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Rejection Action Petition, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post each such notice on the Website. Such Rejection Action Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Rejection Action Petitioning Decisional Participant who shall act as a liaison with respect to the Rejection Action Supported Petition;

(C) a statement as to whether or not the Rejection Action Petitioning Decisional Participant and/or the Rejection Action Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Rejection Action Community Forum (as defined in Section 2.3 of this Annex D) for the community to discuss the Rejection Action Supported Petition;

(D) a statement as to whether the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant have determined to hold the Rejection Action Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, taking into account the limitation on holding such a Rejection Action Community Forum when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and

Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget as described in Section 2.3(c) of this Annex D; and

(E) a PDP (Policy Development Process) Standard Bylaw Statement, if applicable.

The Rejection Process shall thereafter continue for such Rejection Action Supported Petition pursuant to Section 2.3 of this Annex D. The foregoing process may result in more than one Rejection Action Supported Petition relating to the same Rejection Action.

(ii) The Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Support Period, deliver to the Secretary a Rejection Process Termination Notice, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website, if:

(A) no Rejection Action Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Rejection Action Petition during the Rejection Action Petition Support Period; or

(B) where the Rejection Action Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Rejection Action Petitioning Decisional Participant or (y) one of the Rejection Action Supporting Decisional Participants.

Section 2.3. REJECTION ACTION COMMUNITY FORUM

- a. If the EC (Empowered Community) Administration receives a Rejection Action Supported Petition under Section 2.2(d) of this Annex D during the Rejection Action Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Rejection Action Supported Petition ("**Rejection Action Community Forum**"). If the EC (Empowered Community) Administration receives more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed at the same Rejection Action Community Forum.

- b. If a publicly-available conference call has been requested in a Rejection Action Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Rejection Action Community Forum relating to that Rejection Action Supported Petition, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. If a conference call has been requested in relation to more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed during the same conference call.
- c. The Rejection Action Community Forum shall be convened and concluded during the period beginning upon the expiration of the Rejection Action Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period ("**Rejection Action Community Forum Period**") unless all Rejection Action Supported Petitions relating to the same Rejection Action requested that the Rejection Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Rejection Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting (except as otherwise provided below with respect to a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget) on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Rejection Action Petitioning Decisional Participant(s) and the Rejection Action Supporting Decisional Participant(s). If the Rejection Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period, the Rejection Action Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting. Notwithstanding the

foregoing and notwithstanding any statement in the Rejection Action Supported Petition, a Rejection Action Community Forum to discuss a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget may only be held at a scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting if such Rejection Action Community Forum occurs during the Rejection Action Community Forum Period, without any extension of such Rejection Action Community Forum Period.

- d. The Rejection Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Rejection Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Rejection Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Rejection Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Rejection Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Rejection Action Supported Petition prior to the convening of and during the Rejection Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).
- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff (including the CFO when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, IANA (Internet Assigned Numbers Authority) Budget or Operating Plan) and Directors representing the Board are expected to attend the

Rejection Action Community Forum in order to address the concerns raised in the Rejection Action Supported Petition.

- h. If the Rejection Action Petitioning Decisional Participant and each of the Rejection Action Supporting Decisional Participants for an applicable Rejection Action Supported Petition agree before, during or after the Rejection Action Community Forum that the issue raised in such Rejection Action Supported Petition has been resolved, such Rejection Action Supported Petition shall be deemed withdrawn and the Rejection Process with respect to such Rejection Action Supported Petition will be terminated. If all Rejection Action Supported Petitions relating to a Rejection Action are withdrawn, the Rejection Process will automatically be terminated. If a Rejection Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Rejection Action Supported Petition, deliver to the Secretary a Rejection Process Termination Notice. For the avoidance of doubt, the Rejection Action Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant(s).
- i. During the Rejection Action Community Forum Period, an additional one or two Rejection Action Community Forums may be held at the discretion of a Rejection Action Petitioning Decisional Participant and a related Rejection Action Supporting Decisional Participant, or the EC (Empowered Community) Administration.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Rejection Action Community Forum and shall promptly post on the Website a public record of the Rejection Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Rejection Action Community Forum.

Section 2.4. DECISION WHETHER TO REJECT A REJECTION ACTION

- (a) Following the expiration of the Rejection Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Community Forum Period (such period, the "**Rejection Action Decision Period**"), with

respect to each Rejection Action Supported Petition, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Rejection Action Supported Petition and has determined to reject the Rejection Action, (ii) objects to such Rejection Action Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Rejection Action Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Rejection Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Rejection Action Decision Period).

(b) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Rejection Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 2 of Annex D, the EC (Empowered Community) has resolved to reject the Rejection Action if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if the Rejection Action Supported Petition included a GAC (Governmental Advisory Committee) Consensus (Consensus) Statement):

(i) A Rejection Action Supported Petition relating to a Rejection Action other than a Standard Bylaw Amendment is (A) supported by four or more Decisional Participants and (B) not objected to by more than one Decisional Participant; or

(ii) A Rejection Action Supported Petition relating to a Standard Bylaw Amendment that is (A) supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Rejection Action Supported Petition included a PDP (Policy Development Process) Standard Bylaw Statement) and (B) not objected to by more than one Decisional Participant.

(c) If no Rejection Action Supported Petition obtains the support required by Section 2.4(b)(i) or (ii) of this Annex D, as applicable, the Rejection Process will automatically be terminated and the EC (Empowered Community) Administration

shall, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, deliver to the Secretary a Rejection Process Termination Notice.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Rejection Action Board Notice, (ii) Rejection Action Petition, (iii) Rejection Action Petition Notice, (iv) Rejection Action Supported Petition, (v) EC (Empowered Community) Rejection Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Rejection Action, (vi) Rejection Process Termination Notice, and (vii) other notices the Secretary receives under this Article 2.

ARTICLE 3 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REMOVE DIRECTORS AND RECALL THE BOARD

Section 3.1. **NOMINATING COMMITTEE DIRECTOR REMOVAL PROCESS**

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove a Director holding Seats 1 through 8 and initiate the Nominating Committee Director Removal Process ("**Nominating Committee Director Removal Petition**"). Each Nominating Committee Director Removal Petition shall set forth the rationale upon which such individual seeks to remove such Director. The process set forth in this Section 3.1 of Annex D is referred to herein as the "**Nominating Committee Director Removal Process**."

(b) During the period beginning on the date that the Decisional Participant received the Nominating Committee Director Removal Petition (such date of receipt, the "**Nominating Committee Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Nominating Committee Director Removal Petition Date (as it relates to a particular Director, the "**Nominating Committee Director Removal Petition Period**"), the Decisional Participant that has received a Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Petitioned Decisional Participant**") shall either accept or reject such Nominating Committee Director Removal Petition; provided that a Nominating Committee Director Removal Petitioned Decisional Participant shall not accept a Nominating Committee Director Removal Petition if, during the same term, the Director who is the subject of such Nominating Committee Director Removal Petition had previously been subject to a Nominating Committee

Director Removal Petition that led to a Nominating Committee Director Removal Community Forum (as discussed in Section 3.1(e) of this Annex D).

(c) During the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Petitioned Decisional Participant shall invite the Director subject to the Nominating Committee Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the Nominating Committee Director Removal Petition and the Nominating Committee Director Removal Petitioned Decisional Participant's representative on the EC (Empowered Community) Administration. The Nominating Committee Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the Nominating Committee Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Nominating Committee Director Removal Petitioned Decisional Participant shall not accept the Nominating Committee Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.1(b) of this Annex D, a Nominating Committee Director Removal Petitioned Decisional Participant accepts a Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Period (such Decisional Participant, the "**Nominating Committee Director Removal Petitioning Decisional Participant**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall, within twenty-four (24) hours of its acceptance of the Nominating Committee Director Removal Petition, provide written notice ("**Nominating Committee Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Nominating Committee Director Removal Petition Notice shall include the rationale upon which removal of the affected Director is sought. The Nominating Committee Director Removal Process shall thereafter continue pursuant to Section 3.1(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Nominating Committee Director Removal Petition Notice pursuant to Section 3.1(c)(i) of this Annex D during the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Process shall automatically be terminated with respect to the applicable Nominating Committee Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the

expiration of the Nominating Committee Director Removal Petition Period, deliver to the Secretary a notice certifying that the Nominating Committee Director Removal Process has been terminated with respect to the applicable Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Process Termination Notice**").

(d) Following the delivery of a Nominating Committee Director Removal Petition Notice to the EC (Empowered Community) Administration by a Nominating Committee Director Removal Petitioning Decisional Participant pursuant to Section 3.1(c)(i) of this Annex D, the Nominating Committee Director Removal Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Nominating Committee Director Removal Petition. The Nominating Committee Director Removal Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Nominating Committee Director Removal Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Nominating Committee Director Removal Supporting Decisional Participant**") during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Nominating Committee Director Removal Petition Period (the "**Nominating Committee Director Removal Petition Support Period**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Nominating Committee Director Removal Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Nominating Committee Director Removal Supporting Decisional Participant. Each Nominating Committee Director Removal Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Nominating Committee Director Removal Petition. Such Nominating Committee Director Removal Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Nominating Committee Director Removal Petitioning Decisional Participant who shall act as a liaison with respect to the Nominating Committee Director Removal Supported Petition;

(C) a statement as to whether or not the Nominating Committee Director Removal Petitioning Decisional Participant and/or the Nominating Committee Director Removal Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Nominating Committee Director Removal Community Forum (as defined in Section 3.1(e) of this Annex D) for the community to discuss the Nominating Committee Director Removal Supported Petition; and

(D) a statement as to whether the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant have determined to hold the Nominating Committee Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Nominating Committee Director Removal Process shall thereafter continue for such Nominating Committee Director Removal Petition pursuant to Section 3.1(e) of this Annex D.

(ii) The Nominating Committee Director Removal Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Petition Support Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice if the Nominating Committee Director Removal Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Support Period.

(e) If the EC (Empowered Community) Administration receives a Nominating Committee Director Removal Supported Petition under Section 3.1(d) of this Annex D during the Nominating Committee Director Removal Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the

Nominating Committee Director Removal Supported Petition ("**Nominating Committee Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in a Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Nominating Committee Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability.

(ii) The Nominating Committee Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period ("**Nominating Committee Director Removal Community Forum Period**") unless the Nominating Committee Director Removal Supported Petition requested that the Nominating Committee Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Nominating Committee Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s); provided, that, the date and time of any Nominating Committee Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability. If the Nominating Committee Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as

calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period, the Nominating Committee Director Removal Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Nominating Committee Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Nominating Committee Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Nominating Committee Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the Nominating Committee Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Nominating Committee Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Nominating Committee Director Removal Petitioning Decisional Participant or the Nominating Committee Director Removal Supporting Decisional Participant, nor the individual who initiated the Nominating Committee Director Removal Petition, shall be permitted to participate in the management or moderation of the Nominating Committee Director Removal Community Forum.

(v) The Director subject to the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Nominating Committee Director Removal Supported Petition prior to the convening of and during the Nominating Committee Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community)

Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the Nominating Committee Director Removal Supported Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the Nominating Committee Director Removal Community Forum in order to address the issues raised in the Nominating Committee Director Removal Supported Petition.

(vii) If the Nominating Committee Director Removal Petitioning Decisional Participant and each of the Nominating Committee Director Removal Supporting Decisional Participants for an applicable Nominating Committee Director Removal Supported Petition agree before, during or after the Nominating Committee Director Removal Community Forum that the issue raised in such Nominating Committee Director Removal Supported Petition has been resolved, such Nominating Committee Director Removal Supported Petition shall be deemed withdrawn and the Nominating Committee Director Removal Process with respect to such Nominating Committee Director Removal Supported Petition will be terminated. If a Nominating Committee Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Nominating Committee Director Removal Supported Petition, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. For the avoidance of doubt, the Nominating Committee Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s).

(viii) During the Nominating Committee Director Removal Community Forum Period, an additional one or two Nominating Committee Director Removal Community Forums may be held at the discretion of a Nominating Committee Director Removal Petitioning Decisional Participant and a related Nominating Committee Director Removal Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Nominating Committee Director Removal Community Forum and shall promptly post on the Website a public record

of the Nominating Committee Director Removal Community Forum as well as all written submissions of the Director who is the subject of the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Nominating Committee Director Removal Community Forum.

(f) Following the expiration of the Nominating Committee Director Removal Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period (such period, the "**Nominating Committee Director Removal Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Nominating Committee Director Removal Supported Petition, (ii) objects to such Nominating Committee Director Removal Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Nominating Committee Director Removal Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Nominating Committee Director Removal Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Nominating Committee Director Removal Decision Period).

(g) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver a written notice ("**Nominating Committee Director Removal Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of Section 3.1 of this Annex D, the EC (Empowered Community) has approved of the removal of the Director who is subject to the Nominating Committee Director Removal Process if the Nominating Committee Director Removal Supported Petition is (i) supported by three or more Decisional Participants and (ii) not objected to by more than one Decisional Participant.

(h) Upon the Secretary's receipt of a Nominating Committee Director Removal Notice, the Director subject to such Nominating Committee Director Removal Notice shall be effectively removed from office and shall no longer be a Director

and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(i) If the Nominating Committee Director Removal Supported Petition does not obtain the support required by Section 3.1(g) of this Annex D, the Nominating Committee Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. The Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(j) If neither a Nominating Committee Director Removal Notice nor a Nominating Committee Director Removal Process Termination Notice are received by the Secretary prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period, the Nominating Committee Director Removal Process shall automatically terminate and the Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and shall not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(k) Notwithstanding anything in this Section 3.1 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of a Nominating Committee Director Removal Process ceases to be a Director, the Nominating Committee Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(l) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Nominating Committee Director Removal Petition, (ii) Nominating Committee Director Removal Petition Notice, (iii) Nominating Committee Director Removal Supported Petition, (iv) Nominating Committee Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (v) Nominating Committee Director Removal Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.1.

Section 3.2. SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) DIRECTOR REMOVAL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to the ASO (Address Supporting Organization), ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization) or At-Large Community (as applicable, the "**Applicable Decisional Participant**") seeking to remove a Director who was nominated by that Supporting Organization (Supporting Organization) or the At-Large Community in accordance with Section 7.2(a) of the Bylaws, and initiate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**"). The process set forth in this Section 3.2 of this Annex D is referred to herein as the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process.**"

(b) During the period beginning on the date that the Applicable Decisional Participant received the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition (such date of receipt, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date (as it relates to a particular Director, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period**"), the Applicable Decisional Participant shall either accept or reject such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to the internal procedures of the Applicable Decisional Participant for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; provided that the Applicable Decisional Participant shall not accept an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition if, during the same term, the Director who is the subject of such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition had previously been subject

to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition that led to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D).

(c) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall invite the Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Applicable Decisional Participant's representative on the EC (Empowered Community) Administration. The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Applicable Decisional Participant shall not accept the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.2(b), the Applicable Decisional Participant accepts an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall, within twenty-four (24) hours of the Applicable Decisional Participant's acceptance of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, provide written notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional

Participants and the Secretary. Such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Applicable Decisional Participant who shall act as a liaison with respect to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice;

(C) a statement as to whether or not the Applicable Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D) for the community to discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; and

(D) a statement as to whether the Applicable Decisional Participant has determined to hold the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall thereafter continue for such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to Section 3.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice pursuant to Section 3.2(c)(i) during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically be terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, deliver to the Secretary a notice certifying that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process has been terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice**").

(d) If the EC (Empowered Community) Administration receives an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice under Section 3.2(c) of this Annex D during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability.

(ii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period**") unless the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice requested that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Applicable Decisional Participant; provided, that the date and time of any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period shall expire at 11:59 p.m., local time of

the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Applicable Decisional Participant, nor the individual who initiated the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, shall be permitted to participate in the management or moderation of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(v) The Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the SO (Supporting

Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice prior to the convening of and during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in order to address the issues raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice.

(vii) If the Applicable Decisional Participant agrees before, during or after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum that the issue raised in such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice has been resolved, such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall be deemed withdrawn and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process with respect to such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice will be terminated. If an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. For the avoidance of doubt, the SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Applicable Decisional Participant.

(viii) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, an additional one or two SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forums may be held at the discretion of the Applicable Decisional Participant or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum and shall promptly post on the Website a public record of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum as well as all written submissions of the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(e) Following the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the request of the EC (Empowered Community) Administration, issue a request for comments and recommendations from the community, which shall be delivered to the Secretary for prompt posting on the Website along with a means for comments and recommendations to be submitted to ICANN (Internet Corporation for Assigned Names and Numbers) on behalf of the EC (Empowered Community) Administration. This comment period shall remain open until 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the request for comments and recommendations was posted on the Website (the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal**").

Comment Period"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website all comments and recommendations received by **ICANN (Internet Corporation for Assigned Names and Numbers)** during the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**.

(f) Following the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of **ICANN (Internet Corporation for Assigned Names and Numbers)**'s principal office) on the 21st day after the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period** (such period, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period**"), the Applicable Decisional Participant shall inform the **EC (Empowered Community) Administration** in writing as to whether the Applicable Decisional Participant has support for the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice** within the Applicable Decisional Participant of a three-quarters majority as determined pursuant to the internal procedures of the Applicable Decisional Participant ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice**"). The Applicable Decisional Participant shall, within twenty-four (24) hours of obtaining such support, deliver the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** to the **EC (Empowered Community) Administration**, the other Decisional Participants and Secretary, and **ICANN (Internet Corporation for Assigned Names and Numbers)** shall, at the direction of the Applicable Decisional Participant, concurrently post on the Website an explanation provided by the Applicable Decisional Participant as to why the Applicable Decisional Participant has chosen to remove the affected Director. Upon the Secretary's receipt of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** from the **EC (Empowered Community) Administration**, the Director subject to such **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** shall be effectively removed from office and shall no longer be a Director and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(g) If the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**

Notice does not obtain the support required by Section 3.2(f) of this Annex D, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the failure to obtain such support, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. The Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(h) If neither an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice nor an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice are received by the Secretary prior to the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically terminate and the Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(i) Notwithstanding anything in this Section 3.2 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ceases to be a Director, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director

Removal Petition, (ii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, (iii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (iv) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice, and (v) other notices the Secretary receives under this Section 3.2.

Section 3.3. BOARD RECALL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove all Directors (other than the President) at the same time and initiate the Board Recall Process ("**Board Recall Petition**"), provided that a Board Recall Petition cannot be submitted solely on the basis of a matter decided by a Community IRP if (i) such Community IRP was initiated in connection with the Board's implementation of GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and (ii) the EC (Empowered Community) did not prevail in such Community IRP. Each Board Recall Petition shall include a rationale setting forth the reasons why such individual seeks to recall the Board. The process set forth in this Section 3.3 of this Annex D is referred to herein as the "**Board Recall Process**."

(b) A Decisional Participant that has received a Board Recall Petition shall either accept or reject such Board Recall Petition during the period beginning on the date the Decisional Participant received the Board Recall Petition ("**Board Recall Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Board Recall Petition Date (the "**Board Recall Petition Period**").

(i) If, in accordance with Section 3.3(b) of this Annex D, a Decisional Participant accepts a Board Recall Petition during the Board Recall Petition Period (such Decisional Participant, the "**Board Recall Petitioning Decisional Participant**"), the Board Recall Petitioning Decisional Participant shall, within twenty-four (24) hours of the expiration of its acceptance of the Board Recall Petition, provide written notice ("**Board Recall Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Board Recall Petition Notice shall include the rationale upon

which removal of the Board is sought. The Board Recall Process shall thereafter continue pursuant to Section 3.3(c) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Board Recall Petition Notice pursuant to Section 3.3(b)(i) of this Annex D during the Board Recall Petition Period, the Board Recall Process shall automatically be terminated with respect to the Board Recall Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Period, deliver to the Secretary a notice certifying that the Board Recall Process has been terminated with respect to the Board Recall Petition ("**Board Recall Process Termination Notice**").

(c) Following the delivery of a Board Recall Petition Notice to the EC (Empowered Community) Administration by a Board Recall Petitioning Decisional Participant pursuant to Section 3.3(b)(i) of this Annex D, the Board Recall Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Board Recall Petition. The Board Recall Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Board Recall Petitioning Decisional Participant obtains the support of at least two other Decisional Participants (each, a "**Board Recall Supporting Decisional Participant**") during the period beginning upon the expiration of the Board Recall Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Board Recall Petition Period (the "**Board Recall Petition Support Period**"), the Board Recall Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Board Recall Supported Petition**") within twenty-four hours of receiving the support of at least two Board Recall Supporting Decisional Participants. Each Board Recall Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Board Recall Petition. Such Board Recall Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Board Recall Petitioning Decisional Participant who shall act as a liaison with respect to the Board Recall Supported Petition;

(C) a statement as to whether or not the Board Recall Petitioning Decisional Participant and/or the Board Recall Supporting Decisional Participants requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Board Recall Community Forum (as defined in Section 3.3(d) of this Annex D) for the community to discuss the Board Recall Supported Petition; and

(D) a statement as to whether the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants have determined to hold the Board Recall Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Board Recall Process shall thereafter continue for such Board Recall Supported Petition pursuant to Section 3.3(d) of this Annex D.

(ii) The Board Recall Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Support Period, deliver to the Secretary a Board Recall Process Termination Notice if the Board Recall Petitioning Decisional Participant is unable to obtain the support of at least two other Decisional Participants for its Board Recall Petition during the Board Recall Petition Support Period.

(d) If the EC (Empowered Community) Administration receives a Board Recall Supported Petition under Section 3.3(c) of this Annex D during the Board Recall Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Board Recall Supported Petition ("**Board Recall Community Forum**").

(i) If a publicly-available conference call has been requested in a Board Recall Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Board Recall Community Forum, and inform the Decisional Participants of the date, time

and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Board regarding the availability of the Directors.

(ii) The Board Recall Community Forum shall be convened and concluded during the period beginning upon the expiration of the Board Recall Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period ("**Board Recall Community Forum Period**") unless the Board Recall Supported Petition requested that the Board Recall Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Board Recall Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants; provided, that, the date and time of any Board Recall Community Forum shall be determined after consultation with the Board regarding the availability of the Directors. If the Board Recall Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period, the Board Recall Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Board Recall Community Forum shall have at least one face-to-face meeting and may also be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects. If the Board Recall Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of

the date, time and participation methods of the Board Recall Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Board Recall Community Forum in a fair and neutral manner; provided that no individual from the Board Recall Petitioning Decisional Participant or a Board Recall Supporting Decisional Participant, nor the individual who initiated the Board Recall Petition, shall be permitted to participate in the management or moderation of the Board Recall Community Forum.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Board Recall Supported Petition prior to the convening of and during the Board Recall Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and the full Board are expected to attend the Board Recall Community Forum in order to address the issues raised in the Board Recall Supported Petition.

(vii) If the Board Recall Petitioning Decisional Participant and each of the Board Recall Supporting Decisional Participants for the Board Recall Supported Petition agree before, during or after the Board Recall Community Forum that the issue raised in such Board Recall Supported Petition has been resolved, such Board Recall Supported Petition shall be deemed withdrawn and the Board Recall Process with respect to such Board Recall Supported Petition will be terminated. If a Board Recall Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Board Recall Supported Petition, deliver to the Secretary a Board Recall Process Termination Notice. For the avoidance of doubt, the Board Recall Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants.

(viii) During the Board Recall Community Forum Period, an additional one or two Board Recall Community Forums may be held at the discretion of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Board Recall Community Forum and shall promptly post on the Website a public record of the Board Recall Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Board Recall Community Forum.

(e) Following the expiration of the Board Recall Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Community Forum Period (such period, the "**Board Recall Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Board Recall Supported Petition, (ii) objects to such Board Recall Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Board Recall Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Board Recall Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Board Recall Decision Period).

(f) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver a written notice ("**EC (Empowered Community) Board Recall Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 3.3 of this Annex D, the EC (Empowered Community) has resolved to remove all Directors (other than the President) if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if an IRP Panel found that, in implementing GAC (Governmental Advisory

Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles or Bylaws) a Board Recall Supported Petition (i) is supported by four or more Decisional Participants, and (ii) is not objected to by more than one Decisional Participant.

(g) Upon the Secretary's receipt of an EC (Empowered Community) Board Recall Notice, all Directors (other than the President) shall be effectively removed from office and shall no longer be Directors and such vacancies shall be filled in accordance with Section 7.12 of the Bylaws.

(h) If the Board Recall Supported Petition does not obtain the support required by Section 3.3(f) of this Annex D, the Board Recall Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver to the Secretary a Board Recall Process Termination Notice. All Directors shall remain on the Board.

(i) If neither an EC (Empowered Community) Board Recall Notice nor a Board Recall Process Termination Notice are received by the Secretary prior to the expiration of the Board Recall Decision Period, the Board Recall Process shall automatically terminate and all Directors shall remain on the Board.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Board Recall Petition, (ii) Board Recall Petition Notice, (iii) Board Recall Supported Petition, (iv) EC (Empowered Community) Board Recall Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to recall the Board, (v) Board Recall Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.3.

Article 4 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO INITIATE MEDIATION, A COMMUNITY IRP OR RECONSIDERATION REQUEST

Section 4.1. MEDIATION INITIATION

(a) If the Board refuses or fails to comply with a decision by the EC (Empowered Community) delivered to the Secretary pursuant to an EC (Empowered Community) Approval Notice, EC (Empowered Community) Rejection Notice, Nominating Committee Director Removal Notice, SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice or EC (Empowered Community) Board Recall Notice pursuant to and in compliance with Article 1, Article 2 or Article 3 of

this Annex D, or rejects or otherwise does not take action that is consistent with a final IFR Recommendation, Special IFR Recommendation, SCWG Creation Recommendation or SCWG Recommendation, as applicable (each, an "**EC (Empowered Community) Decision**"), the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate mediation with the Board in relation to that EC (Empowered Community) Decision as contemplated by Section 4.7 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration, the Decisional Participants and the Secretary requesting the initiation of a mediation ("**Mediation Initiation Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any Mediation Initiation Notice.

(b) As soon as practicable after receiving a Mediation Initiation Notice, the EC (Empowered Community) Administration and the Secretary shall initiate mediation, which shall proceed in accordance with Section 4.7 of the Bylaws.

Section 4.2. COMMUNITY IRP

(a) After completion of a mediation under Section 4.7 of the Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a Community IRP (a "**Community IRP Petitioning Decisional Participant**"), as contemplated by Section 4.3 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the Decisional Participants requesting the initiation of a Community IRP ("**Community IRP Petition**"). The Community IRP Petitioning Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. The process set forth in this Section 4.2 of this Annex D as it relates to a particular Community IRP Petition is referred to herein as the "**Community IRP Initiation Process.**"

(b) Following the delivery of a Community IRP Petition to the EC (Empowered Community) Administration by a Community IRP Petitioning Decisional Participant pursuant to Section 4.2(a) of this Annex D (which delivery date shall be referred to herein as the "**Community IRP Notification Date**"), the Community IRP Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community IRP

Petition. The Community IRP Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community IRP Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community IRP Supporting Decisional Participant**") during the period beginning on the Community IRP Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community IRP Notification Date (the "**Community IRP Petition Support Period**"), the Community IRP Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community IRP Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community IRP Supporting Decisional Participant. Each Community IRP Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Community IRP Petition. Such Community IRP Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community IRP Petitioning Decisional Participant who shall act as a liaison with respect to the Community IRP Supported Petition;

(C) a statement as to whether or not the Community IRP Petitioning Decisional Participant and/or the Community IRP Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community IRP Community Forum (as defined in Section 4.2(c) of this Annex D) for the community to discuss the Community IRP Supported Petition;

(D) a statement as to whether the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant have determined to hold the Community IRP Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting;

(E) where the Community IRP Supported Petition relates to a Fundamental Bylaw Amendment, a PDP (Policy Development Process) Fundamental Bylaw Statement if applicable and, if so, the name of the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant;

(F) where the Community IRP Supported Petition relates to an Articles Amendment, a PDP (Policy Development Process) Articles Statement if applicable and, if so, the name of the Articles Amendment PDP (Policy Development Process) Decisional Participant;

(G) where the Community IRP Supported Petition relates to a Standard Bylaw Amendment, a PDP (Policy Development Process) Standard Bylaw Statement if applicable and, if so, the name of the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant; and

(H) where the Community IRP Supported Petition relates to a policy recommendation of a cross community working group chartered by more than one Supporting Organization (Supporting Organization) ("**CCWG Policy Recommendation**"), a statement citing the specific CCWG Policy Recommendation and related provision in the Community IRP Supported Petition ("**CCWG Policy Recommendation Statement**"), and, if so, the name of any Supporting Organization (Supporting Organization) that is a Decisional Participant that approved the CCWG Policy Recommendation ("**CCWG Policy Recommendation Decisional Participant**").

The Community IRP Initiation Process shall thereafter continue for such Community IRP Supported Petition pursuant to Section 4.2(c) of this Annex D.

(ii) The Community IRP Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Petition Support Period, deliver to the Secretary a notice certifying that the Community IRP Initiation Process has been terminated with respect to the Community IRP included in the Community IRP Petition ("**Community IRP Termination Notice**") if:

(A) no Community IRP Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Community IRP Petition during the Community IRP Petition Support Period;

(B) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Fundamental Bylaw Statement, the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(C) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Articles Statement, the Articles Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(D) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants; or

(E) where the Community IRP Supported Petition includes a CCWG Policy Recommendation Statement, the CCWG Policy Recommendation Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants.

(c) If the EC (Empowered Community) Administration receives a Community IRP Supported Petition under Section 4.2(b) of this Annex D during the Community IRP Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community IRP Supported Petition ("**Community IRP Community Forum**").

(i) If a publicly-available conference call has been requested in a Community IRP Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community IRP Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community IRP Community Forum shall be convened and concluded during the period beginning on the expiration of the Community IRP Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period ("**Community IRP Community Forum Period**") unless the Community IRP Supported Petition requested that the Community IRP Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community IRP Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s). If the Community IRP Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period, the Community IRP Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community IRP Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community IRP Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community IRP Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community IRP Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community IRP Community Forum in a fair and neutral

manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community IRP Supported Petition prior to the convening of and during the Community IRP Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community IRP Community Forum in order to discuss the Community IRP Supported Petition.

(vii) If the Community IRP Petitioning Decisional Participant and each of the Community IRP Supporting Decisional Participants for the Community IRP Supported Petition agree before, during or after a Community IRP Community Forum that the issue raised in such Community IRP Supported Petition has been resolved, such Community IRP Supported Petition shall be deemed withdrawn and the Community IRP Initiation Process with respect to such Community IRP Supported Petition will be terminated. If a Community IRP Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community IRP Supported Petition, deliver to the Secretary a Community IRP Termination Notice. For the avoidance of doubt, the Community IRP Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s).

(viii) During the Community IRP Community Forum Period, an additional one or two Community IRP Community Forums may be held at the discretion of a Community IRP Petitioning Decisional Participant and a related Community IRP Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community IRP Community Forum and

shall promptly post on the Website a public record of the Community IRP Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community IRP Community Forum.

(d) Following the expiration of the Community IRP Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community IRP Community Forum Period (such period, the "**Community IRP Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community IRP Supported Petition, (ii) objects to such Community IRP Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community IRP Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community IRP Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community IRP Decision Period).

(e) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Community IRP Initiation Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.2 of this Annex D, the EC (Empowered Community) has resolved to accept the Community IRP Supported Petition if:

(i) A Community IRP Supported Petition that does not include a PDP (Policy Development Process) Fundamental Bylaw Statement, a PDP (Policy Development Process) Articles Statement, a PDP (Policy Development Process) Standard Bylaw Statement or a CCWG Policy Recommendation Statement (A) is supported by three or more Decisional Participants, and (B) is not objected to by more than one Decisional Participant;

(ii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Fundamental Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Articles Statement, (B) is supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iv) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Standard Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant; or

(v) A Community IRP Supported Petition that (A) includes a CCWG Policy Recommendation Statement, (B) is supported by three or more Decisional Participants (including the CCWG Policy Recommendation Decisional Participant), and (C) is not objected to by more than one Decisional Participant.

(f) If the Community IRP Supported Petition does not obtain the support required by Section 4.2(e) of this Annex D, the Community IRP Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, deliver to the Secretary a Community IRP Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community IRP Petition, (ii) Community IRP Supported Petition, (iii) EC (Empowered Community) Community IRP Initiation Notice, (iv) Community IRP Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.2.

Section 4.3. COMMUNITY RECONSIDERATION REQUEST

(a) Any Decisional Participant may request that the EC (Empowered Community) initiate a Reconsideration Request (a "**Community Reconsideration Petitioning Decisional Participant**"), as contemplated by Section 4.2(b) of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the

other Decisional Participants, with a copy to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website, requesting the review or reconsideration of an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff ("**Community Reconsideration Petition**"). A Community Reconsideration Petition must be delivered within 30 days after the occurrence of any of the conditions set forth in Section 4.2(g)(i)(A), (B) or (C) of the Bylaws. In that instance, the Community Reconsideration Petition must be delivered within 30 days from the initial posting of the rationale. The process set forth in this Section 4.3 of this Annex D as it relates to a particular Community Reconsideration Petition is referred to herein as the "**Community Reconsideration Initiation Process.**"

(b) Following the delivery of a Community Reconsideration Petition to the EC (Empowered Community) Administration by a Community Reconsideration Petitioning Decisional Participant pursuant to Section 4.3(a) of this Annex D (which delivery date shall be referred to herein as the "**Community Reconsideration Notification Date**"), the Community Reconsideration Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community Reconsideration Petition. The Community Reconsideration Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community Reconsideration Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community Reconsideration Supporting Decisional Participant**") during the period beginning on the Community Reconsideration Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community Reconsideration Notification Date (the "**Community Reconsideration Petition Support Period**"), the Community Reconsideration Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community Reconsideration Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community Reconsideration Supporting Decisional Participant. Each Community Reconsideration Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the

Community Reconsideration Petition. Such Community Reconsideration Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community Reconsideration Petitioning Decisional Participant who shall act as a liaison with respect to the Community Reconsideration Supported Petition;

(C) a statement as to whether or not the Community Reconsideration Petitioning Decisional Participant and/or the Community Reconsideration Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community Reconsideration Community Forum (as defined in Section 4.3(c) of this Annex D) for the community to discuss the Community Reconsideration Supported Petition; and

(D) a statement as to whether the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant have determined to hold the Community Reconsideration Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Community Reconsideration Initiation Process shall thereafter continue for such Community Reconsideration Supported Petition pursuant to Section 4.3(c) of this Annex D.

(ii) The Community Reconsideration Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Petition Support Period, deliver to the Secretary a notice certifying that the Community Reconsideration Initiation Process has been terminated with respect to the Reconsideration Request included in the Community Reconsideration Petition ("**Community Reconsideration Termination Notice**") if the Community Reconsideration Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Community Reconsideration Petition during the Community Reconsideration Petition Support Period.

(c) If the EC (Empowered Community) Administration receives a Community Reconsideration Supported Petition under Section 4.3(b) of this Annex D during

the Community Reconsideration Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community Reconsideration Supported Petition ("**Community Reconsideration Community Forum**").

(i) If a publicly-available conference call has been requested in a Community Reconsideration Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community Reconsideration Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community Reconsideration Community Forum shall be convened and concluded during the period beginning on the expiration of the Community Reconsideration Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period ("**Community Reconsideration Forum Period**") unless the Community Reconsideration Supported Petition requested that the Community Reconsideration Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community Reconsideration Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s). If the Community Reconsideration Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period, the Community Reconsideration Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of

such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community Reconsideration Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community Reconsideration Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community Reconsideration Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community Reconsideration Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community Reconsideration Community Forum in a fair and neutral manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community Reconsideration Supported Petition prior to the convening of and during the Community Reconsideration Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community Reconsideration Community Forum in order to discuss the Community Reconsideration Supported Petition.

(vii) If the Community Reconsideration Petitioning Decisional Participant and each of the Community Reconsideration Supporting Decisional Participants for a Community Reconsideration Supported Petition agree before, during or after the Community Reconsideration Community Forum

that the issue raised in such Community Reconsideration Supported Petition has been resolved, such Community Reconsideration Supported Petition shall be deemed withdrawn and the Community Reconsideration Initiation Process with respect to such Community Reconsideration Supported Petition will be terminated. If a Community Reconsideration Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community Reconsideration Supported Petition, deliver to the Secretary a Community Reconsideration Termination Notice. For the avoidance of doubt, the Community Reconsideration Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s).

(viii) During the Community Reconsideration Community Forum Period, an additional one or two Community Reconsideration Community Forums may be held at the discretion of a Community Reconsideration Petitioning Decisional Participant and a related Community Reconsideration Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community Reconsideration Community Forum and shall promptly post on the Website a public record of the Community Reconsideration Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community Reconsideration Community Forum.

(d) Following the expiration of the Community Reconsideration Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community Reconsideration Community Forum Period (such period, the "**Community Reconsideration Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community Reconsideration Supported Petition, (ii) objects to such Community Reconsideration Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community Reconsideration Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN

(Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community Reconsideration Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community Reconsideration Decision Period).

(e) If (i) three or more Decisional Participants support the Community Reconsideration Supported Petition and (ii) no more than one Decisional Participant objects to the Community Reconsideration Supported Petition, then the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver a notice to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.3 of this Annex D, the EC (Empowered Community) has resolved to accept the Community Reconsideration Supported Petition ("**EC (Empowered Community) Reconsideration Initiation Notice**"). The Reconsideration Request shall then proceed in accordance with Section 4.2 of the Bylaws.

(f) If the Community Reconsideration Supported Petition does not obtain the support required by Section 4.3(e) of this Annex D, the Community Reconsideration Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver to the Secretary a Community Reconsideration Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community Reconsideration Petition, (ii) Community Reconsideration Supported Petition, (iii) EC (Empowered Community) Reconsideration Initiation Notice, (iv) Community Reconsideration Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.3.

Annex E: Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles

1. Principles

The caretaker ICANN (Internet Corporation for Assigned Names and Numbers) budget (the "**Caretaker ICANN (Internet Corporation for Assigned Names and**

Numbers) Budget") is defined as an annual operating plan and budget that is established by the CFO in accordance with the following principles (the "**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles**"):

- a. It is based on then-current ICANN (Internet Corporation for Assigned Names and Numbers) operations;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It enables ICANN (Internet Corporation for Assigned Names and Numbers) to avoid waste of its resources during the rejection period (i.e., the period between when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would otherwise need to be restarted at a materially incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers) from initiating activities that remains subject to community consideration (or for which that community consideration has not concluded) with respect to the applicable ICANN (Internet Corporation for Assigned Names and Numbers) Budget, including without limitation, preventing implementation of any expenditure or undertaking any action that was the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that was rejected by the EC (Empowered

Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

1. Examples

Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically include:

- i. the functioning of the EC (Empowered Community), the Decisional Participants, and any Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) that are not Decisional Participants;
- ii. the functioning of all redress mechanisms, including without limitation the office of the Ombudsman, the IRP, and mediation;
- iii. employment of staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;
- iv. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) in the normal course of business;
- v. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;
- vi. operating all existing ICANN (Internet Corporation for Assigned Names and Numbers) offices, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;
- vii. contracting with vendors as needed in the normal course of business;
- viii. conducting ICANN (Internet Corporation for Assigned Names and Numbers) meetings and ICANN (Internet Corporation for Assigned Names and Numbers) intercessional meetings previously contemplated; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iii. entering into new agreements in relation to opening or operating new ICANN (Internet Corporation for Assigned Names and Numbers) locations/offices, unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

Annex F: Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles

1. Principles

The caretaker IANA (Internet Assigned Numbers Authority) Budget (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget**") is defined as an annual operating plan and budget that is established by the CFO in

accordance with the following principles (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles**"):

- a. It is based on then-current operations of the IANA (Internet Assigned Numbers Authority) functions;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to avoid waste of its resources during the rejection period (i.e., the period between when an IANA (Internet Assigned Numbers Authority) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an IANA (Internet Assigned Numbers Authority) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would have otherwise need to be restarted at an incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, from initiating activities that remain subject to community consideration (or for which that community consultation has not concluded) with respect to the applicable IANA (Internet Assigned Numbers Authority) Budget, including without limitation, preventing implementation of any expenditure or

undertaking any action that was the subject of the IANA (Internet Assigned Numbers Authority) Budget that was rejected by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

1. Examples

a. Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically include:

i. employment of staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;

ii. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) in the normal course of business;

iii. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;

iv. operating all existing offices used in the performance of the IANA (Internet Assigned Numbers Authority) functions, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;

v. contracting with vendors as needed in the normal course of business;

vi. participating in meetings and conferences previously contemplated;

vii. participating in engagement activities with ICANN (Internet Corporation for Assigned Names and Numbers)'s Customer Standing Committee or the customers of the IANA (Internet Assigned Numbers Authority) functions;

viii. fulfilling obligations (including financial obligations under agreements and memoranda of understanding to which ICANN (Internet Corporation for Assigned

Names and Numbers) or its affiliates is a party that relate to the IANA (Internet Assigned Numbers Authority) functions; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iii. entering into new agreements in relation to opening or operating new locations/offices where the IANA (Internet Assigned Numbers Authority) functions shall be performed, unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

ANNEX G-1

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registrars are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet, registrar

services, registry services, or the DNS (Domain Name System);

- functional and performance specifications for the provision of registrar services;
- registrar policies reasonably necessary to implement Consensus (Consensus) Policies relating to a gTLD (generic Top Level Domain) registry;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names); or
- restrictions on cross-ownership of registry operators and registrars or resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in a TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning registered names and name servers;
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the registered names sponsored in a TLD (Top Level Domain) by a registrar losing accreditation; and
- the transfer of registration data upon a change in registrar sponsoring one or more registered names.

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registries are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS (Domain Name System);
- functional and performance specifications for the provision of registry services;
- security and stability of the registry database for a TLD (Top Level Domain);
- registry policies reasonably necessary to implement Consensus (Consensus) Policies relating to registry operations or registrars;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
- restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in the TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning domain name registrations; and
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD (Top Level Domain) affected by such a suspension or termination.

[1] When "1 October 2016" is used, that signals that the date that will be used is the effective date of the Bylaws.



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Exhibit 14

ARIF HYDER ALI

October 17, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's
Community Priority Application No: 1-1713-23699**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“**dotgay**”), to submit the **independent Expert Opinion** of **Professor M.V. Lee Badgett**, the Director of the Center for Public Policy and Administration, and Professor of Economics at the University of Massachusetts Amherst. Professor Badgett is also co-founder and Distinguished Scholar at the Williams Institute on Sexual Orientation, Gender Identity Law and Public Policy at the UCLA School of Law, a research center recognized worldwide for LGBTI research and expertise. Professor Badgett has published widely, including having written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports. She has testified on her research before the U.S. Congress, several U.S. state legislatures, and in litigation. She has also been a consultant and contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues.

Professor Badgett’s Opinion will assist the ICANN Board (“**Board**”) in evaluating dotgay’s pending application (Application No: 1-1713-23699) for community priority status.¹ Prof. Badgett explains that withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community. She relies upon her research to show that the stigma, discrimination and violence faced by the community is real and leads to lower

¹ Exhibit 1, Expert Report of Professor M.V. Lee Badgett, dated October 17, 2016.

incomes, poverty and lower mental and physical health among other unattractive outcomes. She notes that the internet has become the predominant safe space where members of the community can meet, share ideas and engage in collective action to create a more equal world. The .GAY TLD (as envisaged by the community applicant) is part of the effort to create that safe space for economic activity and social change. Prof. Badgett identifies the many and real benefits to the community from dotgay's Public Interest Commitments and registration policies. She also considers the harm that would befall the community in the absence of a community .GAY TLD (which is the likely outcome if dotgay's application for community priority status is unsuccessful).

In short, her reports adds another dimension of support to dotgay's application for community priority status, which has already been substantiated by dotgay's presentation and submissions to the ICANN Board, the **Expert Opinion of Professor William Eskridge Jr of Yale Law School**, and **ICANN Ombudsman's Report**, all of which conclusively demonstrate that dotgay's application is entitled to community priority status under ICANN's Articles, Bylaws and Applicant Guidebook. We urge ICANN to consider Professor Badgett's Expert Opinion together with the existing support on record.

Sincerely,



Arif Hyder Ali

**EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT IN
SUPPORT OF DOTGAY'S COMMUNITY PRIORITY APPLICATION
OCTOBER 17, 2016**

EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT

TABLE OF CONTENTS

I.	EXPERT OPINION	
A.	LGBTIA PEOPLE EXPERIENCE STIGMA, DISCRIMINATION, AND VIOLENCE AROUND THE WORLD.....	1
B.	TO FIGHT SOCIAL EXCLUSION, LGBTIA PEOPLE NEED TO CREATE SAFE SPACES TO MEET EACH OTHER.....	1
C.	THE INTERNET IS NOW ONE OF THE MOST IMPORTANT SPACES FOR LGBTIA PEOPLE.....	2
D.	OF ALL OF THE APPLICANTS FOR THE.GAY TLD, ONLY DOTGAY HAS MADE PUBLIC COMMITMENTS TO COMMUNITY ACCOUNTABILITY.....	2
E.	COMMUNITY ACCOUNTABILITY WILL BE ESSENTIAL IF .GAY IS TO ENHANCE THE ECONOMIC, SOCIAL, AND LEGAL WELL-BEING OF LGBTIA INDIVIDUALS AROUND THE WORLD.....	2
F.	WITHOUT COMMUNITY OVERSIGHT, .GAY COULD BECOME A SOURCE OF ACTIVITY THAT WOULD HARM LGBTIA PEOPLE.....	3
II.	QUALIFICATIONS.....	4
III.	FULL CURRICULUM VITAE.....	5

EXPERT OPINION

I. EXPERT OPINION

ICANN's failure to grant dotgay's community priority application for the .GAY top level domain name would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay economic community. That global economic community, made up of LGBTIA individuals exchanging ideas, knowledge, goods, and services, is a central priority of dotgay's application and mission. Below I describe the challenges and needs of the LGBTIA community and how .GAY could support or hinder efforts to achieve their full social and economic inclusion.

a. LGBTIA people experience stigma, discrimination, and violence around the world.

A growing body of evidence demonstrates that LGBTIA people continue to face stigma, discrimination, and violence around the world. While some countries have moved closer to legal equality than others, many governments, employers, educational institutions, faith communities, families, and other social settings in every country continue to treat lesbian, gay, bisexual, transgender, and intersex people as less than fully equal in market, personal, and social interactions. These individual and institutional forms of exclusion from full and equal participation in life reduce access to education, employment, health care, and government services and increase exposure to unhealthy stress. Thus exclusion contributes to lower incomes, poverty, poorer mental and physical health, and other negative outcomes. These disparities are well documented in my own research cited below, and by research by many other scholars, governments, NGOs, and private research organizations. Much of this research is described in my books and reports (fully cited in Section II), including *Money, Myths, and Change: The Economic Lives of Lesbian and Gay Men*, *Sexual Orientation Discrimination: An International Perspective*, and "The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies."

b. To fight social exclusion, LGBTIA people need to create safe spaces to meet each other.

In this context of exclusion, it is essential for LGBTIA people to be able to create spaces for themselves that enable them to survive and to expand safe spaces into the broader community. They need to meet and support each other, share ideas and knowledge, and engage in collective action to move toward a more equal world. In some countries at different moments in history, we know that markets have allowed the development of such

meeting places. Bookstores, newspapers, magazine, bars, and restaurants emerged in commercial spaces and became important locations that drew LGBTIA people together. More recently in some countries, such spaces have also been found in corporate employee resource groups or gay-straight alliances in educational settings. In many places, LGBTIA organizations have used such settings to create a social movement, economic opportunities, and a community of individuals, bound together in common interest and common challenges.

c. The internet is now one of the most important spaces for LGBTIA people.

Since the early 1990's, the internet has become that meeting space. Over time, the internet has largely replaced some physical locations and products—particularly gay newspapers, gay magazines, and gay bookstores—and greatly influenced others. The internet has proven to be conducive to creating cyberspace locations for LGBTIA people to meet and share their lives and knowledge. Organizations around the world have been able to use the privacy afforded Internet users and new technologies to grow their membership and to connect LGBTIA people with each other online and in person.

In the future, the global gay community will continue to be a creative source of new businesses and organizations that will be tied to the Internet. The community built around the life reality of being seen as “gay”—whether for lesbians, gay men, transgender men and women, intersex individuals, or bisexual people, along with the allies who support them—has developed that term that is recognizable and a form of common property. The .GAY TLD could be used on the internet to promote greater community-building that would lead to social change under the right circumstances.

d. Of all of the applicants for the .GAY TLD, only dotgay has made public commitments to community accountability.

Of the three .GAY applicants that filed public interest commitments, only one—dotgay—made public commitments specific to the gay community, and those commitments to community accountability are significant. Only dotgay expressed an intention and plan to proactively ensure that only members of the community will be allowed to register, an important consideration to prevent abuse that might be likely to occur if a commercial applicant owns .GAY, as discussed further below in section (f). In addition, only dotgay pledged to share a substantial proportion of profits with the community, and only dotgay committed to including members of the community in the development of policies for .GAY. Neither of the other two applicants filing public commitments expressed any knowledge of the challenges and potential concerns of the gay or LGBTIA community, much less any intention to promote the interests of the gay community. Indeed, the only time the word “gay” even appears in the public commitments of the other two applicants is in the term “.GAY”.

e. Community accountability will be essential if .GAY is to enhance the economic, social, and legal well-being of LGBTIA individuals around the world.

More specifically, .GAY has enormous potential to promote equality and prosperity for LGBTIA people if the development of .GAY is guided by dotgay, a community organization that would include the broad involvement of the gay community. Indeed, .GAY is highly unlikely to be a powerful platform for LGBTIA people if there is no community accountability. The value of .GAY would be diminished—or even negative—without community ownership.

As suggested by the analysis of public commitments in section (d), commercial ownership of the .GAY TLD would likely not balance community needs with stockholder goals. The failure to weigh community needs would greatly reduce the value of .GAY to LGBTIA organizations and businesses. Without community interaction and oversight, the pricing decisions, marketing strategies, and development of .GAY would not prioritize community benefit. For example, a purely financial incentive would exist to auction or sell domains like Pride.gay, Center.gay, Hate.gay, Lesbian.gay, Transgender.gay and Lambda.gay, Legal.gay, Health.gay to those willing to pay the most for it without considering the community's best interest. Such sales would likely price out existing and new organizations or businesses in the global LGBTIA community. It is highly unlikely that the winning bidders, lacking community oversight, would use such spaces as community resource hubs, as planned by dotgay. Commercial owners' lack of a vision for meeting the community's needs in developing .GAY would simply perpetuate the current economic and social disadvantages of LGBTIA people.

f. Without community oversight, .GAY could become a source of activity that would harm LGBTIA people.

If ICANN rejects dotgay's community priority application, effectively eliminating community oversight of .GAY, the platform would be highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people. For example, the very active efforts in many countries to commit LGBTIA people to coercive (but professionally discredited) "conversion therapies" could be greatly aided by a site that appears to be gay-supportive but is actually feeding personal information to anti-gay organizations or law enforcement. Such information could be used to publicly disclose someone's sexual orientation or to blackmail them into coercive and harmful treatment.

Such outcomes are not mere speculation. Research has uncovered many examples of police, governmental, and individual efforts to entrap, blackmail, or extort LGBTIA people, where consensual same-sex activity is criminalized, such as in countries as diverse as Zimbabwe, Iran, Kuwait, Kenya, Nigeria, India, and (historically) the United States. For examples, see "Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa," International Gay and Lesbian Human Rights Commission, 2011 (<https://www.outrightinternational.org/sites/default/files/484-1.pdf>). Today, at least 75 countries criminalize same-sex sexual activity, with a death penalty possible in 13 of those countries. In countries that have criminalized advocacy for homosexuals or for certain gay issues, such as Russia or Nigeria, allies participating in .GAY online forums might also be targeted. Thus an online platform seemingly tied to the gay community—while completely unaccountable to actual vital community interests—would be ripe for abuse by people,

organizations, and agencies that would use it to further the oppression of LGBTIA people. Such outcomes would both reduce the economic value of .GAY to its legitimate users in the community and would result in severe personal and economic harms to the individuals targeted.

If ICANN continues to reject dotgay's community priority application, which would provide community oversight of .GAY, these potential negative outcomes are plausible predictions and would make it harder for LGBTIA businesses and organizations to form and to operate effectively. While specific research has not been done to estimate the social and economic cost of these outcomes to the LGBTIA community, those costs would be real and would add to the existing stigma and discrimination faced by LGBTIA people around the world.

II. QUALIFICATIONS

I offer my opinion as an expert on the economic impact of stigma, discrimination, and exclusion of the LGBTI people and on the larger economy. I base this opinion about .GAY on twenty-five years of research as a professor of economics, currently at the University of Massachusetts Amherst. For nine years I was also director of the School of Public Policy at UMass Amherst. My Ph.D. in economics is from the University of California, Berkeley. I am a cofounder of and Distinguished Scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law, a research center that is recognized worldwide for LGBTI research and expertise.

Published Works and Global Consulting: I have written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports, all of which are listed on my CV below. This body of research includes work on many different countries. I have testified on my research to the U.S. Congress, several state legislatures, and in litigation. I have been a consultant or contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues, and I have attended numerous global conferences on LGBTI human rights and development. I have done speaking tours on these topics in Australia, Vietnam, Philippines, China, South Korea, and Peru, among other countries. I have been asked to speak to the ambassadors of the OECD and the board of directors of the Inter-American Development Bank, as well as numerous business audiences around the world.



Signed: _____

M. V. Lee Badgett

Date: October 17, 2016

Full Curriculum Vitae of Professor M.V. Lee Badgett

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Professor	Dept of Economics, Univ. of Massachusetts Amherst
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Williams Distinguished Scholar	Williams Institute, UCLA School of Law
Scholar-in-residence	Equal Employment Opportunity Commission
Fellow	Salzburg Global Seminar, LGBT Forum

EDUCATION:

	DEGREE	DATE	FIELD
University of California, Berkeley	Ph.D.	1990	Economics
Dissertation title: "Racial Differences in Unemployment Rates and Employment Opportunities"			
University of Chicago	A.B.	1982	Economics

PREVIOUS POSITIONS:

Director, School of Public Policy (formerly Center for Public Policy and Admin.) (2007-2016 name change), UMass Amherst
Research Director, Williams Institute, UCLA School of Law (2006-2013)
Assistant & Associate Professor, Dept. of Economics, University of Massachusetts-Amherst (1997-2008)
(Adjunct) Professor, Whittier Law School (Summer 2011)
Visiting Professor, UCLA School of Law (2005-2007; Summer 2008)
Visiting Researcher, Amsterdam School for Social Science Research, University of Amsterdam (2003-2004)
Co-founder & Research Director, Institute for Gay and Lesbian Strategic Studies (1994-2006)

Visiting Assistant Professor, Women's Studies and Lesbian and Gay Studies, Yale University (1995-1996)

Research Analyst, National Commission for Employment Policy, U.S. Department of Labor (Summer 1994)

Assistant Professor, School of Public Affairs, University of Maryland, College Park (1990-1997)

CURRENT RESEARCH TOPICS:

Connections between inclusion of LGBT people and economic development
Sexual orientation and gender identity discrimination in labor markets and impact of public policy

Poverty in LGBT community

COURSES TAUGHT:

Economics: Microeconomics (University of Massachusetts)

Microeconomics and Public Policy (University of Massachusetts-Amherst)

Political Economy of Sexuality (University of Massachusetts-Amherst)

Labor Economics--undergraduate and Ph.D. level (University of Massachusetts-Amherst)

Feminist Economics (co-taught as part of Traveling Course at University of Minnesota)

Policy: Policy Analysis (University of Massachusetts-Amherst), Capstone course (University of Massachusetts-Amherst)

Social Inequality and Social Justice: Problems and Solutions (University of Massachusetts-Amherst)

Social Science and Public Policy on LGBT Issues (Whittier Law School Barcelona program; UMass Online)

Public Policy Seminar: Global LGBT Human Rights and Criminal Justice Reform in U.S. (Univ. of Mass.)

BOOKS:

The Public Professor: How to Use Your Research to Change the World, NYU Press, 2016.

When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage, New York University Press, 2009. Distinguished Book Award, American Psychological Assoc., Division 44, 2010; Korean translation published, Minumsa, 2016.

Sexual Orientation Discrimination: An International Perspective, co-edited by M. V. Lee Badgett and Jeff Frank, Routledge, 2007.

Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men, University of Chicago Press, 2001.

INSTITUTION-BUILDING PROJECTS

- Led growth and transition into School of Public Policy from Center for Public Policy & Administration at UMass Amherst

- Co-founder, Institute for Gay and Lesbian Strategic Studies, merged with Williams Institute in 2006
- Co-builder of the Williams Institute on SOGI Law and Public Policy as founding research director
- Co-PI, *EEO DataNet*, Equal Employment Opportunity Network of academics and EEOC, funded by NSF grant.
- Co-founder and steering committee member, LGBT Poverty Collaborative (U.S.)

JOURNAL ARTICLES:

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"Impact of Extending Sexual Orientation and Gender Identity Nondiscrimination Requirements to Federal Contractors," Williams Institute, February 2012.

"The Economic Impact of Extending Marriage to Same-Sex Couples in Washington," Angeliki Kastanis, M. V. Lee Badgett, and Jody L. Herman, January 2012.

"Estimating the Economic Boost of Marriage Equality in Iowa: Sales Tax," Angeliki Kastanis, M. V. Lee Badgett, and Jody L. Herman, December 2011.

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"Spending on Weddings of Same-Sex Couples in the United States," By Craig J. Konnoth, M.V. Lee Badgett, Brad Sears, Williams Institute, July 2011.

"The Impact of Creating Civil Unions for Same-Sex Couples on Delaware's Budget," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, Williams Institute, March 2011.

"The Fiscal Impact of Creating Civil Unions on Colorado's Budget," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, Williams Institute, February 2011.

"The Impact on Rhode Island's Budget of Allowing Same-Sex Couples to Marry," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, February 2011, Williams Institute.

"Employment Discrimination against Lesbian, Gay, Bisexual, and Transgender People in Oklahoma," By Christy Mallory, Jody L. Herman, M.V. Lee Badgett, Williams Institute, January 2011.

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"The Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia," by Christopher Ramos, M. V. Lee Badgett, and Brad Sears, Williams Institute, April 2009.

"Fact Sheet: Tax Implications for Same-Sex Couples," by Naomi Goldberg and M. V. Lee Badgett, Williams Institute, April 2009.

"The Economic Impact of Extending Marriage to Same-sex Couples in Vermont," By M. V. Lee Badgett, Christopher Ramos, and Brad Sears, Williams Institute, March 2009.

"Poverty in the Lesbian, Gay, and Bisexual Community," by Randy Albelda, M.V. Lee Badgett, Gary Gates, and Alyssa Schneebaum, Williams Institute, March 2009.

"Florida Adoption Ban/ Cost Estimate," by Naomi Goldberg and M. V. Lee Badgett, Williams Institute, February 2009.

"Kentucky Foster Care/Adoption Ban Cost Estimate," By Naomi Goldberg and M. V. Lee Badgett, Williams Institute, February 2009.

“The Economic Impact of Extending Marriage to Same-sex Couples in Maine,” By M. V. Lee Badgett, Christopher Ramos, and Brad Sears, Williams Institute, February 2009.

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“The Impact of Extending Marriage to Non-Resident Same-Sex Couples on the Massachusetts Budget,” By M. V. Lee Badgett and R. Bradley Sears, Williams Institute memo to Massachusetts Secretary of Housing and Economic Development, June 2008.

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“The Impact on Iowa's Budget of Allowing Same-Sex Couples to Marry,” M.V. Lee Badgett, Amanda K. Baumle, Adam P. Romero and Brad Sears, Williams Institute, April 2008.

“The Impact on Oregon's Budget of Introducing Same-Sex Domestic Partnerships,” By M.V. Lee Badgett, R. Bradley Sears, Elizabeth Kukura, and Holning Lau, Williams Institute, February 2008.

“Implications of HB 9 for Businesses in New Mexico,” M.V. Lee Badgett, Williams Institute, January 2008.

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Amici curiae brief, in re Marriage Cases, Supreme Court of California, September 2007, M. V. Lee Badgett and Gary J. Gates.

“Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination,” by Lee Badgett, Holning Lau, Brad Sears, and Deborah Ho, Williams Institute, UCLA, June 2007.

Census Snapshot series: 50 state reports; Williams Institute, UCLA, with various co-authors, 2007.

“Methodological Details for Census Snapshot,” August 2007, Danielle MacCartney, M. V. Lee Badgett, and Gary Gates.

“Adoption and Foster Care by Gay and Lesbian Parents in the United States,” Williams Institute and Urban Institute, March 2007, Gary Gates, Lee Badgett, Jennifer Macomber, and Kate Chambers.

“The Financial Impact of Domestic Partner Benefits in New Hampshire,” Williams Institute, December 2006.

“Economic Benefits from Same-Sex Weddings in New Jersey,” Williams Institute, December 2006.

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“The Impact of the Colorado Domestic Partnership Act on Colorado's State Budget,” M.V. Lee Badgett, R. Bradley Sears, Roger Lee, and Danielle MacCartney, Williams Institute. October 2006

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“The Impact on Washington’s Budget of Allowing Same-Sex Couples to Marry,” M.V. Lee Badgett, R. Bradley Sears, Elizabeth Kukura, and Holning Lau, IGLSS and Williams Institute, 2006.

“The Impact on New Mexico’s Budget of Allowing Same-Sex Couples to Marry,” M.V. Lee Badgett, R. Bradley Sears, Steven K. Homer, Patrice Curtis, and Elizabeth Kukura, IGLSS and Williams Institute, 2006.

“Positive Effects on State of Alaska from Domestic Partnership Benefits,” Williams Institute, 2006.

“The Cost to Ocean County of Providing Pension Benefits to Employees’ Domestic Partners,” Williams Institute, 2006.

“The Impact on New Hampshire’s Budget of Allowing Same-Sex Couples to Marry,” R. Bradley Sears, M. V. Lee Badgett, and Elizabeth Kukura, IGLSS and Williams Institute, 2005.

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Laura E. Durso and M. V. Lee Badgett, "Policymakers should take seriously the need to make all LGBT stories visible through data," *The Hill*, Congress Blog, Sept. 20, 2016, http://thehill.com/blogs/congress-blog/civil-rights/296727-policymakers-should-take-seriously-the-need-to-make-all-lgbt#disqus_thread.

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“High Costs of Discrimination,” *Worcester Telegram*, M. V. Lee Badgett and Jody Herman, May 11, 2011.

Featured guest column, *The Economist* debate on marriage for same-sex couples, January 6, 2011, <http://www.economist.com/debate/days/view/638>.

“Summer of Love and Commitment,” *The Huffington Post*, September 3, 2008.

“Sexual Orientation, Social and Economic Consequences,” in *International Encyclopedia of the Social Sciences, 2nd Edition*, ed. William A. Darity, Jr., Macmillan Reference USA, 2008.

“The Wedding Economy,” *The New York Times*, January 7, 2007.

"The Closet Door's Open: What's Behind Hartford's Surge in Gay Population?" *The Hartford Courant*, Gary J. Gates and M. V. Lee Badgett, November 5, 2006.

"The Future of Same-Sex Marriage," *Social Work Today*, November 2006.

"The Gay Health Insurance Gap," www.alternet.org, October 26, 2006.

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Book review of *Inheritance Law and the Evolving Family*, by Ralph Brashear, *Feminist Economics*, vol. 12, no. 1-2, 2006.

"Equality Doesn't Harm 'Family Values'", with Joop Garssen, *National Post* (Canada), August 11, 2004.

"Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?" *Slate Magazine*, May 20, 2004, <http://slate.msn.com/id/2100884/>.

Brad Sears and Lee Badgett, "Tourism and Same-sex Marriage," *San Diego Union-Tribune*, June 2, 2004.

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"Economics" and "Boycotts", entries for *Encyclopedia of Gay, Lesbian, Bisexual, and Transgender History*, ed. by Marc Stein, Scribners, forthcoming December 2013.

"Recognizing California Couples: Domestic-Partner Law Attacked by Anti-Gay Senator Could Boost Flow of Cash to State," M. V. Lee Badgett and R. Bradley Sears, *Daily Journal*, October 14, 2003.

"A Win at Cracker Barrel," *The Nation*, February 10, 2003.

"Why I was a Dem for a Day," *Daily Hampshire Gazette*, June 2002.

Commentary on Boy Scouts of America, WFCR, Amherst, MA, August 13, 2001.

"Sexual Orientation," Richard Cornwall and M. V. Lee Badgett, entry for *Encyclopedia of Feminist Economics*, ed. by Meg Lewis and Janice Peterson, Edward Elgar, 2000.

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"One Couple's 'Penalty' remains another's privilege", with James Alm and Leslie A. Whittington, *Boston Globe*, September 3, 2000, p. E2.

"Domestic partner status unfair to gay couples," *Springfield Sunday Republican*, op-ed April 2, 2000, p. B3.

"Do Sexual Orientation Policies Help Lesbians?" in *Women's Progress: Perspectives on the Past, Blueprint for the Future*, Institute for Women's Policy Research, Fifth Policy Research Conference Proceedings, Washington, DC, 1998.

"Census Data Needed," letter to the editor, *The Washington Blade*, November 7, 1997, p. 37.

"Same-sex partners bring nurturing--and financial benefits--to the altar," op-ed piece with Gregory Adams, *Chicago Sun-Times*, June 8, 1996, p. 16.

"The Last of the Modernists: A Reply," *Feminist Economics*, Vol. 1, No. 2, 1995.

"Domestic Partner Recognition: Doing the Right--and Competitive--Thing," *Synthesis: Law and Policy in Higher Education*, Vol. 6, No. 4, Spring 1995.

"Equal Pay for Equal Families," *Academe*, May/June 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," in *Higher Education Collective Bargaining During a Period of Change*, Proceedings, Twenty-Second Annual Conference, April 1994, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, 1994.

"Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men," pamphlet published by National Organization of Gay and Lesbian Scientists and Technical Professionals and the Institute for Gay and Lesbian Strategic Studies, 1994. (Early version of book chapter of same title.)

Co-author and co-editor, *Labor and the Economy*, published by the Center for Labor Research and Education, Institute of Industrial Relations, UC Berkeley, 1989.

"Looking for the Union Label: Graduate Students at U.C.," *California Public Employee Relations*, No. 85, June 1990.

"Rusted Dreams: Documenting an Economic Tragedy," *Labor Center Reporter*, No. 219, October 1987.

"How the Fed Works," *Labor Center Reporter*, No. 177, November 1986.

EXPERT WITNESS EXPERIENCE (LITIGATION 2009-2014):

Written testimony, *Birchfield and Mocko v. Armstrong and Jones*, March 2016 (challenge to Florida's policies on death certificates for same-sex spouses)

Written testimony, *Whitewood et al. v. Wolf et al.*, February 2014 (challenge to Pennsylvania's marriage equality prohibition)

Written testimony, *Harris v. McDonnell*, No. 5:13-cv-00077 (W.D. Va.), December 2013 (challenge to Virginia's marriage equality prohibition)

Written testimony, *DeLeon v. Perry*, No. 5:13-cv-00982 (S.D. Tex.), November 2013 (challenge to marriage equality prohibition in Texas)

Written testimony, *Kitchen v. Herbert*, No. 2:13-cv-00217 (D. Utah), October 2013 (challenge to Utah's marriage equality prohibition)

Written testimony, *Darby/Lazaro v. Orr*, No. 12 CH 19718 (Ill. Cir. Ct., Cook Cnty.), April 2013 (challenge to Illinois' marriage equality prohibition)

Written testimony, *Sevcik v. Sandoval*, No. 2:12-cv-00578 (D. Nev.), 2012 (challenge to Nevada's marriage equality prohibition)

Written testimony and deposition, *Bassett v. Snyder*, No. 2:12-cv-100382012 (E.D. Mich.), 2012 and 2013 (challenge to Michigan's Domestic Partner Benefit Restriction Act).

Written testimony, *Glossip v. Missouri Dep't of Transp. and Highway Patrol Employees' Ret. Sys.*, No. 10-CC00434 (Mo. Cir. Ct., Cole Cnty.), 2011 (challenge to denial of death benefit to state trooper's surviving same-sex partner).

Written testimony, *Collins v. Brewer* (later *Diaz v. Brewer*), No. 2:09-cv-02402 (D. Ariz.), 2010 (challenge to Arizona's cancellation of domestic partner benefits).

Deposition and trial testimony, *Perry v. Schwarzenegger* (later *Perry v. Brown, Hollingsworth v. Perry*), No. 3:09-cv-02292 (N.D. Cal.), 2010 (challenge to California's Proposition 8).

LEGISLATIVE WITNESS EXPERIENCE (Selected):

U.S. Senate Committee on Health, Education, Labor, and Pensions, S.811, The Employment Non-Discrimination Act of 2011, June 12, 2012.

Written testimony, S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families, M. V. Lee Badgett, Ilan H. Meyer, Gary J. Gates, Nan D. Hunter, Jennifer C. Pizer, Brad Sears. July 2011.

U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Postal Service, and the District of Columbia on HR 2517: Domestic Partnership Benefits and Obligation Act of 2009, July 2009.

U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, Testimony on Employment Non-Discrimination Act (HR 2015), September 2007.

Written and oral testimony on legislation or regulations in Alaska, California, Hawaii, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Vermont.

SELECTED MEDIA APPEARANCES AND PROFILES:

Featured solo panelist, *The Economist* "Pride and Prejudice: The Business and Economic
Featured economist, "Gay Myths Derailed by Economist Badgett's Data Research," by
Jeanna Smialek, *Bloomberg*, June 20, 2014,
<http://www.bloomberg.com/news/articles/2014-06-20/gay-myths-derailed-by-economist-badgett-s-data-research>

Featured guest, *Tell Me More*, NPR, June 10, 2013.

Featured guest, *Encounter*, Radio National, ABC (Australian Broadcasting Corp), October 9, 2011.

Featured guest, *Faith Middleton Show*, January 13, 2011.
<http://www.yourpublicmedia.org/content/wnpr/faith-middleton-show-when-gay-people-get-married>

Featured guest, "Same-Sex Marriage, Five Years On," *On Point*, National Public Radio, May 27, 2009. <http://www.onpointradio.org/2009/05/same-sex-marriage-five-years-on>

Featured guest, "Gay Commerce," *Talk of the Nation*, National Public Radio, 1997.

Featured guest, "Gay Market," *Odyssey: A Daily Talk Show of Ideas*, NPR nationally syndicated show, 2005.
http://www.chicagopublicradio.org/DWP_XML/od/2005_05/od_20050512_1200_4906/episode_4906.ram

Interviewed on *All Things Considered*, "Gay Marriage in Massachusetts, One Year Later," May 2005. <http://www.npr.org/templates/story/story.php?storyId=4655621>

Featured guest, *CNN American Morning*: "The Future of Marriage," June 2006.
http://www.law.ucla.edu/williamsinstitute/images/CNN_AmericanMorning_FutureOfMarriage_LeeBadgett_062006.mov

SELECTED PRESENTATIONS OF PAPERS SUBMITTED TO ACADEMIC CONFERENCES:

“Assessing the best policy approach for reducing LGBT poverty,” M. V. Lee Badgett and Alyssa Schneebaum, APPAM research conference, Nov. 2015, Miami.

Invited panelist, Roundtable on Marriage Equality, American Political Science Association, Sept. 4, 2015, San Francisco.

Invited panelist, Roundtable on Employment Discrimination Against LGBT People, American Sociological Association meeting, August 25, 2015, Chicago.

“The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies,” Amherst College conference, LGBT Rights in the Americas and Beyond (May 2015), International Associate for Feminist Economics (Berlin, July 2015); Williams Institute Webinar, Feb. 25, 2015; Allied Social Science Associations (economist orgs) meeting, SF, January 2016

Roundtable participant at Institute for Development Studies (UK) panel, “Sexuality, law, and economic development: what are the key conversations and alliances?” Mar. 6, 2015.

“Assessing the effect of nondiscrimination policies related to sexual orientation and gender identity,” Badgett and Samantha Schenck. Presented at: Sexual Orientation Discrimination in the Labor Market, University of Paris 1 Pantheon-Sorbonne, 6/20/2012; International Association for Feminist Economics, Barcelona Spain. 6/27/2012; APPAM conference, November 2012.

“Waves of Change: Is Latin America Really Following Europe in Same-Sex Couples?,” at 8th Annual Update, Williams Institute, “Global Arc of Justice: Sexual Orientation Law Around the World, March 14, 2009.

“Gay poverty,” Presented at 2009 Allied Social Science Association Meeting; 2009 Association for Public Policy Analysis and Management Research Conference; 2008 IAFFE Research Conference, Torino, Italy, June 2008; Williams Institute Annual Update, February 2008.

“Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors,” (with Gary J. Gates and Natalya Maisel), presented at 2007 APPAM Meeting, Washington, DC; 2008 Allied Social Science Associations Annual meeting, New Orleans.

“Predicting Same-Sex Marriage in Europe & the US,” Presented at 2008 IAFFE Research Conference, Torino, Italy, June 2008.

“Social Lab Outcomes: Same-Sex Couples and Legal Recognition,” Temple University Law School, “States as Social Laboratories,” October 20, 2007.

“The Double-Edged Sword in Gay Economic Life: Marriage and the Market.” Washington & Lee School of Law, Feb 2008.

“Why Marry?” Presented at 2006 IAFFE Research Conference, Sydney, Australia, July 2006; New School for Social Research, October 2006; Sociology Family Working Group, UCLA, 2006.

“An exploration of foster care and adoption among lesbians and gay men,” joint work with Jennifer Macomber, Kate Chambers, Gary Gates. Family Pride conference, Philadelphia, PA, May 2006.

“Survey Data on Sexual Orientation: Building a Professional Consensus,” presented at 2005 Joint Statistical Association Meetings, August 2005. Also presented to Canadian Population Society, June 2005; Williams Project Annual Update, UCLA Law School, February 2005.

“Alternative Legal Statuses for Same-sex couples and other families: Can Separate Be Equal Enough?” Presented at International Association for Feminist Economics, Washington DC, July 2005; APPAM, Washington, DC, November 2005; UCLA Law School 2006.

“Looking into the European Crystal Ball: What Can the U.S. Learn About Same-Sex Marriage?” Tulsa Gay and Lesbian History Project, October 2004; University of Connecticut, October 2004; Yale University, February 2005; American Psychological Association, August 2005; National Council of Family Relations (invited special session), 2005.

“Predicting Partnership Rights: Applying the European Experience to the United States,” Yale University Law School, March 5, 2005.

“Asking the Right Questions: Making the Case for Sexual Orientation Data,” Joint Statistical Meetings of the American Statistical Association, Toronto, August 2004; Williams Project Annual Update, UCLA, February 2005; Canadian Population Society, June 3, 2005.

“A New Gender Gap: Sex Differences in Registered Partnerships in Europe,” International Association for Feminist Economics research conference, London, August 2004.

“Variations on an Equitable Theme: International Same-sex Partner Recognition Laws,” Research Conference of International Associate for Feminist Economics, July 2002. Stockholm University, September 2003; University of Linz, Austria, November 2003; University of Amsterdam, June 2004; American Political Science Association, Chicago, September 2004.

“The Myth of Gay Affluence and Other Tale Tales: The Political Economy of Sexual Orientation,” University of California, San Diego, June 2002.

“A Family Resemblance: Legal Recognition of Same-Sex Partners in the United States,” Research Conference of International Association for Feminist Economics, Oslo, Norway, June 2001; University of Southern Maine, October 2001; University of Massachusetts, February 2002; Washington University Political Science Department, March 2002; University of Wisconsin, LaCrosse, April 2002.

"A Movement and a Market: GLBT Economic Strategies for Social Change," University of Wisconsin, LaCrosse, April 2002; Macalester College, April 2002.

"Job Gendering: Occupational Choice and the Marriage Market," Research Conference of International Association for Feminist Economics, Ottawa, CA, June 1999.

"Tolerance, Taboos, and Gender Identity: The Occupational Distribution of Lesbians and Gay Men," Research Conference of International Association for Feminist Economics, Amsterdam, The Netherlands, June 1998.

"The Impact of Affirmative Action on Public-Sector Employment in California," ASSA Meetings, 1997.

"Tolerance or Taboos: Occupational Differences by Sexual Orientation," presented at American Economic Association Meetings, January 1996, and American Psychological Association convention in Toronto, August 1996.

"A Race, Ethnicity, and Gender Analysis of the 1990-91 Recession," ASSA Meetings 1995.

"Choices and Chances: Is Coming Out at Work a Rational Choice?" The Sixth North American Lesbian, Gay, and Bisexual Studies Conference, University of Iowa, November 18, 1994.

"Civil Rights and Civilized Research: Constructing a Sexual Orientation Policy Based on the Evidence," Association for Public Policy Analysis and Management Research Conference, October 27, 1994

"Where the Jobs Went in the 1990-91 Downturn," National Conference on Race Relations and Civil Rights in the Post Reagan-Bush Era, The Roy Wilkins Center, Humphrey Institute, University of Minnesota, October 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," The American Political Science Association meeting, September 1994.

Panelist, "Developing Lesbian/Gay Studies in Economics," ASSA Meetings, 1994.

"The Rainbow at Work: Differences in the Economic Status of Women Workers in the United States," presented at the 5th International Interdisciplinary Congress on Women, 1993.

"The Economic Well-Being of Lesbians and Gay Men: Pride and Prejudice," December 1992, presented at 1993 ASSA Meetings.

"Affirmative Action in a Changing Legal and Economic Environment," revised, December 1992, presented at 1993 ASSA Meetings.

"The Effects of Structural Change on the Race and Gender Distribution of Employment," with Rhonda M. Williams, presented at Eastern Economic Association Meeting, 1992.

"Changes in Racial Inequality Among Women: Evidence from Unemployment Rates," presented at AEA Meetings, 1992.

"Labor Market Discrimination--Economic and Legal Issues for Gay Men and Lesbians," presented at AEA Meetings, 1992.

"Rising Black Unemployment: Changes in Job Stability or in Employability?" presented at National Economic Assoc., 1992.

"Rising Black Unemployment and the Role of Affirmative Action Policy," presented at APPAM Research Conference, October 1990.

INVITED KEYNOTES AND OTHER PRESENTATIONS (Selected):

"The Public Professor," book talks at University of Massachusetts Amherst, Duke University, University of North Carolina-Chapel Hill, Odyssey Bookstore, UCLA, Hunter College, Vanderbilt University, Georgia State University, University of Washington, January-May 2016; "Author meets critics" session at Southern Sociological Society, April 2016.

"The Marriage Equality Experience—An International Perspective," East China Normal University, Shanghai; Renmin University Beijing; Ewha University, Seoul; Korea University School of Law; March 2016.

"The Business Case for LGBT Equality and Inclusion," Sookmyung Women's University (SMU) Entrepreneurship Center, Seoul, Korea, March 11, 2016.

"Left Out—Lesbian, Gay, and Bisexual Poverty in the U.S." Franklin and Marshall College, Oct 21, 2015; Colorado State Univ, Nov 2015; Univ of Minnesota, Feb 2016.

"The Economic Cost of Stigma and Exclusion of LGBT People," Board of Directors of Inter-American Development Bank, Oct. 2, 2015 and March 6, 2015; Boston Consulting Group, Oct. 7, 2015; Salzburg Global LGBT Forum, June 14-18, 2015; Clinton Global Initiative learning call, April 8, 2015, World Bank Fall Meeting, Nov. 9, 2014; UN Development Programme Experts Meeting, Sept. 16-17, 2015.

US State Department Speaker Program: Oct. 12-18, 2014: Series of talks to government ministries, American Chamber of Commerce, universities, community groups, international agencies, Lima, Peru. August 12-21, 2015: Series of talks to Congress, universities, municipal policymakers, community groups, and other government agencies, The Philippines.

“Sexual Orientation and Gender Identity Diversity in Entertainment: Experiences and Perspectives of SAG-AFTRA Members,” Gender, Sexual Orientation, and Labor in Entertainment Panel at conference of UCLA Institute for Research on Labor and Employment, April 18, 2015.

Dublin City University, School of Applied Language and Intercultural Studies, and Marriage Equality; Keynote speaker for The Marriage Equality Experience: An International Perspective, my talk: When Gay People Get Married Dublin, Ireland, March 19, 2015.

Presentation at Overseas Development Institute and Kaleidoscope Trust meeting, London (by skype), “The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies” , Feb. 12, 2015.

Panelist, USAID Frontiers in Development, Sept. 2014.

Invited keynote speaker, “The Economic Cost of Homophobia,” The World Bank, March 12, 2014.

Invited speaker, “The Impact of LGBT Inclusion on Economic Outcomes,” OECD, Paris, February 12, 2014.

Invited Keynote Speaker, “Workshop on Comparative Experiences in Protection of LGBT Rights in the Family and Marriage Relations,” hosted by Ministry of Justice, Viet Nam, and UNDP, December 20-21, 2012, Hanoi.

“When Gay People Get Married,” London School of Economics and Politics, Keynote for LSE Pride Week, November 2012; Bryant University, November 2013; University of Pennsylvania Dept of Sociology, March 2014.

Keynote speaker at Roundtable, "Taking Poverty Out of the Closet," Horizons Foundation, San Francisco, March 19, 2012.

“The Impact of Allowing Same-sex Couples to Marry,” Australian National University College of Law. March 1, 2012; Gough Whitlam Institute, Sydney Australia, March 2, 2012.

Australian Parliament, Canberra, "The Impact of Allowing Same-Sex Couples to Marry," February 27, 2012.

Keynote lunch speaker, E-Marriage Symposium, Michigan State University Law School, “My Marriage, No Marriage,” November 11, 2011.

“When Gay People Get Married,” University of North Carolina Chapel Hill, October 13, 2011.

IAFFE, 2011, Hangzhou China: Roundtable on Sexuality and the Economy, Roundtable on Enhancing IAFFE's Vision in the 21st Century. June, 2011.

Panelist, "Same-Sex Marriage: Past, Present and Future," M. V. Lee Badgett, David Boies, and Nancy Cott, UCLA History Department, February 24, 2011.

Janus Lecture, Debate on same-sex marriage, Brown University, February 17, 2011.

Panelist, "Queering Where We Work: Bridging LGBTQ Policy Advocacy, Front-Line Activism, and Research," University of Toronto, Rotman School of Management, November 5, 2010.

"The Economic Value of Marriage," Drake Constitutional Law Center's Annual Symposium, The Same-Sex Marriage Divide, Drake University, Iowa. April 10, 2010.

Keynote address, "Out and Equal in the Workplace: Sexual Orientation Discrimination, Univ of Pittsburgh School of Law. March 18, 2010.

"When Gay People Get Married": Portland State Univ Portland, OR. 4/23/2010; University of Chicago Alumni Weekend, Chicago, IL; University of Chicago, June 3, 2010; Kennesaw State University, Atlanta, GA, March 24, 2010; Andrew Young School of Public Affairs; Georgia State University, March 25, 2010; and many other bookstores and locations.

"Challenges for LGBT Workers" Department of Labor at invitation of Assistant Secretary for Policy, January 29, 2010.

Keynote Address on Sexual orientation and economics, University of Illinois-Chicago, September 30, 2009.

Multiple talks, University of Minnesota, Duluth, April 2009.

"On the Road to Equality: Health Care for LGBT Americans," Opening address, 2007 National LGBT Health Expo, Washington, DC, November 2, 2007.

"Does diversity make a difference? A view from the marketplace." *Keynote Address*, 7th annual international conference on diversity in organizations, communities, and nations, Amsterdam, The Netherlands, July 1, 2007.

"Not-So-Gay Divorce: A Reason for Marriage," Gay Divorce Conference, King's College London, May 20, 2006.

"Thinking for Change/Changing our Thinking: Effective Research in GLBT Policy Debates", Presidential Invited Address, Division 44, American Psychological Association Convention, August 2005.

"Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men," University of Toronto, March 16-17, 2005.

Panelist, "Aging in the Gay Community," American Association of Retired Persons, June 2000.

"Money and Our Discontents," Keynote speech, Smart Women/Smart Money conference by the Astraea Foundation. November 1999.

"Homo Economics: The Myth of Gay Affluence and Other Tall Tales," University of Connecticut, March 1999; American University, October 1999.

Same-Sex Couples and Public Policy, panel member, University of Maryland, College Park, October 1999.

"A Bridge to the Future or the Road to Nowhere? Respectability and Lesbian and Gay Think Tanks," Remarks prepared for the Politics of Respectability Conference, University of Chicago, April 1999

Panelist, Unifying Anti-Subordination Theories, DePaul University Law School, February 1999.

"Lesbians, Gays, and Bisexuals in a Gender Agenda," Roundtable on Feminism and Public Policy, 1998 ASSA Meetings, Chicago, IL.

"Economic Issues for Lesbians," Workshop on Lesbian Health Research Priorities, Institute of Medicine, Board on Neuroscience and Behavioral Health, Washington, DC, October 6, 1997.

"Lesbians, Gays, Bisexuals, and Transgenders: Who Gives, How Much, and Why," OutGiving Conference, Aspen, CO, September 1997; Horizons Foundation and United Way, San Francisco, CA, October 1997; NGLTF Creating Change conference, San Diego, November 1997; Cream City Foundation Milwaukee, WI; Chicago, IL; Boston Foundation, February 1998.

"Lesbian and Gay Money: Is There a Gender Gap?" Towson State University, March 1997.

Panelist, "Out in the Workplace," University of Pennsylvania, February 10, 1997.

"Workplace Policy Issues for Lesbian, Gay, and Bisexual People," Gender, Race, Economics, and Public Policy Conference of the New School for Social Research, April 5, 1996.

Panelist, "Compensating for Gender, Race, and Class Inequalities: Is Affirmative Action the Means to Social Justice," A Future of Equality: Feminist Rethinkings of the Affirmative Action and Welfare Debates, Yale University Women's Center, March 30, 1996.

"Equal Pay for Equal Work," University of Delaware Lavender Scholars Series, March 7, 1996.

"Lesbian and Gay Think Tanks," Center for Lesbian and Gay Studies, CUNY Graduate School, February 9, 1996.

Panelist, Affirmative Action in the 21st Century, Chicago United, February 15, 1996.

"The Economic Status of Lesbians and Gay Men: Discrimination, Data, and Debate," Bureau of Labor Statistics, U.S. Department of Labor, June 15, 1995; Institution for Social and Policy Studies, Yale University, September 1995; University of Massachusetts, Boston, May 1996.

Panelist, "Gay Money: Power of the Purse," National Lesbian & Gay Journalists Association, October 19, 1995.

Panelist, Domestic Partner Benefits and Other Gay Rights Policy Issues: Creating Change on Campus, American Association of University Professors, June 9, 1995.

Prepared testimony, Select Education and Civil Rights Subcommittee, Committee on Education and Labor, U. S. House of Representatives, Testimony on the 30th Anniversary of the Equal Pay Act, 1994. (Hearing cancelled at the last minute.)

"Economic Evidence of Sexual Orientation Discrimination," Gay, Lesbian, and Bisexual Studies Faculty Seminars, Univ. of Massachusetts, Amherst, Dept. of Economics and Program for Gay, Lesbian, and Bisexual Concerns, May 11, 1994.

"The Economics of Being Lesbian, Gay, or Bisexual: Pride, Prejudice and Politics," Brown Bag Series in Gay, Lesbian, and Bisexual Studies, University of Massachusetts, Amherst, May 11, 1994.

"Thinking Homo/Economically," conference presentation, Center for Lesbian and Gay Studies, CUNY Graduate School, May 7, 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," Annual Conference, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, April 19, 1994. Also presented at the American Political Science Association meeting, September 1994.

"The Changing Contours of Discrimination: Race, Gender, and Structural Economic Change," presented at University of Michigan, School of Social Work, Profs. Mary Corcoran and Sheldon Danziger, March, 15, 1994.

"Redefining Families: Research and Policy," American Political Science Association meetings, Washington, D.C., September 3, 1993.

"A Cost/Benefit Analysis of Coming Out," presented at OUT Magazine press conference, broadcast on CSPAN, April 21, 1993.

GRANTS:

U.S. Department of State, Speaker's Grants for trip to Peru, October, 2014; Trip to The Philippines, August, 2015.

National Science Foundation, "Building an Interdisciplinary Equal Employment Opportunity Research Network and Data Capacity," 7/1/13 to 6/30/16 (\$245,216), co-PI.

Five Colleges Inc (from Mellon Foundation): Bridging the Liberal Arts and Professional Training in Public Policy & Social Innovation (\$178,000)

Five Colleges Inc: Social Justice Public Policy Practitioners-in-Residence (\$95,000)

Ford Foundation, 2003-2006 (2 grants), Data on Sexual Orientation (total \$600,000)

2002 Wayne F. Placek Award, American Psychological Foundation, "Health Insurance Inequality for Gay, Lesbian, and Bisexual People," with Michael A. Ash.

1995 Wayne F. Placek Award, American Psychological Foundation, "The Impact of Attitudes on Lesbian and Gay Male Earnings and Occupations." (\$15,000)

The Aspen Institute, Nonprofit Sector Research Fund, "Lesbian, Gay, and Bisexual Giving and Volunteering," 1996. (\$40,000)

CONSULTANCIES: World Bank; UN Development Programme; Pew Research Center

BOARDS, PANELS, AND COMMITTEES:

Board, Interdisciplinary Studies Institute, UMass Amherst, 2013-2016

Co-convenor of LGBT economists network, American Economic Association, 2016

Board, International Association for Feminist Economics, 2015-2017

Board member and Co-chair of Board, Wellspring Cooperative Corporation, 2014-present.

Chair, Diversity Committee, International Association for Feminist Economics, 2011-2013.

Association for Public Policy Analysis and Management (APPAM): Institutional representative, 2007-present and Vice Chair of Inst. Reps 2011-12; Program Committee for 2010 conference.

Nat'l Association of Schools of Public Administration and Affairs (NASPAA): Leslie Whittington Teaching Award Committee, 2010.

Advisory Committee for "Real Families, Real Facts: Research Symposia on LGBT-headed Families," Family Pride, held May 2006.

Planning committee and facilitator for research meeting held at Out & Equal Workplace conference, September 2005.

Reviewer, Wayne F. Placek Award, American Psychological Foundation

Women's Funding Network, Lesbian Donor Research Project Advisory Committee, 1997-1998

Visiting Lecturer and co-designer, Traveling Feminist Economics Ph.D. Course, Univ. of Minnesota, 1997-1998

FELLOWSHIPS AND HONORS:

School of Public Policy faculty created an annual "M. V. Lee Badgett Social Justice Award" for a graduating student, 2016

Women in Leadership Award, Williams Institute, UCLA School of Law, 2015.

Samuel F. Conti Faculty Fellowship, University of Massachusetts Amherst, 2013-2014.

“When Gay People Get Married,” Distinguished Book Award, American Psychological Association, Division 44, 2010; chosen for Diversity Book Club, Kennesaw State University, 2010.

Distinguished Faculty Lecture, University of Massachusetts-Amherst, November 9, 2009, and Chancellor’s Medal (the highest honor bestowed on individuals for exemplary and extraordinary service to the campus)

Named one of twenty most influential lesbians in academia, *Curve Magazine*, 2008

Rockwood Leadership Fellow in Lesbian, Gay, Bisexual, and Transgender Community & Advocacy, 2008-09

2005 Dukeminier Award for Best Sexual Orientation Law Review Article

College Outstanding Teacher Award, Social and Behavioral Sciences, University of Massachusetts, 2000-2001

Out 100, *Out Magazine*, 2001.

One of Our Best and Brightest Activists, *The Advocate*, 2000.

Lilly Fellow, Center for Teaching, University of Massachusetts- Amherst, 1999-2000

Certificate of Appreciation, Stonewall Center, 1999.

Certificate of Recognition, University of Maryland at College Park Diversity Initiative, 1994-95

Graduate Opportunity Fellowship, 1985-86, UC Berkeley

A.B. with General Honors, University of Chicago

Maroon Key Society, University of Chicago

Abram L. Harris Prize, 1978-79, 1979-80, University of Chicago

AFFILIATIONS

Association for Public Policy Analysis & Management

American Economic Association

Editorial Board (and past Associate Editor), *Feminist Economics*

International Association for Feminist Economics (past and present board member)

Past editorial boards, *Sexuality Research and Social Policy*; *Sexuality & the Law (Social Science Research Network)*; *Law and Social Inquiry*

REFEREE:

Quarterly Journal of Economics, *Industrial Relations*, *Journal of Human Resources*, *Feminist Economics*, *Journal of Policy Analysis & Mgmt.*, *Amer. Sociological Review*, *Review of Social Economy*, *Review of Economics and Statistics*, Columbia University Press, National Science Foundation, *Qualitative Sociology*, *Social Problems*, *Social Forces*, University of Wisconsin Press, *Journal of Population Economics*, Routledge Press, Princeton University Press, *Industrial and Labor Relations Review*, *Demography*, *American Journal of Sociology*, *Contemporary Economic Policy*, *Journal of Marriage and the Family*, *Cambridge Journal of Economics*, *Social Forces*, *Health Affairs*, and others

Exhibit 15



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STATE-SPONSORED HOMOPHOBIA

**A WORLD SURVEY OF SEXUAL ORIENTATION LAWS:
CRIMINALISATION, PROTECTION AND RECOGNITION**

12TH EDITION

MAY 2017

AENGUS CARROLL AND LUCAS RAMÓN MENDOS

ilga.org

This 12th edition of *State Sponsored Homophobia* report was researched and written by Aengus Carroll and Lucas Ramón Mendos and published by ILGA. It is copyright-free provided you cite both the author and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA).

Suggested citation: International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A. and Mendos, L.R., *State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (Geneva; ILGA, May 2017).

This report is available to download in Word or PDF formats.

Digital versions of the four ILGA maps of LGB legislation in the world are available for print.

State-Sponsored Homophobia and its world maps are published simultaneously in English and Spanish, and will be available in Arabic, Chinese, French and Russian.

Download the maps and reports at <http://ilga.org> or contact info@ilga.org

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CONTENT

FOREWORD: CO-SECRETARIES-GENERAL: RUTH BALDACCHINO AND HELEN KENNEDY	5
AUTHORS' PREFACE: AENGUS CARROLL AND LUCAS RAMÓN MENDOS	7
STRENGTHENING SOGI PROTECTION AND UNPACKING INTERSECTIONALITY AT THE UNITED NATIONS IN 2016: ANDRÉ DU PLESSIS, DIANA CAROLINA PRADO MOSQUERA AND KSENIYA KIRICHENKO	13
LGB LEGISLATION GLOBAL OVERVIEW	25
SAME-SEX SEXUAL ACTS LEGAL	26
SAME-SEX SEXUAL ACTS ILLEGAL.....	37
SAME-SEX SEXUAL ACTS - DEATH PENALTY	40
PROMOTION ('PROPAGANDA') AND 'MORALITY' LAWS	41
BARRIERS TO SOGI NGOS.....	46
CONSTITUTIONAL PROHIBITION OF DISCRIMINATION SPECIFYING SEXUAL ORIENTATION	46
PROHIBITION OF DISCRIMINATION IN EMPLOYMENT BASED ON SEXUAL ORIENTATION	48
HATE CRIMES BASED ON SEXUAL ORIENTATION CONSIDERED AN AGGRAVATING CIRCUMSTANCE.....	60
INCITEMENT TO HATRED BASED ON SEXUAL ORIENTATION PROHIBITED	63
BAN ON 'CONVERSION THERAPIES'	67
MARRIAGE OPEN FOR SAME-SEX COUPLES.....	68
PARTNERSHIP RECOGNITION FOR SAME-SEX COUPLES.....	70
JOINT ADOPTION BY SAME-SEX COUPLES	73
SECOND PARENT ADOPTION.....	75
CRIMINALISATION	79
AFRICA	81
ALGERIA.....	81
ANGOLA.....	81
BOTSWANA.....	82
BURUNDI	83
CAMEROON	84
COMOROS.....	84
EGYPT	85
ERITREA	86
ETHIOPIA	87
GAMBIA.....	88
GHANA	89
GUINEA	90
KENYA	90
LIBERIA	91
LIBYA.....	92
MALAWI	93
MAURITANIA	94
MAURITIUS.....	95
MOROCCO.....	95
NAMIBIA.....	95
NIGERIA	96
SENEGAL	97
SIERRA LEONE.....	98
SOMALIA.....	98
SOUTH SUDAN.....	99
SUDAN.....	100
SWAZILAND.....	100
TANZANIA	101
TOGO	102
TUNISIA.....	103
UGANDA	104
ZAMBIA	105
ZIMBABWE	106
AMERICAS	108
ANTIGUA AND BARBUDA.....	108
BARBADOS	109
DOMINICA.....	110
GRENADA.....	111
GUYANA.....	112
JAMAICA	114
ST KITTS & NEVIS	116
ST LUCIA.....	117
ST VINCENT & THE GRENADINES.....	118
TRINIDAD AND TOBAGO	119

ASIA.....	121
AFGHANISTAN	121
BANGLADESH	121
BHUTAN	122
BRUNEI DARUSSALAM	123
GAZA (IN THE OCCUPIED PALESTINIAN TERRITORY)	124
INDIA	124
INDONESIA (SOUTH SUMATRA AND ACEH PROVINCE)	125
IRAN.....	126
IRAQ.....	128
KUWAIT	129
LEBANON.....	130
MALAYSIA.....	130
MALDIVES.....	131
MYANMAR	132
OMAN	133
PAKISTAN.....	133
QATAR.....	134
SAUDI ARABIA	135
SINGAPORE	136
SRI LANKA	137
SYRIA.....	137
TURKMENISTAN.....	138
UNITED ARAB EMIRATES	139
UZBEKISTAN.....	139
YEMEN	140
OCEANIA.....	141
COOK ISLANDS (ASSOCIATES TO NEW ZEALAND).....	141
KIRIBATI	141
PAPUA NEW GUINEA.....	142
SAMOA	143
SOLOMON ISLANDS.....	144
TONGA.....	145
TUVALU.....	146
GLOBAL PERSPECTIVES.....	147
AFRICA REFERENCE CHART	148
LGBT VISIBILITY: A DOUBLE-EDGED SWORD: ANTHONY OLUOCH AND MONICA TABENGWA	150
AMERICAS REFERENCE CHART	156
THE AMERICAS IN 2016: A YEAR MARKED BY SIGNIFICANT ADVANCES, VIOLENCE AND ANTI-RIGHTS STAKEHOLDERS: FANNY GOMEZ-LUGO AND VÍCTOR MADRIGAL-BORLOZ	158
ASIA REFERENCE CHART	164
ASIA THESE DAYS – THREE PARTS: EAST & SOUTH EAST ASIA, SOUTH ASIA AND MIDDLE EAST: VARIOUS CONTRIBUTORS	166
EUROPE REFERENCE CHART	178
EUROPE – TIME TO IMPLEMENT PROTECTIONS: THE ILGA-EUROPE TEAM	180
OCEANIA REFERENCE CHART	184
OCEANIA: A YEAR OF STEADY PROGRESS TOWARDS EQUALITY: RAYMOND ROCA AND HENRY 'AHO.....	186
WORLD MAPS 2017	192
READING ILGA MAPS	192
OVERVIEW MAP	193
CRIMINALISATION MAP.....	194
PROTECTION MAP.....	195
RECOGNITION MAP	196

ILGA CO-SECRETARIES GENERAL' FOREWORD

RUTH BALDACCHINO AND HELEN KENNEDY

On reviewing this 12th edition of *State Sponsored Homophobia*, the ancient Arabic phrase, later to be adopted by everyone, comes to mind: 'knowledge itself is power'. This report offers a compilation of useful, credible data to human rights defenders, civil society organisations, governments, UN and regional agencies, media, and allies of our communities in the fight for a more just and inclusive society. The data is compiled with the express purpose of supplying precise detail and current sources.

As such, a single tool may be used for different purposes: this information can be useful to support advocacy and change processes in societies where sexual orientation intersects with other issues; institutions can take stock of human rights violations faced by LGBTQ people worldwide and accelerate efforts to end these atrocities; media and allies can find precise references to the actual content of laws, and then report and raise awareness of where this information leads.

Since the launch of our first edition in 2006, *State Sponsored Homophobia* has become increasingly richer in its content and more detailed. It is a unique document: it bridges the world of technical black-letter law provisions, tracks progress in global and regional human rights settings, and offers insight (and abundant sources) into the social conditions that LGBTQ people lived in and experienced over the past year.

In this edition, the theme of Protection of our Communities underpins the short essays and entries on countries. There is, therefore, significant attention paid to the concept of persecution and the necessity to flee, as well as to barriers to the founding, establishment and/or registration of sexual orientation-related NGOs, along with a new category about countries which have banned so-called 'conversion therapy'. As we witness threats to civil society spaces in countries traditionally known for their openness, and new pieces of legislation being adopted in more repressive societies, this is a much needed discussion. In times when basic democratic principles and even notions of respect for human rights, solidarity, and the rule of law are under threat, we witness everyday how the gains made by the broader human rights movement are never set in stone, and must be fought for and protected continuously.

The number of laws that safeguard our rights to express a different sexual-orientation (decriminalisation), protect us from violence and hatred, or that recognise us as human beings who need relationship, have expanded greatly over the years. This is why the value of having non-anecdotal information on how the situation facing our communities is evolving across the world can't be overstated. Comparative overviews like the one of *State Sponsored Homophobia* offer human rights defenders valuable learning on other States: how rights are denied or upheld, what scapegoating looks like, and how our issues become ideological battlefields in political spaces.

In the past twelve months, ILGA has produced more research in a number of areas: a *Trans Legal Mapping Report*, the ILGA-RIWI *Global Attitudes Survey on LGBTI People* in partnership with Logo, and very useful compilations of, and commentaries on, SOGIESC issues at various United Nations mechanisms. Together with this *State Sponsored Homophobia*, they all form an important and reliable corpus of information in the hands of individual activists, NGOs and allies, addressing lived realities and experiences of LGBTIQ people from all over the world.

Knowledge is itself power. There is wisdom in those words. In this case, it is the power to challenge norms and practices that continue to oppress our communities. It is the power of information, and the courage to use it that will indeed make this world a better place for everyone.

*Our thanks go to all those who worked on this report:
the co-authors, Aengus Carroll and Lucas Ramón Mendos;
the numerous contributors in this edition;
ILGA staff, translators, map-maker and designer
and particularly to all ILGA members whose knowledge continues to sustain this report.*

CO-AUTHORS' PREFACE

AENGUS CARROLL, LL.M., IS AN IRELAND-BASED AUTHOR AND CONSULTANT HUMAN RIGHTS RESEARCHER ON SOGIESC ISSUES.

LUCAS RAMÓN MENDOS IS AN ARGENTINE HUMAN RIGHTS LAWYER, LECTURER ON HUMAN RIGHTS AND GAY ACTIVIST.

The fundamental purpose of producing ILGA's annual *State Sponsored Homophobia* publication is to compile information on the world's laws that are relevant to sexual orientation in one place. In addition to ILGA's membership of around 1300 SOGIESC-related organisations, this publication is primarily designed to provide a body of accurate and credible reference sources to researchers, human rights defenders, agencies, organisations, institutions and allies.

Building on the authorship of previous editions, this year the publication provides significantly more comprehensive coverage of each State where specific sexual orientation law pertains. Through the use of hyperlinks (in red font throughout) rather than footnotes, the digital form of this publication connects to a substantial body of primary and secondary sources.

We organise this proliferating data under three headings: criminalization, protection and recognition. Slowly but surely law that criminalises our sexual practice or our expression – **criminalisation** - is decreasing, with Belize and Seychelles being the most recent to repeal such laws in 2016. On the other hand, specific legislation that protects us from discrimination and violence – **protection** - has expanded greatly in recent years, and those laws that recognise us as beings who need relationship and family – **recognition** - are also on the increase.

Accompanying ILGA's red-green single snapshot map of the global legal situation regarding sexual orientation in the world, individual maps on these three overarching categories are included that enable the reader to glean more specific information at a glance. These maps are coded to allow a deeper, more precise reading of the legal environments in States across the world. Similarly, the five essays that conclude this publication in the Global Perspectives section - which focus on the socio-legal situations for sexual minorities in each continent - open with overview charts that illustrate comparative situations of those regions.

LEGAL DEVELOPMENTS IN 2016/2017

Through the regular desk-research channels of verification with individuals, NGOs and LGBTI organisations, as well as institutional sources, including government gazettes we are able to keep largely up to date with legal developments on the fourteen categories we chart in the 'Legislation Overview' and 'Criminalising States' sections of this publication.

As such, we are on a constant search to more meaningfully categorise the state of law pertaining to sexual orientation. For example, we reflect that although one of the most hostile States to LGBTI people on the planet, same-sex sexual relations *per se* are not criminalised in Egypt, and there is an equal age of consent for those relations. It is through the various inputs of readers and practitioners that we are able to pick up on winds of change, and we wholeheartedly welcome participation, correction and critique on the information we present.

As of May 2017, there are **124 States**, (122 UN member States as well as **Taiwan** and **Kosovo**) where there are no legal penalties levied for consenting same-sex sexual activity between adults in private. In this edition we sought to provide notation on each of these States, in most cases being able to link to texts of the black letter law, as well as other resources. This year we list **108** countries (including Egypt) with an equal age of consent law, and **16** that have an unequal age threshold: these age of consent notes are listed alongside the country entries.

There are **72 States** that we classify as criminalising States – we include Egypt where same-sex sexual relations are *de facto* severely outlawed. We note that in **45 of these States** (24 in Africa, 13, in Asia, six in the Americas and two in Oceania) the law is applied to women as well as men.

Reporting on the death penalty is quite complex, and throughout 2016 we saw it reported in media and elsewhere that 13 States ‘apply’ it. In fact, only **four sovereign** States apply the death penalty in 2017, while **regions** of two other States apply it under Shari’a, and **non-State actors** apply it across two more States. Therefore, it would be valid to say that the death penalty is ‘allowed’, or evidence of its existence, occurs in **eight (8)** States. Although its potential application by Shari’a courts in Pakistan, Afghanistan, the United Arab Emirates, Qatar and Mauritania, emits a chill factor, these States have less severe penalties encoded in their penal laws, and there appears to be no data to suggest the death penalty has been implemented in those States for consensual same-sex sexual acts between adults and in private. Further, **Brunei Darussalam** has not yet triggered its criminal procedure code, thereby stalling the introduction of its second and third phases of the 2014 Syariah Penal Code Order, and as such the threatened death penalty has not yet been implemented.

This year, we list **19 States** in North Africa and the Middle East (and Tanzania) where ‘morality’ laws or ‘promotion’ laws actively target public promotion or expression of same-sex and trans realities. With the rise in the use of digital devices in these parts of the world, deployment of these laws becomes all the more sinister. Further, in this edition we have opened a category looking at the barriers to the formation, establishment or registration of sexual orientation- related NGOs: we record **25 States** in total: 11 of these in Africa, 13 in Asia and one in Europe. As widely discussed about the 2017 laws in **China**, these laws function to limit civil society participation and their ability to bring their issues to public attention and be included at the policy and political levels.

In our comprehensive review of how we categorise, our listing of Constitutions is limited to those **nine (9) States** that actually refer to the sexual orientation or some such unambiguous term in their black-letter text, but we provide some discussion on sources on other’s where constitutional protection is assumed. Laws on discrimination in the workplace have substantial impact on those who are protected by them: allowing not only a basic independent income but the ability to flourish in their work. This year we list **72 States** (including Taiwan and Kosovo) that offer such protection.

This year the authors had the opportunity to delve further into a generalist ('various') non-discrimination category: we list **63 States** with provisions that are either comprehensive or are specific non-discrimination laws (such as the 2017 anti-bullying law in Japan). This broad category includes several subcategories which may be developed in detail in future editions of this report, such as bans on blood donation, legal protection from partner violence for same-sex couples, and protection against SOGI-based bullying in schools. Regarding hate crime and incitement to hatred we list **43** and **39 States** respectively in 2017 that we identify as enacting such protections, at least in law. This year we opened a category on those States that ban so-called 'conversion therapies' – the harmful practice often linked to religious practice - we list only **three (3) States**, but expect this list will increase in future years.

There are currently **22 States** in the world that recognise and provide for same-sex marriage, with the law Finland coming into force at the start of 2017. We include **Brazil** and **Mexico** as marriage States in this edition because in both cases, through one legal route or another, it appears to be possible to marry in most jurisdictions within those States. As regards legislation that protects partnership relationships, as of May 2017 we list **28 States**: we include **Taiwan** in this year's count because around 80% of the population live in areas where such partnership is available to them. **Austria**, **Finland** and parts of **Australia** introduced joint adoption laws in 2016 and 2017, and we find there are currently **26 States** that provide for this in the world. A further **27 UN States** allow for same-sex second parent adoption, not counting **Italy** where there have been significant developments in regional courts.

THIS EDITION

In this edition, we have focused on providing black-letter law sources for each of the States that fall into the fourteen categories listed. To do this, we have provided short annotations discussing or explaining the law and its context. This approach allows us to more assuredly count States where most of a population benefit (or suffer) under a law, alongside those that have such a law enacted. It also allows us to notate exceptions – where, for example, parts of a country allow certain provisions. As such, the result is a Legislation Overview section that is comprehensive in its reach.

As last year, we include symbols on each of the 72 States listed in the Criminalisation section of this publication. Whether the text of a law that penalizes same-sex sexual activity applies to men only, or to both male- and female-identified individuals is indicated by the inclusion of such a symbol.

Whether an existing national human rights institution (NRHI) includes sexual orientation within the scope of its work is symbolised in each country entry (green dot for yes, red for no, etc). NRHIs take various forms - national human rights commissions, equality authorities, Ombudsman offices, Public Defenders, etc – and have varying degrees of impact and influence as standard bearers in States. But they generally act as bridges between civil society, the domestic political establishment, potential ally organisations, and regional and international mechanisms, and are often an early engagement in legal change processes.

The last symbol – handcuffs – is included to indicate whether our research has produced evidence of arrests in the criminalizing State in the past three years. These indicate the active deployment of the law to intimidate and suppress sexual minorities, thus acknowledging the chill factor that the very

existence of such law provokes. Often arrests are made by police in order to extract bribes or coerce sex from vulnerable individuals and do not lead to prosecutions. The authors are mindful that there are, anecdotally, numerous situations that never get documented, and which our desk-based research does not reach.

To comprehend more easily what a given law actually penalises, we have noted the actual terms used ('acts against nature', 'buggery', 'sodomy', etc, and 'promotion of non-traditional values' or 'morality') beside the text of the black letter law listed in criminalising States. In entries on some States, we also include the text of misdemeanors (gross indecency, etc) where such provisions appear to be activated. There is a specific criminalisation map that codifies all of this data.

Throughout the Criminalisation section there is a heightened focus on how the United Nations mechanisms - the Treaty Bodies and the Universal Periodic Review - have urged States regarding sexual orientation issues in recent years on both single and intersectional LGBTI-related issues. Numerous links to secondary sources (NGO, organisations, or media reports) are also provided throughout these texts, indicated in red font.

CONTRIBUTORS

In commissioning and researching the content of this edition, the issue of protection was at the forefront of the authors' minds. Over recent years, despite significant gains in States, we see fundamental challenges to human rights principles at national and international levels, and increased threats to human rights defenders, as well as a somewhat closing civil society space.

In light of this, ILGA's UN staff, **André du Plessis, Diana Carolina Prado Mosquera and Kseniya Kirichenko**, have written on the role of new UN SOGI Independent Expert's role, developments at the Universal Periodic Review mechanism in 2016, and a comprehensive overview of expanding activity at seven of the ten UN Treaty Bodies focusing on where sexual orientation issues were addressed.

This year our 'Global Perspectives' section is written for us by teams of co-authors from the world's regions. **Anthony Oluoch** and **Monica Tabengwa** address the double-edged sword of LGBT visibility on the African continent: regarding increased confidence and organization on one hand, and the plight of SOGI human rights defenders and individuals who are forced into silence or forced to flee.

Regarding the situation of LGB people in the Americas, **Fanny Gómez-Lugo** and **Víctor Madrigal-Borloz** provide insights into advances in 2016 at the regional level at the Organisation of American States (OAS) and the Inter-American Court of Human Rights, and locate some positive developments regarding education, relationships and other forms of protection in this period. However, they also point to the increasing violence against LGBT persons, and the manner in which resources are being rallied to exclude LGB people from protections in policy and law.

Professor **Douglas Sanders** authored the section on East and South-East Asia, with invaluable inputs from a number of correspondents: **Anna Arafin, Jean Chong, Jack Lee, Mingke Liu, Daniele Paletta, Yuli Rustinawati, Minhee Ryu, Azusa Yamashita, and Bin Xu**. Their insights describe regions where there are buoyant dialogues currently in play regarding protections from discrimination, contrasted with increased institutionalized and political homophobia. We received on-site information from **Joyjayanti**

Chatterjee, Namrata Mukherjee, Nitika Khaitan, Nivedita Saksena, Shohini Sengupta and Shruti Ambast in the South Asia region that point to regressive attitudes towards criminalizing laws, yet strong advocacy in these countries in 2016. Perhaps illustrating the dangers, the authors of this Middle East section have asked for anonymity in information on the Middle East region, describing the scale of vulnerability of numerous people on account of their sexual orientation.

The team at **ILGA-Europe** supplied the overview of developments in Europe in 2016 and early-2017, drawn from research for their Annual Overview and Rainbow Index. They focus on some of the intersectional realities faced by LGBTI persons in asylum situations and in the face of growing political populism in the region. They point to the fact that the pace of new legislative provisions regarding LGB people has slowed down, and how the focus needs to further shift to implementation of those legal gains.

Regarding legal environments for LGB people in Oceania, **Raymond Roca** and **Henry 'Aho** provide insight into where developments have occurred in the past year, particularly regarding discrimination and progress in protection of economic, social and cultural rights. Although repeal of laws that criminalise same-sex sexual activity are not expected any time soon, it is notable that cohesion in regional and national advocacy is growing in strength annually.

Finally, in addition to extending ILGA's most sincere thanks to the wide variety correspondents we connected with in making the publication, and most special thanks to the contributors to this edition named above, the authors would like to extend particular thanks to a number of individuals that were instrumental to this edition: Renato Sabbadini, Natalia Voltchkova, Daniele Paletta and André de Plessis of ILGA, Maks Klamer (independent social science researcher), Maria von Kaenel (NEFLA), Tashwill Esterhuizen and Anneke Meerkotter (SALC), Eric Gitari, Faith Gaitho, Ty Cobb (HRC), Danish Sheik, as well as George Robotham and Santiago Ramayo, amongst many others. We would like to acknowledge sources we relied on extensively including the Kaleidoscope Trust's publication *Speaking Out*, ARC-International online resources, the *Erasing 76 Crimes* news resource (Colin Stewart), the UPR-info database, the World Policy Analysis Centre, the Civic Freedom Monitor and Human Rights Watch, and various others. We gratefully acknowledge the assistance of Professors Robert Wintemute (King's College, UK) and Kees Waaldijk (Grotius Centre, Leiden) over the years.

Particular thanks are also due to Renné Ramos for designing and typesetting this edition, and to Eduardo Enoki for his precision in this year's map-making.

We are hugely grateful to the individuals who have taken on the task of translating this text into Spanish (María Laura Speziali and Lucas Ramón Mendos), French (Emmanuel Lauray), Arabic (Ezzedin Fadel), Russian (Inna Iryskina), and Chinese ((Hou Ping and Gong Yu). Also, we extend thanks to Kseniya Kirichenko, Ghaith Arar, Yiu Tung Suen, Christelle Vieux, Ruby Young Yuk Chau and Eliz Wong Miu Yin for further translation work.

This 12th edition of the report was researched and written by Aengus Carroll and Lucas Ramón Mendos, evolved from the original report which was researched and compiled by Daniel Ottosson from 2006 until 2010, by Eddie Bruce-Jones and Lucas Paoli Itaborahy in 2011, by Lucas Paoli Itaborahy in 2012, and by Lucas Paoli Itaborahy and Jingshu Zhu in 2013 & 2014, Aengus Carroll and Lucas Paoli Itaborahy in 2015, and Aengus Carroll in 2016.

STRENGTHENING SOGIESC PROTECTION AND UNPACKING INTERSECTIONALITY AT THE UNITED NATIONS IN 2016

ANDRÉ DU PLESSIS, DIANA CAROLINA PRADO MOSQUERA AND KSENIYA KIRICHENKO

Activity around the protection of SOGIESC human rights within the various parts of the United Nations has never been higher than it was in 2016. The proliferation of consciousness that human rights encompass all persons regardless of any status brings concurrent responses of inclusion and denial amongst UN States. These short insight pieces by ILGA's UN Programme staff into some of what is happening at the UN reflects the nature and relevance of the new UN Independent Expert on SOGI, the Universal Periodic Review and the UN Treaty Body system to the advancement of the human rights of people regardless of their sexual orientation, gender identity, gender expression or their sex characteristics (SOGIESC).

THE UNITED NATIONS' INDEPENDENT EXPERT ON SEXUAL ORIENTATION AND GENDER IDENTITY

ANDRÉ DU PLESSIS

ILGA's Head of UN Programme and Advocacy

Undoubtedly the single biggest progression regarding SOGIESC at the United Nations in 2016 was the **creation** of a new Special Procedure: the United Nations Independent Expert on Sexual Orientation and Gender Identity. ILGA was central in the tremendous advocacy efforts to have the position instated despite strong opposition from Member States, and now works closely with the first appointee to the post, Professor **Vitit Muntarbhorn**.

THE CREATION OF THE MANDATE

At the beginning of 2016, despite the great work that has been carried out by **OHCHR** and other UN agencies over many years, it was clear that the arrangements to protect the human rights of LGBT and intersex persons were inadequate. There was no dedicated human rights mechanism at the international level that had a systematic and comprehensive approach to the human rights situation of LGBT persons.

A unanimous decision of the ILGA World Board in March 2016 paved the way for ILGA to call for the creation of the new mandate, building on the many years of advocacy in coalition with other civil society from all regions.

In June, ILGA was **joined** by defenders from around the world in a truly global advocacy outreach effort that **secured** the requisite number of votes for the position to be created at the Human Rights Council in Geneva. 628 NGOs from 151 countries worldwide, **called** on the UN to take meaningful action to end abuses on the basis of sexual orientation and gender identity, and create the Independent Expert position.

Shortly after Professor Muntarhorn started his work on 1 November, ILGA and fellow defenders were again **fighting** to ensure the very existence of the mandate in **four** separate votes brought to the United Nations General Assembly in New York by governments intent on destroying it. Advocates from around the world worked tirelessly together to **successfully** protect the very existence of the position.

THE WORK OF THE MANDATE

There were many reasons that civil society wanted this mandate. The final 'instructions' from UN States to Professor Muntarhorn are **set-out** in the resolution establishing the position itself, effectively mandating the Independent Expert to get on with the work of being an international focal point on violence and discrimination on the basis of SOGI. It asks him to report annually to both the Human Rights Council in Geneva and the General Assembly in New York, as well as authorising him to conduct country visits (as agreed with the concerned country) and to receive and act on communications received from individuals who have human rights issues they wish to raise with him.

At ILGA there were several parts of the resolution that we were particularly happy to see included. For example, in para. 3(b) it asks the Independent Expert to raise awareness of the violence and discrimination faced on the basis of SOGI and **to identify and address the root causes**. This matters to us deeply. For example, the violence faced by lesbians cannot be addressed by simply looking at physical violence on its own. Rather, the violence and discrimination they face can only be addressed by digging deep into issues related to the causes of poverty, lesbian invisibility in society, gender power imbalances, the lack of autonomy over bodies, and the use and abuse of notions of gender to subjugate. We are very pleased that he has been asked to dig deep here.

At para. 3(d), the Independent Expert is asked to address the **multiple, intersecting and aggravated forms of violence and discrimination** faced by persons on the basis of their sexual orientation and gender identity. Again for ILGA, this paragraph is key, recognising that SOGI issues are connected with a broad range of issues such as gender equality, poverty, class, bodily autonomy, sexual health and rights, among many others.

This approach allows deep examination, and address, of the origins of discrimination and violence in a given society, and thereby focuses on issues that otherwise might fall outside the scope of this new mandate.

DIALOGUE WITH STATES

The third paragraph we particularly note in the resolution: para. 3(c), asks the Independent Expert to engage in dialogue with States. Establishing such dialogue is so clearly needed as a matter of urgency in many States, especially with those who felt that they could not support the creation of the mandate, and those that are particularly hostile to the visibility of sexual and gender diversity.

When ILGA called for the creation of this mandate, we noted that an Independent Expert could help firstly, to depolarize the issue of SOGI by highlighting that all countries and regions face challenges in addressing violence and discrimination on these grounds.

Secondly, we noted that the mandate could help by highlighting and supporting positive developments in States, as well as addressing violations. The Independent Expert – as with SOGI advocates everywhere – has to enter into deep, principled, respectful and wise dialogue with many who may find even talking about SOGI issues difficult or uncomfortable.

He would be wise to continue to reach out to the experts in these conversations, namely SOGIESC human rights defenders who live and work in the most hostile and difficult situations. They know how to have these conversations.

Many of us are engaged in lifelong change movements where the slow and steady change of hearts and minds of our fellow human beings is at the core of our strategies. We know, often and sadly, that what we work for today will not be realised in our lifetimes. This is a movement with a long-term view.

ENGAGING ON THE DIFFICULT STUFF

The SOGI Independent Expert resolution doesn't just contain the operational instructions by States to the mandate described above. It also includes preambular paragraphs that set the tone of the resolution.

The second preambular paragraph, straight after a reference to the Universal Declaration of Human Rights (UDHR), refers to the 1993 [Vienna Declaration and Programme of Action](#): “while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.

This is at the core of the human rights framework. That [obligation](#) to promote and protect all human rights remain on States regardless of these cultural and other systems.

Through the contentious voting process that established the SOGI Independent Expert's on mandate, however, those opposed to the resolution successfully managed to add a series of preambular paragraphs that highlight their areas of concern. Whether we like them or not, what we hear voiced in these paragraphs are fears about even discussing these issues.

Importantly, none of these inserted paragraphs mention SOGI. They focus rather on *how* the conversations happen, and other geo-political factors that impact on such discussions.

They appear to focus on a number issues:

- that human rights are for all people and not the few
- that attention needs to be given to racism, xenophobia, and other forms of intolerance as much as other issues
- that local, traditional and religious values systems matter

- that discussions are also happening at local levels
- that external pressures on a country, especially withholding international development aid, is not welcome
- that some concepts or notions are not to be discussed internationally
- that States are different.

There are fears and concerns expressed behind these paragraphs that are far wider than anything about a person's sexual orientation and their gender identity. We may disagree with some or all of them; we may balk at one or two. But we know that these issues come up again and again in our work. These paragraphs are ignored at our peril, and can actually be seen as a tool for navigating the more difficult dialogue that the Independent Expert – and us all – will inevitably be engaged in.

CLOSING THOUGHTS

No LGBTI person chooses by birth to be drawn into these geo-political discussions. We are, after all, simply human beings born free and equal in dignity and rights just like any other human being.

As we head into the coming years of this mandate, we hope that the Independent Expert will come back to this fundamental point. In the difficult discourse he will face, we hope he will focus on the **persons**, and not the issues. After all, the very first preambular paragraph is the UDHR itself. All *persons*. All.

THE UNITED NATIONS' UNIVERSAL PERIODIC REVIEW (UPR)

DIANA CAROLINA PRADO MOSQUERA

ILGA's UN Programme and Advocacy Officer

In March 2006 the Universal Periodic Review (UPR) mechanism was **established** by the United Nations, commencing its **calendar** in early-2008. It was – and continues to be – a unique and valuable human rights accountability mechanism. As its name suggests, it is universal in that it applies to each of the 193 Member States of the UN, and is thereby the only geographically universal human rights mechanism available. But it is also universal in its scope of coverage: it accommodates address of all human rights issues, including those relating to a person's sexual orientation, gender identity and expression, and sex characteristics. The UPR is also a review process designed to be cyclically periodic, rotating every four to five years for every State and it does not permit scheduling delays. Its most unique feature is that the UPR offers States an opportunity to review their peers' human rights records, and be reviewed by them. In this light, the UPR has opened up new dialogic opportunities to address SOGIESC issues from what is essentially a political and diplomatic perspective. In early-2017, its third cycle began, meaning that to date every State has been reviewed twice.

Concluding Observations and General Comments of the UN human rights **Treaty Bodies** are designed to be more specific and technical in nature than the types of recommendations found in the UPR. As guidance on the application of international law, Treaty Body recommendations are made by human rights experts operating in their personal capacities, and not as government representatives weighing many other considerations in their choice of words or approaches. However, crucially, the UPR has demonstrated that it is dialogic: it can be a space to start having conversations with many different governments on SOGIESC issues where they otherwise might not welcome or tolerate such discussion. As one government representative recently said, the UPR is sometimes the only space where SOGIESC issues can be addressed without triggering alarms.

Civil society actors have learned much about the operation of the UPR through these years of engagement with it, as reflected in our **joint research** published in late-2016. The merits of a reliable reporting calendar and a system that does not wholly rely on the willingness of a sometimes-reluctant state are significant factors in ILGA's advocacy strategy (the Philippines **considered** postponing in 2017, and Israel **failed** to appear at their review in 2013). Further, we have often witnessed how the UPR has acted as an entry point for advocates to both utilize international human rights standards to craft arguments at the national level, and to access other UN and regional human rights mechanisms.

Over the past ten years, more than 1,100 UPR recommendations have been made on SOGIESC issues – 2.5% of the total number of recommendations made (see p.28 of **joint report**). Of these, about half were specifically on issues related to sexual orientation, while the vast majority of the rest were on 'LGBT' or 'LGBTI' generally. Only a handful specifically focused on gender identity and expression, and in 2016 there was just one on intersex issues (Australia to **Iceland** regarding non-discrimination, at 115.44).

The UPR has helped trigger both visible and less visible State actions on SOGIESC issues. For example, this mechanism has been recognized by SOGIESC human rights defenders as one of the tools that helped to bring about the following changes: the decriminalization of same-sex relationships in both the Seychelles and Nauru (both of whom committed to decriminalization in their 2011 reviews, and announced around the time of their 2nd reviews in 2016); the inclusion of sexual orientation and gender identity in protective legislation in Suriname and Greece; the addition of hate crimes based on SOGI into the criminal codes in Honduras and the Netherlands. In other cases, institutions that tackle violence and discrimination that were called for at the UPR have in fact been created, such as the Fiji Human Rights & Anti-Discrimination Commission. Whether with public impact or with less prolific attention, we **recognize** (at p. 86) that the UPR mechanism has been useful as a catalyst for public debate and consideration around SOGIESC issues.

The effectiveness of the UPR has demonstrable limits. Although it has served as a point to continue nascent discussions, or even to create the first space to have such discussions, there has not been much evidence that those conversations have been adequately followed-up by civil society, recommending States as well as the States under review. Secondly, the follow-up on the implementation of the recommendations received is difficult to evaluate as only 64 States and three other stakeholders have submitted the voluntary **mid-term report** on implementation that was envisaged in the system.

In regards to **mid-term reporting**, it is clear that for States to fulfill their commitments and build on the dialogues that happen at their UPR sessions, an ongoing and systematic monitoring of implementation

is required. Civil society has a significant role to play in providing data and relationship-building in the period between UPR reviews and in the implementation reporting process.

By way of example, one of the few States that presented a mid-term report at the beginning of 2017 was **Albania**. They reported on their positive implementation of the three SOGI recommendations that they accepted (made by Argentina, France and Portugal): in 2015, the parliament had approved a resolution on the protection of the rights and freedoms of LGBT persons, in 2016 Albania adopted an action plan on the rights of LGBT persons, and the labour and criminal codes both added "gender identity" their in anti-discrimination provisions or as aggravating circumstances in cases of crimes.

The challenges of creating dialogue in States around SOGIESC issues often gets articulated at the UPR. For example, Suriname's delegation in 2016 **stated** that "[a]s a multicultural society, the subject of [SOGIE] is one that requires a broad based consultation process at the national level, involving all sectors of society, including the civil society". While offers of dialogue should be welcomed cautiously – as sometimes it might be interpreted as suggesting human rights are somehow negotiable – such dialogue provides opportunity for civil society to educate, inform and assist States give effect to international human rights law at home.

The UPR process has been useful to allow governments that still criminalize same-sex relationships to consider other protective provisions. For example, both Saint Vincent and the Grenadines and Swaziland have stated at UPR **Working Group sessions** that 'despite' their criminalization of sexual acts legislation, they respect the civil rights of LGBTI persons as constitutionally protected and do not apply the current laws that criminalizes same-sex relationships between consenting adults. For longer-term SOGIESC advocacy such statements are a definite positive step forward in public-awareness and education work.

The UPR has a tangible role to play in advancing the rights of lesbian, gay, bisexual, trans and intersex persons. It is clear that the UPR mechanism facilitates deepening dialogue between civil society, which in turn can lead to action on meaningful implementation. Legal and policy change are areas that demonstrate the effectiveness of the mechanism, but equally important is the opportunity it offers human rights defenders to dialogue and build bridges with their governments and State institutions.

THE UNITED NATIONS' TREATY BODIES

KSENIYA KIRICHENKO

ILGA's UN Programme Officer

This section focuses on how homophobic violence and discrimination have featured within the UN Treaty Body (TB) monitoring system in 2016. It further looks at the where the TBs have in 2016 viewed sexual orientation discrimination as it intersects with poverty, race, migrant or other status. Please note that the following text is supplemented by a more technical version ([here](#)) that supplies comprehensive links to the source documents supporting all observations made in this truncated essay.

As ILGA **reported** in its reviews of **2014** and **2015**, there were quantifiable increases in authoritative references to SOGIESC across the Treaty Bodies in recent years: rising from 41 mentions in 2014 to 66 in 2015. In 2016, such mentions appeared for the first time in over half of the TB hearings: we calculate 79 mentions in **Concluding Observations** of 155 countries, across seven of the ten TBs (Human Rights Committee (HRCtee), Committee on Economic, Social and Cultural Rights (CESCR), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on the Elimination of Discrimination against Women (CEDAW), Committee on the Elimination of Racial Discrimination (CERD) and Committee on the Rights of Persons with Disabilities (CRPD).

VIOLENCE

In 2016, the TBs examined different forms of homophobic violence and ill-treatment, including hate crimes, domestic violence and non-consensual medical treatment.

Hate Crimes: The TBs have referred to various aspects of violence: that committed by state representatives, including law enforcement officials, military servants and private individuals; killings, physical attacks, sexual violence and other ill-treatment; the situation in both general and references to **particular cases**. Regarding **Macedonia**, **Mongolia** and **Côte d'Ivoire**, for example the TBs expressed concern about police misconduct regarding reporting and investigating cases of hate-motivated violence that could lead to victims' **reluctance** to file complaints, and abuse of gay men by law enforcement personnel and blackmailing in **Namibia** and **Azerbaijan**. Governments were asked about the statistics of complaints on hate-motivated violence, investigations, prosecutions, convictions and punishments, as well as reparations provided to victims, and their responses to issues related to hate crime.

The types of responses to the identified problems related to hate crimes that the TBs proposed included ensuring prompt, thorough and impartial investigation and bringing perpetrators to justice in for example **Belarus**, **Ecuador**, **Turkey** and **USA**; adopting hate crimes legislation in **Poland** mentioning homophobic motivation of violence as an aggravating circumstance; providing redress in **Haiti**, access to justice and complaints mechanisms: training for law enforcement and health service personnel regarding domestic and gender-based violence, and violence based on sexual orientation in **South Africa**.

Non-consensual medical procedures: The practice of so-called "conversion therapy" was extensively analyzed in the **CAT** and **HRCtee** reviews of Ecuador, regarding investigations of involuntary placement and ill-treatment of women in private drug addiction treatment centers that practiced "sexual reorientation or dehomosexualization therapies", and the fact that the perpetrators of such activity had not been brought to justice, or compensation paid. **CESCR** and **CRC** 2016 General Comments also condemn the practice. In a review of Tunisia, non-consensual forensic anal examination to establish proof of [criminalized] same-sex sexual acts, **CAT** recommended the State outlaw the practice.

Domestic violence: The TBs also referred to domestic violence covering two types of situations: **partner violence** in same-sex relations and violence **committed** by parents, siblings or other family members that do not accept their LGBTI relative, **including** forced marriages and honor killings.

Hate Speech: Incitement of homophobic hatred, or hate speech, were also frequently discussed by the TBs in 2016, for example in **Mongolia** and **Poland**, utterances by politicians, State officials, religious

actors and the media (e.g. [Burkina Faso](#)), regarding impunity ([Estonia](#)), effective solutions to the issue ([Serbia](#)) and protection of victims ([Ghana](#)). It is notable that the TBs referred to “digital” forms of homophobic hate speech, including acts on hostility on social media, on the internet and online forums ([Slovakia](#), [Slovenia](#), [Azerbaijan](#)). Many responses have been offered by the TBs (see [here](#))

DISCRIMINATION

In 2016, the TBs expressed their concerns about discrimination on ground of sexual orientation in different spheres, such as health care (e.g. [Kenya](#), [Namibia](#) and [Jamaica](#)), sexual and reproductive health services (e.g. [Paraguay](#) and [General Comment 22](#) [2016]), employment (amongst many, [Togo](#) and [Thailand](#)), provision of services ([Norway](#)), education (amongst many, [Thailand](#) and [Jamaica](#)), and housing (e.g. [Togo](#) and [Namibia](#)).

On several occasions in 2016, the TBs asked governments to adopt a comprehensive policy to combat discrimination (for example, [Costa Rica](#) and [Dominica](#)) – repeatedly the TBs have made it clear that comprehensive anti-discrimination legislation plays a central role in the protection of citizens on grounds of their sexual orientation (sources [here](#)). Such legislation should explicitly include sexual orientation in the list of protected grounds, should define direct and indirect discrimination, as well as multiple discrimination, should prohibit discrimination in both the public and the private spheres, and should establish mechanisms for reparation in cases of discrimination and, if needed, temporary special measures. Alongside the adoption of anti-discrimination legislation, States were recommended to remove any existing discriminatory legislative provisions.

A system of measures against discrimination on ground of sexual orientation, as articulated by the HRCtee to [Denmark](#) and [Poland](#) in 2016, should comprise a working complaint mechanism and ensuring access of persons affected to effective remedies, including courts and National Human Rights Institutions.

The above-mentioned measures and instruments could be accompanied by awareness-raising activities for the general public, revising university textbooks convey negative stereotypes, as well as awareness-raising and trainings for professional groups such as health-care providers, social workers and law enforcement and other public officials (list of 2016 TB recommendations [here](#)).

INTERSECTIONALITY

In the 2015 [edition](#) of *State Sponsored Homophobia*, the Sexual Rights Initiatives wrote about the significance and necessity to taking intersectional approaches to SOGIE advocacy.

The UN Treaty Bodies are not the exception in this regard, and all of them have uncovered, to a greater or lesser degree, effects and consequences of multiple and/or intersectional discrimination when sexual orientation is accompanied by other grounds, such as gender, race, disability, HIV/AIDS, detention/imprisonment, migrant and asylum-seeker status, age or involvement in human rights activism.

Obviously, relevant issues were raised mostly by more specialised committees: for instance, intersections between sexual orientation and gender – by CEDAW, race and sexuality – CERD, age and sexual

orientation – CRC, etc. However, different dimensions of multiple-discrimination have been addressed by the TBs outside of their primary themes as well.

Disability: Significant progress has been made by CRPD in addressing SOGIESC issues in its Lists of Issues and Concluding Observations on six States (Colombia, Cyprus, Iran, Italy, Lithuania and Uganda), which comprises 43% of 14 States reviewed in 2016 (only one State in 2015 had SOGIESC-inclusive recommendations from CRPD, and none in 2014). See a detailed referenced listing of TB sources for disability and SOGIESC [here](#).

HIV/AIDS: Quite surprisingly, the TBs have not examined intersectionality between HIV/AIDS and sexual orientation frequently in 2016. Only one country-specific question was asked of Costa Rica by HRCtee, and CRC also mentioned this issue in its General Comment (at para. 62) on the implementation of the rights of the child during adolescence.

Detention/imprisonment: The intersections between sexual orientation and detention/imprisonment has drawn the TB's attention on numerous occasions in 2016 in various countries. They have called for action in regard to LGBTI people in detention, segregation, discrimination, hate speech, violence and humiliating and degrading treatment of "homosexual prisoners" by other prisoners. As a result of country examinations, CAT called on the authorities to put an end to the discrimination and violence against "homosexual prisoners", abolish the practice of their degrading and involuntary segregation and all other degrading and humiliating practices, and to investigate effectively all such allegations, and bring perpetrators to justice. Further, of those countries that criminalize same sex sexual activity, issues of arbitrary arrests and detention based on sexual orientation, were raised. See a detailed referenced listing of TB sources for detention/imprisonment and SOGIESC [here](#).

Race: Intersections between racial discrimination and discrimination on the grounds of sexual orientation were examined in the CRPD's review of Uruguay. The Committee expressed its concerns on the situation of LGBTI Afro-Uruguayans and recommended the State party to implement measures to combat the multiple forms of discrimination faced by LGBTI individuals, including by mainstreaming an ethno-racial dimension in its measures to combat discrimination based on sexual orientation and gender identity.

Migrant status: In 2016, the Committee on Migrant Workers (CMW) that has been excluded from our analysis so far, started to address issues related to sexual orientation. Relevant references have been made in its periodic review of Honduras and Mexico in 2016.

Asylum seekers: In 2016, the HRCtee and CEDAW addressed the situation of asylum seekers fleeing their countries because of the violence and harassment based on their sexual orientation. The State parties were asked if persons persecuted because of their sexual orientation may apply for asylum, and what steps have been taken to ensure that refugee status determination procedures are fully gender-sensitive, including the adoption of guidelines on gender-based persecution and persecution based on SOGI for first-instance asylum officials. Further, the principle of *non-refoulement* was examined in 2016 (Australia and Namibia) in relation to persecutions based on sexual orientation.

Age: Unsurprisingly, intersections between age and sexual orientation were addressed mainly by CRC. On numerous occasions, the CRC expressed its concerns and made subsequent recommendations

on discrimination against LGBTI children that have general application, rather than specific (see list of sources here). However, it also gave extensive recommendations to more than 17 States in 2016 concerning such discriminatory issues as lack of access to information, structural discrimination (education, and other basic services, such as health care), and social stigmatization through the media, bullying, cyber bullying, hate speech, discrimination against same sex parents. The CRC analyzed as well how criminalization of same sex sexual acts affected children/adolescents in [Maldives](#) and [Iran](#). The CRC also released [General Comment 20](#) (2016) on adolescents that contains important guidance. The full list and links to sources for this section may be found [here](#).

Human rights defenders: In 2016, the TBs paid particular attention to the situation and risks faced by LGBTI activists and human rights defenders noting harassment, intimidation and violence against them as a result of their activities, amongst them [Israel](#), [Turkey](#), [Ghana](#), [South Africa](#), [Togo](#), [Haiti](#), [Argentina](#) and [Belarus](#). In some cases, including [Montenegro](#) and [Turkey](#), the UN experts asked State parties to provide information on specific cases, such as violent attacks against LGBTI demonstrations and centers. Several questions and recommendations were related to realization of the rights to freedom of peaceful assembly and association by LGBTI groups (see [Azerbaijan](#), [Honduras](#), [Mongolia](#) and [Poland](#)).

Gender: While in 2016 CAT and HRCtee raised problems related to homophobic violence aimed at women in 2016 (for example, in [Croatia](#) and [Namibia](#)), most of work in this field was done by CEDAW. Conceptually, CEDAW puts LGBTI women into the category of “disadvantaged groups of women” usually including relevant paragraphs of its Concluding Observations in the sections under this title (find links to sources [here](#)).

Among topics mostly covered by CEDAW in relation to intersections between gender and sexual orientation, were hate crimes and lack of due investigation and prosecution for such acts (six States, see [here](#)). In the case of [Turkey](#), CEDAW offered in-depth analysis of the various forces weighing against LGBT women, particularly regarding issues to do with hate crimes and the concept of “unjust provocation” in the Penal Code that can operate to mitigate perpetrators of such crimes. In the review of [Armenia](#), CEDAW also addressed hate speech against LGBTI women, while in general this topic was not discussed in 2016 by the Committee. In many cases, CEDAW examined problems related to discrimination of LGBTI women, including in specific areas such as education, employment, health care and adequate housing or through specific means such as “anti-propaganda” laws. Finally, CEDAW also addressed issues of stereotypes and access to justice in 2016 (all sources [here](#)).

Despite these numerous references to SOGIESC, it is not clear that CEDAW has yet come to fully embrace or often even understand the realities of LGBT women. Specific issues like so-called ‘corrective rape’ may fall outside the range of legislative reforms recommended by CEDAW, as might issues to do with reproductive health literacy amongst lesbian women. To date, it appears that although the Committee has repeatedly called for such information, neither States nor civil societies have demonstrated the capacity to generate such disaggregated data for the most part.

FINAL WORD

It is undisputable that protection from violence and discrimination based on SOGIESC have become points of focus and within the scope of the various UN Treaty Bodies. However, ILGA would assess that

interesting and important opportunities for the development of advocacy strategies lie in increasingly in-depth analysis of intersectional problems when sexual orientation is linked with other grounds such as gender, disability, race, etc.

However, credible quantitative and qualitative data on SOGIESC issues must support the work of engagement with the TBs. Strong advocacy strategies would aim to direct petitions to work with the strengths of any Committee or other UN mechanism. Often intersectional issues, because of the nature of TB Concluding Observations and General Comments, may best be deeply analysed by **Special Procedures** mandate holders, or by the TBs through individual communications.



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LEGISLATION OVERVIEW

LEGALITY OF SAME-SEX SEXUAL ACTS

This overview presents annotated entries on those 124 States where same-sex sexual acts are not criminalised (122 UN States as well as Taiwan and Kosovo). Some of these States never contained a criminalising provision in their Penal Codes, while others consciously removed the offending law, initiated within parliaments or by the imperatives set by courts. Needless to say, in many of these States social stigmatisation of persons who are, or perceived to be, belonging to a sexual minority runs high. On each entry, links to the texts of the law online (mostly in English, typeface in red) are provided along with other ancillary material. This section also confirms the legal age of consent in these States, and points to where they are equal or unequal for same-sex and different-sex sexual acts. Unequal ages of consent (AoC) exist in eight (8) African States, six (6) in the Americas, two (2) in Asia, one (1) in Europe, and in none of the States in Oceania.

Same-sex acts: legal (124) [including non-UN States Taiwan and Kosovo]

63% of UN States

AFRICA (22)

Country Age of Consent (AoC)	Provisions in law
BENIN Unequal AoC: 21	1877 Despite a number of draft amendments to the existing Criminal Code of Benin , none passed into law. There are numerous impediments to the realisation of rights in Benin, as recorded in 2014 . The age of consent is 13 for different-sex sexual activity, and 21 for same-sex (Article 331).
BURKINA FASO Equal AoC: 13	1960 Prior to and since independence from France in 1960, Burkina Faso has no law outlawing same-sex sexual relations for men or women in its Penal Code .
CAPE VERDE Equal AoC: 14	2004 The Penal Code does not criminalise consensual same-sex sexual acts between adults. However, until it came into force, Article 71 of the 1886 penal code provided for 'security measures' for people who habitually practice 'vice against the nature'.
CENTRAL AFRICAN REPUBLIC Equal AoC: 18	1961 Since independence from France, the Penal Code of CAR has not outlawed consensual same-sex sexual acts between adults in private.
CHAD Unequal AoC: 21	1967 Although the legal status of consensual same-sex sexual activity between adults is not currently clear, it is classified here as legal because there appears to be no official verification that the black letter law has in fact changed from its 1967 original. Under French rule (1900-1960) such sexual acts were not penalised in Chad. Although Article 272 of the first Penal Code of 1967 penalised those who commit "unnatural acts" with persons under the age of 21 (the age of consent for different-sex is 14), there are no criminalising provisions for consensual sexual activity. A Bill of 2014 to impose severe penalties (Article 361bis) of up to 20 years incarceration was debated , but did not pass into law. The issue of penalisation re-emerged in parliament in December 2016, now framing "unnatural acts" amongst consenting adults as a mere 'misdemeanour' triggering a small fine, but the outcome of these deliberations is currently unclear and unverified, and as such we classify Chad as 'legal'.
CONGO Unequal AoC: 21	1940 In the Republic of Congo Brazzaville, the text of the 1940 Penal Code , as amended in 2006 , only prohibits same-sex sexual behaviour with a person younger than 21 years, while the age of consent for different-sex is 18.
CÔTE D'IVOIRE Unequal AoC: 18	1960 Post-independence from France's rule in 1960, Côte d'Ivoire did not criminalise consensual same-sex sexual activity between adults in its Penal Code , yet the age of consent differs (Sections 356 and 358) – 15 for different-sex, and 18 for same-sex. However, in 2014 Côte d'Ivoire rejected three non-discrimination recommendations regarding SOGI in its 2 nd cycle UPR. Further, in late-2016, for the first time in the country an indecent law was used to jail gay persons . Concurrently, 76 Crimes reports formal reviews of the Penal Code are on-going.
DEM. REP. CONGO Equal AoC: 18	1940 There are no evident provisions outlawing consensual same-sex sexual behaviour between adults in the 2004 Penal Code of the DRC.

Country Age of Consent (AoC)	Provisions in law
DJIBOUTI Equal AoC: 18	1995 The Djibouti Penal Code of 1995 contains no provisions prohibiting consensual same-sex sexual activity between adults.
EGYPT Equal AoC: 18	1937 There are no legal provisions in Egyptian Penal Code that outlaw consensual same-sex sexual activity between adults.. However, this is really just a technical distinction because such activity, and related expression, is outlawed under debauchery, indecency and other laws (see Egypt in the 'Criminalisation' section in this edition).
EQUATORIAL GUINEA Equal AoC: 18	1963 The Criminal Code in force in Equatorial Guinea is a 1963 revision of the Spanish Criminal Code that dates back to the Francoist era. This Code does not contain specific provisions on same-sex sexual acts between adults. However, there is evidence (p.27) that State intimidation of sexually diverse individuals persists, and at its 2nd UPR review (para. 135.51) in 2014 Equatorial Guinea rejected a recommendation to foster acceptance of LGBT persons through awareness-raising.
GABON Unequal AoC: 21	1960 Prior to and following its independence from France in 1960, the Gabon Criminal Code does not criminalise consensual same-sex sexual acts between adults, yet the age of consent for different-sex sexual acts is 15, and for same-sex it is 21. However, as alluded to (para.12) by the Committee on Economic, Social and Cultural Rights in 2013, it is a highly discriminatory environment for LGBT people, which may be why LGBT reporting of incidences is so low (p. 19). In August 2016, the UN Committee of the Rights of the Child reiterated (para. 23) the need for non-discrimination legislation inclusive of SOGI.
GUINEA-BISSAU Equal AoC: 16	1993 Same-sex sexual activity is only referred to in Articles 133-138 in the context of sexual offences in the Penal Code of 1993. Consensual, same-sex sexual activity between adults in private is not in itself criminalised.
LESOTHO Equal AoC: 16	2010 In Article 52 of the 2010 Penal Code Act (into force in 2012), sodomy is not mentioned: this article erases the punitive enumeration of [male] sodomy indicated in Section 185(5) of the 1939 Criminal Procedure and Evidence Act.
MADAGASCAR Unequal AoC: 21	1960 Prior to and following its independence from France in 1960, the Criminal Code of Madagascar does not prohibit consensual same-sex sexual relations between adults. However, Article 331 establishes that the age of consent is 14 for different-sex sexual acts, and 21 for same-sex.
MALI Equal AoC: 18	1961 Neither the 2001 Penal Code (nor its predecessor, the 1961 Penal Code) stipulates provisions targeting consensual same-sex sexual relations between adults.
MOZAMBIQUE Equal AoC: 18	2014 In July 2014, the Parliament approved Law 35/2014 by consensus that removed earlier criminalising provisions. (Articles 70 and 71 of the 1886 Penal Code had imposed penalties on people who habitually practiced "vices against nature".) This revised Penal Code came into force in June 2015.
NIGER Unequal AoC: 21	1961 The Penal Code (with amendments up to 2003) does not specify provisions against consensual same-sex sexual relations, yet Sections 278 and 282 specify that the age of consent differs: 21 for same-sex sexual acts, and 13 for different-sex.
RWANDA Unequal AoC: 18	1980 The Rwanda Penal Code of 1980 does not contain same-sex criminalising provisions, yet Sections 358 and 362 set the age of consent as unequal: 16 for different-sex and 18 for same-sex sexual activity. The legal and social situation of LGBT people in Rwanda is captured in a 2016 report (Agaciro) produced by the East African Sexual Health and Rights Initiative, which points to severe stigmatisation.
SÃO TOMÉ & PRÍNCIPE Equal AoC: 14	2012 Sao Tomé and Príncipe's Penal Code , adopted in 2012, contains no provision for criminalisation of consensual same-sex sexual activity between adults., This 2012 text drops former references to "acts against nature" that were contained in the earlier colonial-era Penal Code.
SEYCHELLES Equal AoC: 18	2016 In July 2016, Seychelles amended Sections 151(a and c) to the 1955 Penal Code came into force, thereby decriminalising "(a) ...carnal knowledge of any person against the order of nature" that is consensual and amongst adult persons.

Country Age of Consent (AoC)	Provisions in law
SOUTH AFRICA Equal AoC: 16	1998 Following a case taken at the Constitutional Court of South Africa, the State abrogated laws carried through from the 1955 Penal Code in which Article 600(1) and 601 criminalised consensual same-sex sexual conduct between adults, including the common-law crime of sodomy.

AMERICAS (25)

Country Age of Consent (AoC)	Provisions in law
ARGENTINA Equal AoC: 18	1887 Law 1,920 enacted Argentina's first federal Penal Code, which entered into force in 1887 and made no reference to consensual sexual acts between adults. However, until very recently local regulations issued by provincial, municipal and local authorities targeted "homosexuality" and/or regulated morality, vice and mores. LGBT people were heavily persecuted under these regulations.
BAHAMAS Unequal AoC: 18	1991 Same-sex sexual acts in private were decriminalized by amendment to the Sexual Offences Act (1989) , and came into force in 1991, although the age of consent differs for same-sex (18) and different-sex (16) sexual acts (see Section 16(1)(2) of the Sexual Offences and Domestic Violence Act (1991)). Section 107(4) (j) of the Bahamas Penal Code justifies the use of force against a person, extending, in the case of extreme necessity even to killing, for the prevention of a "forcible unnatural crime", as reflected in relevant case law .
BELIZE Equal AoC: 16	2016 The country's colonial-era sodomy law was declared unconstitutional by the Belize Supreme Court in Caleb Orozco v. Attorney General of Belize . The Court revised the language of Section 53 of the Belize Criminal Code and ordered the insertion of a clause to exclude consensual sexual acts between adults in private. According to University of West Indies Rights Advocacy Project (U-RAP) , irrespective of Government appeals, Section 53 is inconsistent with the Constitution (see article and video). Interestingly, the court dismissed the National Evangelical Association of Belize (NEAB) to join the litigation, although the Catholic church continues to oppose the ruling. For more information on the decision, see: Press conference offered by litigants at UWI Campus (article and video); U-RAP detailed Q&A on the case; " Belize scraps law targeting gay men ", Human Dignity Trust ; Inter-American Commission on Human Rights (IACHR) statement on the decision. In March 2014, Caleb Orozco co-presented the situation of human rights of LGBTI people in Belize at a public hearing before the IACHR.
BOLIVIA Equal AoC: 14	1832 The first Criminal Code of Bolivia (1831) entered into force in 1832. This Code largely followed the Spanish Criminal Code of 1822 that contained no provision on sodomy. There are no criminalising provisions for same-sex sexual acts between consenting adults in private in the current (2010) Penal Code of Bolivia .
BRAZIL Equal AoC: 14	1831 The first Criminal Code of Brazil contained no provision on sodomy. It has been indicated that other provisions of that Code were used to persecute persons who engaged in same-sex sexual acts. The Inter-American Commission on Human Rights reported (fn. 129) that there is a lawsuit pending before the Supreme Court requesting that Article 235 of the 1969 Military Penal Code be declared unconstitutional, as the term "pederasty" has been used to restrict same-sex activity.
CANADA Unequal AoC: 18	1969 The enactment of the Criminal Law Amendment Act (Bill C-150) in 1969 introduced an exception that decriminalized "buggery" between spouses or two persons over 21 years of age who had consented to the commission of the act. In 1988, Section 159(2)(b) of the Criminal Code replaced that buggery law altogether, but retained a different age of consent: 18 for "acts of anal intercourse" and 16 for non-anal sex. This provision has been declared unconstitutional by five provincial courts (end of page). In 2016, the Toronto police Chief apologized for 1981 gay bathhouse raids. In early-2017, the Canadian government announced that it intended to review many historical gay conviction cases.
CHILE Unequal AoC: 18	1999 Article 10 of Law 19,617 amended Article 365 of the Penal Code by decriminalizing consensual same-sex sexual acts between consenting adults. However, that same Article sets the age limit at 18 for "same-sex carnal access", and 14 for other sexual acts. Local organizations denounce that Article 373, which criminalises "acts against decency and good mores" is used as a tool to criminalise LGBT people. In its 2nd cycle of the UPR, the Government of Chile committed to derogating this Article (para. 105) in a forthcoming Penal Code revision.

Country Age of Consent (AoC)	Provisions in law
COLOMBIA Equal AoC: 14	1981 Decriminalisation of 'homosexual carnal knowledge' occurred through repeal of Article 323(2) in the 1980 Penal Code (effective January 1981). In 1999, the Constitutional Court Decision C-507 of 1999 repealed (or reinterpreted) certain provisions of Executive Order No. 85/1989 which established that "being homosexual" or "committing acts of homosexuality" were affronts against Military Honour.
COSTA RICA Equal AoC: 15	1971 The 1941 Penal Code criminalized sodomy under Article 233 . With the enactment of the 1971 Penal Code , consensual same-sex acts in private were decriminalised. However, "scandalous sodomy" remained a misdemeanour under Article 378(15) , until it was repealed by Section 2 of Law 8,250 in 2002. In 2013, the last provisions which provided for security measures in cases of "homosexuality" were repealed by Resolution N° 010404 issued by the Constitutional Chamber. In 2008, the Committee against Torture noted (para. 11) that local provisions in Costa Rica on "public morals" granted the police and judges discretionary power to discriminate on the basis of sexual orientation.
CUBA Equal AoC: 15	1979 The Social Defence Code, which deemed "homosexual practices" as a "social threat" and imposed preventive measures to combat it, was repealed in 1979 by the New Criminal Code of Cuba. This Code did not criminalise homosexuality <i>per se</i> . However, Article 359(1) criminalised those who made "public display of their homosexual condition" (repealed by Article 303(1) of Law No. 62 of 1987) or bothered or solicited others with "homosexual requests" (amended by Executive Order-Law No. 175 in 1997 to refer only to "sexual" requests).
DOMINICAN REPUBLIC Equal AoC: 18	1822 The first Criminal Code in force in the Dominican Republic, imposed after the Haitian invasion in 1822, did not criminalise consensual same-sex sexual acts between adults in private. The new 2007 Criminal Code does not innovate in this regard. However, Article 210 of the 1966 Police Justice Code (download here) still outlaws sodomy (defined as a "sexual act between persons of the same-sex") among members of police forces.
ECUADOR Equal AoC: 14	1997 Article 516(1) of the Penal Code imposed a penalty of 4-8 years in prison for "acts of homosexuality" which did not fall under the crime of rape. This provision was repealed by the 1997 Constitutional Court decision in Case No. 111-97-TC . In 2014, the new Organic Integral Penal Code entered into force. In 2016, the Inter-American Court of Human Rights issued its decision in the <i>Homero Flor Freire</i> case (in Spanish only) regarding the powers of dismissal encoded in the 1997 Rules of Military Discipline for consensual same-sex sexual acts between adults.
EL SALVADOR Equal AoC: 18	1822 The first Penal Code of El Salvador was enacted in 1826 following the Spanish Criminal Code of 1822 that contained no provisions on consensual same-sex sexual acts between adults... In 2003, the Human Right Committee noted (at para.16) that local provisions ("ordenanzas contravencionales") were being used to discriminate against people on account of their sexual orientation.
GUATEMALA Equal AoC: 18	1871 According to Guatemalan historian Manuel Fernandez, consensual same-sex sexual acts were decriminalized as a result of the 1871 Revolution "on the constitutional grounds that private sexual acts between consenting adults were not the concern of the state". The new Penal Code (updated version) entered into force in 1877.
HAITI Equal AoC: 18	1804 When Haiti became independent from France in 1804, no law that criminalising consensual same-sex sexual acts was introduced, and no such law has come into the Penal Code since. France repealed its sodomy laws in 1791 (see entry below).
HONDURAS Equal AoC: 15	1899 Consensual same-sex sexual acts between adults have been legal since the entry into force of the 1899 Penal Code of Honduras.
MEXICO Equal AoC: 17	1872 The first federal Penal Code of Mexico was approved in 1871 and entered into force in 1872. This Code made no reference to consensual same-sex acts between adults.
NICARAGUA Equal AoC: 18	2008 In 2007, the New Penal Code repealed the 1974 Penal Code that had criminalised "sodomy" under Article 204.

Country Age of Consent (AoC)	Provisions in law
PANAMA Equal AoC: 18	2008 Presidential Executive Order No. 332 of 31 July 2008 repealed section 12 of Executive Order No. 149 of 20 May 1949, which criminalised “sodomy”. The Executive Order states that “sodomy was the term by which homosexuality was referred to prior to 1973”.
PARAGUAY Unequal AoC: 16	1880 The first Penal Code of Paraguay was adapted from that in force in the Argentine province of Buenos Aires (in force there since 1877). This code made no reference to consensual same-sex acts between adults. However, Article 138 of the Penal Code currently in force specifies the age of consent for “homosexual acts” is 16, while it is set at 14 for different-sex sexual acts.
PERU Equal AoC: 14	1924 Article 272 of the 1863 Penal Code criminalized sodomy. Since the inception in the 1924 Penal Code, same-sex sexual acts have been legal. However, civil society indicates (page 31) that Article 183 of the Penal Code on “obscene exhibitions and publications”, provides the legal basis for State discrimination regarding issues such as public display of affection.
SURINAME Unequal AoC: 18	1975 When Suriname became fully independent from the Netherlands in 1975, no sodomy law was in force and no such law has been reintroduced since then. Sodomy was repealed in the Netherlands in 1811. However, Section 302 of the Criminal Code stipulates that the age of consent for same-sex acts is 18 (limit established at “minority age”), while it is 16 for different-sex sexual relations.
UNITED STATES OF AMERICA AoC: varies by State (16 to 18); 3 unequal.	1962-2003 Under the USA federal system, all 50 States enact their own Criminal Codes (listed here). “Sodomy” was criminalized throughout the USA until 1962, when Illinois became the first State to decriminalise consensual same-sex sexual acts between adults. In 2003 all remaining sodomy statutes —still in force in 14 States— were invalidated by the Supreme Court verdict in <i>Lawrence v. Texas</i> (2003). Age of consent laws also vary across the USA. Only three States still keep laws establishing unequal laws of consent: Alabama , Kansas and Texas . In early 2017 outgoing U.S. Secretary of State, John Kerry, issued a formal apology to employees and their families who were discriminated against on the basis of their perceived sexual orientation.
URUGUAY Equal AoC: 15	1934 The 1934 amendment of the Penal Code repealed the crime of ‘sodomy’ in Uruguay. It bears mentioning that this provision was placed under the section on ‘rape’: this, together with other indicia in local case law , suggests that the crime of ‘sodomy’ repealed in 1934 referred to non-consensual same-sex acts.
VENEZUELA Equal AoC: 16	1836 Since 1836, when Venezuela produced its first Penal Code , consensual same-sex sexual activity has not been criminalised. As reported by the IACHR (see fn. 239), in 1997, the Supreme Court of Venezuela declared the unconstitutionality of the Law on Vagrants and Crooks , which had been reportedly used to persecute and abuse LGBT persons.

ASIA (20 [inc. Taiwan])

Country Age of Consent (AoC)	Provisions in law
BAHRAIN Unequal AoC: 21	1976 Repealing the colonial British code that had pervaded the Persian Gulf, Bahrain’s current Penal Code was enacted in 1976. This code decriminalised consensual adult same-sex sexual behaviour, yet set the age of consent at 20 for different-sex and 21 for same-sex sexual acts.
CAMBODIA Equal AoC: 15	1953 Following royal request, in 1867 Cambodia became a French Protectorate, thereby coming under French law, which had decriminalised same-sex sexual activity between consenting adults in private in 1791. Following 1946, and Independence in 1953, no criminalising provisions were added to the Penal Code in this regard.
CHINA Equal AoC: 14	1997 China’s current Penal Code of 1997 contains no explicit prohibition of consensual sexual acts between persons of the same-sex. Explicit prohibitions of “consenting jjian” (sodomy) were abolished in China around 1912 (end of Qing Dynasty). A ‘hooliganism’ provision in the 1979 Penal Code was used to target male same-sex activity until the code was repealed in 1997. Although China accepted SOGI non-discrimination UPR recommendations in 2013, no such provisions have been enacted to date as reported in 2016. Same-sex sexual acts were decriminalised in the Chinese associates of Hong Kong in 1991 and Macau in 1996 respectively.

Country Age of Consent (AoC)	Provisions in law
EAST TIMOR Equal AoC: 14	1975 On Independence from Portuguese rule in 1975, the new Penal Code (2009 revision) made no mention of a prohibition on same-sex sexual acts between consenting adults in private.
INDONESIA Unequal AoC: 18	1976 <i>Most parts.</i> Having achieved independence from Dutch governance in 1945, the Indonesian Penal Code has no provisions outlawing same-sex sexual relations. The 2002 Law on Child Protection sets an unequal age of consent for same-sex (18) and different-sex (16) acts. Although the country has many traditional variations of sexual and gender expression , Sharia interpretations prevail in certain provinces, as outlined in the 'Criminalisation' section below.
ISRAEL Equal AoC: 16	1988 Although the 1977 Penal Law contained a sodomy provision, at Section 347, the parliament repealed that provision in 1988.
JAPAN Equal AoC: 13	1882 According to 2014 scholarship , consensual same-sex sexual activity was never criminalised in modern Japan (except a very short period 1873-1881).
JORDAN Equal AoC: 16	1960 Jordan is one the few Middle Eastern countries where same-sex sexual acts are not criminalised, see Penal Code of 1960. However, although relatively safe in the region, levels of stigma and discrimination directed at LGBT people is significant .
KAZAKHSTAN Equal AoC: 16	1998 With recent autonomy from the USSR, Kazakhstan's Criminal Code of 1997 (in force 1998) removed earlier provisions that penalised consensual same-sex sexual acts.
KYRGYZSTAN Equal AoC: 16	1998 With recent autonomy from the USSR, Kyrgyzstan's Criminal Code of 1997 (in force 1998) removed earlier provisions that penalised consensual same-sex sexual acts.
LAOS Equal AoC: 15	1954 Following independence from France in 1954 (with subsequent non-criminalisation), the 1989 Penal Code made no provisions to criminalise consensual same-sex sexual acts.
MONGOLIA Equal AoC: 16	1961 In 1961, under the Mongolian People's Revolutionary Party, consensual same-sex sexual relations were decriminalised. This position remained through the 2002 Criminal Code . For its 2nd cycle UPR in 2015, Mongolian advocates produced an excellent factsheet , and the UPR submission from the LGBT Centre of Mongolia offers a snapshot of current LGBT focus. In September 2016, the Committee Against Torture pointed to a hostile environment for LGBTI people (para. 29).
NEPAL Equal AoC: 16	2008 In its finding of 2008 , the Nepal Supreme Court ruled that "LGBTI persons" would be regarded as "natural persons" under the law. A 2014 report looks at the situation of LGBT persons in Nepal. Under Articles 18(3) and 41 (rights equality and social justice) in the Nepali Constitution of 2015, gender and sexual minorities" are comprehensively included as protected status.
NORTH KOREA Equal AoC: 15	1950 There appears to be no laws penalising consensual same-sex sexual activities between adults in the Criminal Code of 1950, which was updated in 2009.
PHILIPPINES Equal AoC: 12	1932 The 1932 Revised Penal Code (RPC) does not criminalise consensual same-sex activities between adults. In line with the adoption of the Napoleonic Code, when the Philippines came under Spanish control in 1822, 'sodomy' provisions were first repealed.
SOUTH KOREA Equal AoC: 13	1962 The 1962 Criminal Act (updated 2009) of South Korea contains no provisions criminalising consensual same-sex sexual acts between adults. Article 305 (amended 1995) indicates 13 as the age of consent (information verified by practioners in South Korea, as there are English versions of the Crimnial Act that state 15 as the age of consent). The fact that such equal age protection is not afforded to the crime of rape is highlighted in Rainbow Action against Sexual Minority Discrimination's Shadow Report to CAT in March 2017.

Country Age of Consent (AoC)	Provisions in law
TAIWAN Equal AoC: 16	1954 Taiwan's Criminal Code of 1954 contained no provisions prohibiting consensual same-sex sexual activity between adults. (Taiwan is not a member State of the United Nations).
TAJIKISTAN Equal AoC: 16	1998 There are no restrictions on adult, consensual same-sex sexual relations between adults in the 1998 Criminal Code of Tajikistan (amended to 2010).
THAILAND Equal AoC: 15	1957 The Thai Penal Code of 1956 came into force in 1957: it has no criminalising provision on consensual same-sex sexual activity between adults.
VIETNAM Equal AoC: 18	1945 Following independence from France in 1945 (with subsequent non-criminalisation), the 1999 Penal Code made no provisions to criminalise consensual same-sex sexual acts between adults.
WEST BANK Equal AoC: 16	1960 West Bank in the Occupied Palestinian Territory aligns with the Jordanian Penal Code of 1960, where consensual same-sex sexual acts are not penalised under the law. However, clearly public discussion about sexual diversity is severely limited, as reported in early-2017 . The West Bank is not a member State of the United Nations.

EUROPE (49 [inc. Kosovo])

Country Age of Consent (AoC)	Provisions in law
ALBANIA Equal AoC: 14	1995 Prior to its repeal by Article 116 of the Criminal Code , the previous Article 137 penalised "homosexuality" amongst men with up to 10 years imprisonment.
ANDORRA Equal AoC: 16	1791 As a co-principality with France, Andorra was subject to the same Penal Code provisions that decriminalised "sodomy" in 1791.
ARMENIA Equal AoC: 16	2003 Armenia's former Soviet Union provision that punished consensual sex between adult men with five years imprisonment (under Article 116), was repealed in the 2003 Criminal Code .
AUSTRIA Equal AoC: 14	1971 The previous Penal Code of 1852 penalised (with five years imprisonment) "sodomy" between men, and unusually in Europe, amongst women. The 1971 Criminal Code lifted all such sanctions.
AZERBAIJAN Equal AoC: 16	2000 Prior to 1988, aligned to the Soviet Union provisions, Article 113 criminalised "anal intercourse between men". This was repealed by a new Criminal Code that came into force in 2000.
BELARUS Equal AoC: 16	1994 'Homosexual acts' were criminalised with up to five years imprisonment under Article 119(1) in line with the Soviet Union code, and was repealed under the Belarus 1994 Criminal Code .
BELGIUM Equal AoC: 16	1830 Neither the Napoleonic Code of 1810 (which Belgium operated under until independence in 1830) nor the Belgian Penal Code of 1867 conferred penal sanctions for consensual same-sex sexual activity between adults.
BOSNIA & HERZEGOVINA Equal AoC: 14	1998/2001 The three parts of Bosnia and Herzegovina decriminalised 'homosexuality' separately: Federation of Bosnia and Herzegovina (1998), Republika Srpska (2000), Brcko District (2001).
BULGARIA Equal AoC: 14	1968 The Criminal Code of 1968 repealed the sodomy provisions contained in Bulgaria's first Penal Code of 1896.

Country Age of Consent (AoC)	Provisions in law
CROATIA Equal AoC: 15	1977 The provisions of 1951 Yugoslavia Criminal Code regarding consensual same-sex relations were rescinded in the Croatian Penal Code of 1977, and the age of consent was equalised in 1998.
CYPRUS Equal AoC: 17	1998 Under Section 171 of the 1959 Criminal Code , male/male sexual 'unnatural acts' could be punishable with five year's imprisonment. This clause was removed in the 1998 following the <i>Modinas v Cyprus</i> case. Northern Cyprus decriminalised in 2014, the last part of Europe to do so.
CZECH REPUBLIC Equal AoC: 15	1961 The current Criminal Code came into force in 1962, which removed sodomy provisions from previous ruling codes (that of Austria ruled Bohemia and Moravia, and Slovakia used the Hungarian penal code).
DENMARK Equal AoC: 15	1933 Replacing a Criminal Code and a series of laws that criminalised sodomy, the 1933 Penal Code removed provisions on consensual adult same-sex sexual relations.
ESTONIA Equal AoC: 14	1992 On dissolution from the Soviet Union in 1991, Estonia created its own Penal Code that removed criminalising sanctions on same-sex sexual intimacy.
FINLAND Equal AoC: 16	1971 The 1889 Criminal Code was revised in 1971 to remove Chapter 20 'Unlawful sexual intercourse and other lewdness'.
FRANCE Equal AoC: 15	1791 The newly-formed constitutional monarchy of France adopted a Penal Code that removed sodomy provisions, thus becoming the world's first country to decriminalise same-sex sexual acts between consenting adults. The law applies to the Overseas Departments of Martinique, Guadeloupe, Saint Barthélemy, French Guyana, Mayotte , and Réunion, and to the islands of Saint Pierre and Miquelon.
GEORGIA Equal AoC: 16	2000 The Criminal Code of Georgia removed the pre-existing sodomy provisions that were carried through from the Soviet Union period.
GERMANY Equal AoC: 14	1968/1969 Although East Germany and West Germany stopped applying its Criminal Code provisions (Paragraph 175 – "lewd and lascivious acts") in 1968 and 1969 respectively, the black letter law was not abolished until 1994.
GREECE Unequal AoC: 17	1951 Prior to the post-war 1951 Penal Code , consensual male same-sex sexual acts were outlawed. Articles 339 and 347 stipulate the age of consent: 'contact against nature between males' is 17, while for different-sex that age is 15.
HUNGARY Equal AoC: 14	1962 The Criminal Code of Hungary removed the 1878 provisions that referred to 'crimes against nature'.
ICELAND Equal AoC: 15	1940 The General Penal Code of 1940 removed the provisions of 1869 Penal Code, Clause 178 that stipulated, "[u]nnatural forms of sexual intercourse are punishable by a term in prison".
IRELAND Equal AoC: 17	1993 Section 2, Criminal Law (Sexual Offences) Act 1993 removed the 'buggery' provisions Ireland inherited from British rule.
ITALY Equal AoC: 14	1890 The first Italian Penal Code in 1889 had no prohibition on consensual same-sex sexual acts between adults in private.
KOSOVO Equal AoC: 16	1994 The Criminal Code of the Republic of Kosovo repealed the 1951 Yugoslav provisions regarding same-sex sexual acts. Kosovo is not a member State of the United Nations.

Country Age of Consent (AoC)	Provisions in law
LATVIA Equal AoC: 16	1992 Following dissolution of the Soviet Union, Latvia's Criminal Law removed its punitive provisions under Paragraph 124(1) regarding consensual same-sex sexual relations between adults.
LIECHTENSTEIN Equal AoC: 14	1989 The Criminal Code was revised in 1989 to remove Sections 129 and 130 "lewdness against the order of nature".
LITHUANIA Equal AoC: 16	1993 Following independence from the Soviet Union, Lithuania abolished Articles 121 and 122(1) of its Criminal Code , thereby decriminalising consensual same-sex sexual relations between adults.
LUXEMBOURG Equal AoC: 16	1795 As Luxembourg came into the possession of France, any sodomy provisions from its Criminal Code were removed in 1795.
MACEDONIA (FRYOM) Equal AoC: 16	1996 The Criminal Code of 1996 removed provisions regarding consensual [male] same-sex relations (penalised with one year in jail) that were previously encoded under Article 101.
MALTA Equal AoC: 18	1973 Malta removed the offence of "unnatural carnal connection" from Article 201 of the Criminal Code in 1973.
MOLDOVA Equal AoC: 16	1995 The Criminal Code of Moldova removed the pre-existing sodomy provisions (at Article 106) that were carried through from the Soviet Union period.
MONACO Equal AoC: 15	1793 As Monaco was in the possession of France, it removed any sodomy provisions from its Penal Code in 1795.
MONTENEGRO Equal AoC: 14	1977 The Criminal Code of 1977 repealed the 1951 Yugoslav provisions regarding same-sex sexual acts.
NETHERLANDS Equal AoC: 16	1811 When the Kingdom of Holland became annexed to France in 1811, the Napoleonic Penal Code of 1810 came into operation containing no provision on sodomy, and that standard applies in the current Penal Code , as well as to the three Netherlands Associates (Aruba, Curaçao and St Maarten) and in the their Territories of Bonaire, Saba and St Eustatius.
NORWAY Equal AoC: 15	1972 "Indecent intercourse" between men was decriminalised by repeal of Paragraph 213 in Norway's Penal Code of 1972.
POLAND Equal AoC: 15	1932 After its independence in 1918, Poland returned to the Napoleonic tradition that it had enjoyed in the early-19th century, and subsequently its 1932 Penal Code contains no criminalising provisions regarding consensual same-sex sexual relations amongst adults.
PORTUGAL Equal AoC: 14	1983 Under the reign of Louis 1 from 1886 on, Portugal criminalised consensual same-sex sexual relations between men, but that law was repealed in the 1983 Penal Code .
ROMANIA Equal AoC: 15	1996 Prior to 1996, Section 200 of the Penal Code had penalised "sexual relations between persons of the same-sex" with 1-5 years imprisonment. This was then repealed, but replaced with a clause "committed in public or producing a public scandal", which was itself removed in 2001.

Country Age of Consent (AoC)	Provisions in law
RUSSIA Equal AoC: 16	1993 Article 121(1) of the 1934 Criminal Code of the Soviet Union (discussed here) had stated “[s]exual relations of a man with a man (pederasty)” was punishable with up to five years imprisonment. This is the model language that was transposed into penal codes in States throughout the former-Soviet Union. The 1993 Criminal Code removed such provisions from the Russian law. However, as has been widely reported over the past decade, a variety of repressive legal provisions on areas critical to SOGI-related advocacy (regarding expression, assembly and funding) have been implemented and societal stigmatisation is high . The Russian LGBT Network reported on the persecution of gay men in Chechnya in March 2017 that has had fatal results, an issue that (at time of writing) has been recorded by media , but cynically denied by officialdom.
SAN MARINO Equal AoC: 14	2004 Although San Marino decriminalised ‘sodomy’ in 1865, it was re-introduced at Article 274 into the Penal Code in 1975, targeting those who “habitually” practice (not known to have been ever implemented). This was finally repealed in the 2004 Penal Code .
SERBIA Equal AoC: 14	1994 In its modern history, and as part of the Kingdom of Yugoslavia in 1918, “lewdness against the order of nature” in Serbia was banned. The 1994 Criminal Code removed that prohibition.
SLOVAKIA Equal AoC: 15	1962 The current Criminal Code came into force in 1962, and removed sodomy provisions from previous ruling codes (Slovakia relied on the Hungarian law that had previously referred to “crimes against nature”).
SLOVENIA Equal AoC: 15	1977 When Slovenia was still a part of Yugoslavia in 1976, work on the Criminal Code to remove provisions penalising consensual same-sex sexual relationships commenced, and the resultant law came into force in 1977.
SPAIN Equal AoC: 16	1979 Following the re-establishment of constitutional democracy in Spain after Franco, consensual same-sex sexual intercourse amongst males was removed as an offence in the Penal Code (download in English here).
SWEDEN Equal AoC: 15	1944 Sweden removed its ‘sodomy’ provisions from the Penal Code in 1944, specifying freedom for both men and women in the subsequent revision.
SWITZERLAND Equal AoC: 16	1942 Although various cantons had remained with the Napoleonic Code since 1798 in not penalising same-sex sexual relations, the entire country became free from such criminalisation by way of the Penal Code that came into force in 1942.
TURKEY Equal AoC: 18	1858 The Turkish Imperial Penal Code of 1858 (thought to be based on the 1810 French Penal Code) makes no mention of consensual same-sex sexual acts between adults, and neither does the current Penal Code .
UKRAINE Equal AoC: 16	1991 ‘Homosexual acts’ were criminalised with up to five years imprisonment in line with the Soviet Union code of 1934: this was repealed under the Ukraine Criminal Code of 1991.
UNITED KINGDOM Equal AoC: 16	1967 In 1861, the death penalty for ‘buggery’ was abolished across the United Kingdom, but the offence was codified in Section 61 of the Offences Against the Person Act 1861 as life sentence, and the lesser misdemeanour of gross indecency was codified in Section 11 of the Criminal Law Amendment Act 1885 , with a penalty of up to two years imprisonment, hard labour possible. These were the model laws that spread throughout the Commonwealth. England and Wales removed the provisions in 1967, Scotland in 1981, and Northern Ireland in 1982 (following the Dudgeon case at the European Court of Human Rights). Various entities attached to the UK similarly repealed: Akrotiri & Dhekelia (2000), Anguilla (2001), Bailiwick of Guernsey (1983), Bermuda (1994), British Virgin Islands (2001), Cayman Islands (2001), Falkland Islands (1989), Gibraltar (1993), Isle of Man (1992), Jersey (1990), Montserrat (2001), Pitcairn, South Georgia, St Helena, Turks & Caicos Islands, and all other territories (2001).

OCEANIA (8)

Country Age of Consent (AoC)	Provisions in law
<p>AUSTRALIA Equal AoC: 16</p>	<p>1975-1997 Decriminalisation of consensual same-sex sexual acts took place variously across the eight provinces of Australia between 1975 and 1997. In 1975, South Australia abolished the offences of buggery, gross indecency and soliciting for immoral sexual purposes, and 22 years later the last state to decriminalise was Tasmania in 1997. Following the seminal UN Human Rights Committee’s finding of incompatibility in <i>Toonen v. Australia</i> in 1994 (primarily on the basis of privacy), the federal government introduced Section 4(1) of the Human Rights (Sexual Conduct) Act 1994 to uphold that principle in Australian law.</p>
<p>FIJI Equal AoC: 16</p>	<p>2010 In 2005, in its decision in <i>Dhirendra Nadan and Thomas McCosker v. The State</i>, the High Court of Fiji invalidated two convictions based on sections 175(a), 175(c) and 177 of the Penal Code which criminalised “carnal knowledge against the order of nature” and indecent practices. These provisions were finally repealed by the Crimes Decree 2009, which came into force in February 2010.</p>
<p>MARSHALL ISLANDS Equal AoC: 16</p>	<p>2005 The Criminal Code (Amendment) Act 2005 amended the Criminal Code to decriminalise consensual same-sex sexual activity between adults in private.</p>
<p>MICRONESIA [FEDERATED STATES OF] Equal AoC: 14</p>	<p>1982 The first 1982 legal code of the FSM (which included criminal provisions) did not contain any provision criminalising same-sex consensual sexual acts between adults and no such provision has been introduced since. It has been reported (para. 5) that culture stigmatizes public acknowledgement or discussion of certain sexual matters, including sexual orientation and gender identity, and it was rare for individuals to identify themselves publicly as LGBT persons.</p>
<p>NAURU Equal AoC: 17</p>	<p>2016 In May 2016 the Crimes Act 2016 repealed the Criminal Code 1899 that itself was drawn from the 1899 Queensland Criminal Code. The Government of Nauru stated that this law —by far the most comprehensive new law in the country— removed homosexuality as an offence. Nauru had previously accepted three recommendations to decriminalise same-sex sexual activity in its 1st cycle of the UPR in 2011.</p>
<p>NEW ZEALAND Equal AoC: 16</p>	<p>1986 The General Assembly passed the Homosexual Law Reform Act 1986 which decriminalised sexual relations between men aged 16 and over. Same-sex activity between women was not illegal. In February 2017, the government of New Zealand announced that it would introduce legislation to open an application process to quash historical convictions for consensual sex between men. In 2007 Niue (associated state) and Tokelau (dependent territory) decriminalised same-sex consensual relations as a result of the amendment of the Niue Act by the Niue Amendment Act 2007. The act came into force on 20 September 2007.</p>
<p>PALAU Equal AoC: 16</p>	<p>2014 Palau repealed its legal provisions that criminalised consensual same-sex sexual activity between gay men, introducing a new Penal Code with no such provisions, signed by the President in April 2014. Palau had previously accepted three recommendations to decriminalise same-sex sexual activity in its 1st cycle of the UPR in 2011. In 2014, a bill on hate crimes, including those based on sexual orientation, was rejected and not passed into law. It has been reported that the LGBTI community faces security threats and made calls for government action.</p>
<p>VANUATU Equal AoC: 15</p>	<p>1981 Soon after becoming an independent State in 1980, Vanuatu enacted its first Criminal Code (in force 1981), which did not criminalise (see page 122) same-sex activity between persons over 18 years of age. The 2006 Consolidation of the Criminal Code maintained the same provision under Section 99. In that same year, the Penal Code (Amendment) Act 2006 (in force March 2007) repealed section 99 altogether, which had the effect of equalising ages of consent for same-sex and different-sex sexual acts at 15.</p>

Same-sex acts: illegal (71)

37% of UN States

This section provides a quick-reference overview of all the States that criminalise same-sex sexual activity. In the first column it lists the country name and if the symbol indicates if the law applies to men and to women, or just to men only. The second column supplies a link to the text of the law, and the appropriate provision reference. Each entry in this listing is linked to more comprehensive country entries in the Criminalisation section of this document.

AFRICA (32)

Country	M/F	Provisions in law
ALGERIA	♂♀	1996 Penal Code Articles 333, 333bis, 338.
ANGOLA	♂♀	1886 Penal Code Articles 70, 71(4).
BOTSWANA	♂♀	1964 Penal Code Sections 164, 165, 167.
BURUNDI	♂♀	2009 Penal Code Article 567.
CAMEROON	♂♀	1965 Penal Code Article 347-1.
COMOROS	♂♀	1981 Penal Code Article 318.
ERITREA	♂♀	1957 Penal Code Article 600.
ETHIOPIA	♂♀	1957 Criminal Code Articles 629, 630.
GAMBIA	♂♀	1965 /2014 Criminal Code Articles 144, 144A, 147(2) .
GHANA	♂	1960 Criminal Code Articles 99, 104.
GUINEA	♂♀	1988 Penal Code Article 325.
KENYA	♂	1948 Penal Code Section 162.
LIBERIA	♂♀	1978 Penal Law Article 14.74.
LIBYA	♂♀	1976 Law 70 of 1976 (amending Articles 407 and 408 of 1953 Penal Code)
MALAWI	♂♀	1930 Penal Code Sections 153, 137A.
MAURITANIA	♂♀	1983 Penal Code Articles 306, 308.
MAURITIUS	♂	1838 Criminal Code Section 250.
MOROCCO	♂♀	1962 Penal Code Article 489.
NAMIBIA	♂	Common Law Offence
NIGERIA	♂♀	1990 Criminal Code Act Sections 214, 2 15, 217.
SENEGAL	♂♀	1965 Penal Code Article 319(3).
SIERRA LEONE	♂	1861 Offences against the Person Act Section 61.
SOMALIA	♂♀	1962 Penal Code Article 409.

Country	M/F	Provisions in law
SOUTH SUDAN	♂♀	2008 Penal Code Sections 148.
SUDAN	♂♀	1991 Penal Code Sections 148, 151.
SWAZILAND	♂	Common law offence
TANZANIA	♂	1945 Penal Code Section 154.
TOGO	♂	1980 Penal Code Article 88.
TUNISIA	♂♀	1913 Penal Code Article 230.
UGANDA	♂♀	1950 Penal Code Section 145.
ZAMBIA	♂♀	1930 Penal Code Sections 155, 156.
ZIMBABWE	♂	1996 Criminal Law Section 73.

AMERICAS (10)

Country	M/F	Provisions in law
ANTIGUA AND BARBUDA	♂♀	1995 Sexual Offences Act (Act No. 9), Sections 12, 15.
BARBADOS	♂♀	1992 Sexual Offences Act, Chapter 154, Sections 9, 12.
DOMINICA	♂♀	1998 Sexual Offences Act, Sections 14, 16.
GRENADA	♂	1993 Criminal Code, Section 431.
GUYANA	♂	1893 Criminal Law (Offences) Act, Sections 352, 353, 354.
JAMAICA	♂	1864 Offences Against the Person Act, Sections 76, 77, 78, 79.
SAINT KITTS AND NEVIS	♂	1873 Offences against the Person Act, Sections 56, 57.
SAINT LUCIA	♂♀	2005 Criminal Code, Sections 132, 133.
SAINT VINCENT AND THE GRENADINES	♂♀	1990 Criminal Code, Section 146, 148.
TRINIDAD AND TOBAGO	♂♀	1986 Sexual Offences Act 1986, as amended by the Sexual Offences (Amendment) Act (No. 31 of 2000), Sections 13, 16.

ASIA (23)

Country	M/F	Provisions in law
AFGHANISTAN	♂♀	1976 Penal Code Article 427.
BANGLADESH	♂	1860 Penal Code Section 377.
BHUTAN	♂	1959 Penal Code Section 213.

Country	M/F	Provisions in law
BRUNEI DARUSSALAM	♂	1951 Penal Code Section 377.
GAZA (OPT)	♂	1936 Criminal Code Ordinance No. 74 Section 152.
INDIA	♂	1860 Penal Code Section 377.
INDONESIA	♂♀	Indonesia [two provinces only].
IRAN	♂♀	2013 Islamic Penal Code Articles 233-241.
IRAQ	♂♀	1969 Penal Code Article 404.
KUWAIT	♂	1960 Penal Code Article 193.
LEBANON	♂	1943 Penal Code Articles 209, 532, 534.
MALAYSIA	♂♀	1976 Penal Code Section 377A.
MALDIVES	♂♀	2014 Penal Code Articles 410, 411, 412.
MYANMAR	♂	1860 Penal Code Section 377.
OMAN	♂♀	1974 Penal Code Articles 33, 223.
QATAR	♂♀	2004 Penal Code Articles 296, 298.
PAKISTAN	♂	1860 Penal Code Section 377.
SAUDI ARABIA	♂♀	Sura 7:80/81.
SINGAPORE	♂	1872 Penal Code Section 377A.
SRI LANKA	♂♀	1885 Penal Code Articles 365, 365A
SYRIA	♂♀	1949 Penal Code Article 520
TURKMENISTAN	♂	1997 Criminal Code Article 135.
UAE	♂♀	1987 Penal Code Article 356.
UZBEKISTAN	♂	1994 Criminal Code Article 120.
YEMEN	♂♀	1984 Penal Code Articles 264, 268.

OCEANIA (6)

Country	M/F	Provisions in law
COOK ISLANDS [NEW ZEALAND ASSOCIATE]	♂	1969 Crimes Act 1969, Sections 154, 155.
KIRIBATI	♂♀	1977 Penal Code, Sections 153, 154.
PAPUA NEW GUINEA	♂	1974 Criminal Code, Sections 210, 212.

Country	M/F	Provisions in law
SAMOA	♂	2013 <i>Crimes Act</i> , Sections 67, 68, 71.
SOLOMON ISLANDS	♂♀	1996 <i>Penal Code</i> , Sections 160, 161, 162.
TONGA	♂♀	1988 <i>Criminal Offences Act</i> , Sections 136, 139, 140, 142.
TUVALU	♂	1978 <i>Penal Code</i> , Sections 153, 154, 155.

Death penalty for same-sex sexual acts

There is significant inconsistency in reportage of how the death penalty for same-sex sexual acts is applied.

By our reckoning, as charted below, there are **eight** (8) States where the death penalty is **activated**: **four** (4) at country level, **two** (2) only in certain provinces, and in **two** (2) States a death penalty is carried out by non-State actors. We recommend that this is the most accurate manner to report on the current situation on the death penalty for consensual same-sex sexual activity between adults in private.

Further, there are another **five** (5) States where interpretation of Sharia, or where black letter law, permits the death penalty technically, but where it is **not invoked** to our knowledge, and indeed where governments have made statements to that effect in forums, such as the UN’s Universal Periodic Review. Further, these States operate civil codes where lesser penalties are indicated.

	ASIA	AFRICA
Codified under <i>Sharia</i> and implemented countrywide (4)	Iran Saudi Arabia Yemen	Sudan
Codified under <i>Sharia</i> and implemented provincially (2)		Somalia (southern parts) Nigeria (12 states)
Implemented by local courts / vigilantes / non-state actors (2)	Iraq Daesh-held ((ISIS / ISIL) territories in northern Iraq and northern Syria;	
Codified in the law, but not implemented for same-sex behaviour specifically (5)	Afghanistan Pakistan Qatar UAE	Mauritania

PROMOTION ('PROPAGANDA') AND 'MORALITY' LAWS THAT TARGET FREEDOM OF EXPRESSION RELATED TO SEXUAL ORIENTATION (19)

10% of UN States

Morality codes pertaining to public discussion have long been in force in some Arabic States. However, a new legal vehicle has been employed more laterally where we are witnessing the framing of 'propagation' of certain values to children as a criminal offence (often [inaccurately] framed as 'propaganda').

AFRICA (8)

ALGERIA	2014 Article 333 (Reiterated) of the Penal Code penalises the possession, dissemination or display of anything that would constitute a breach of modesty with imprisonment from two months to two years and a fine.
EGYPT	1937 Penal Code No. 58 of 1937, speaks Article 178 of purveyance of materials "against public morals" (see country entry on Egypt).
LIBYA	1953 Article 421 of the 1953 Penal Code refers to distribution of "articles of an indecent nature".
MOROCCO	1962 Article 483 of the 1962 Penal Code speaks of public indecency through "obscenity in his actions", which is understood to include promoting 'obscenity'.
NIGERIA	2014 Section 5, Same-sex Marriage (Prohibition) Act , 2013 (17 December 2013, signed into law in January 2014) provides that a person who "directly or indirectly makes public show of same-sex amorous relationship[s]" may receive a penal sentence of up to ten years imprisonment.
SOMALIA	1964 Article 406 of the 1964 Penal Code prohibits dissemination of material that "incites to lewd acts".
TANZANIA	1981 Article 175 of the Penal Code stipulates materials that are intended to "corrupt morals" may not be shared or sold.
TUNISIA	1913 Amended in 2004, Article 226 <i>bis</i> of the Penal Code of 1913 speaks of the manner of inviting "debauchery".

AMERICAS (0)

In the **United States of America** several states have enacted local laws—informally referred to as '[No Promo Homo Laws](#)'—which in some way restrict or condition the discussion of same-sex sexual activity and relations. In some States course material and instruction must: emphasise that "homosexuality is not a lifestyle acceptable to the general public" (Alabama and Texas); refrain from suggesting that "homosexual sex" can be ever be safe (Arizona); explain that "engaging in homosexual activity" is now known to be "primarily responsible for contact with the AIDS virus" (Oklahoma); refer to "homosexual relationships" only when teaching about sexually transmitted diseases (South Carolina), among others. Human Rights Watch documented the effects of these laws in its [report](#) on school bullying against LGBT students in the United States (see especially page 11). In March 2017, the governor of Utah signed [SB 196](#), revising the state law that prohibited the "advocacy of homosexuality" in schools. The [National Center for Lesbian Rights \(NCLR\)](#) was involved in strategic litigation to have these laws repealed (see legal brief [here](#)).

ASIA (9)

INDONESIA	2016 The Circular to All Broadcasting Companies on Effeminate Men prohibits all broadcasting companies from representing sexual and gender diversity in men. The State also used 2012 Broadcasting Program Standards to limit LGBT expression on TV, with the logic of protecting children. Further, there are growing threats to the continuance of online LGBT content in the country.
IRAQ	1969 Article 404 of Islamic Penal Code states, "Any person who himself or through some mechanical means sings or broadcasts in a public place obscene or indecent songs or statements is punishable by a period of detention not exceeding 1 year or by a fine not exceeding 100 dinars".
IRAN	1986 The Press Law contains a variety of limitations on material that may be considered offensive to the public.

JORDAN	1962 Article 320 of Penal Code states, "Anyone who commits an act incompatible with modesty or expresses signs incompatible with modesty in a public place or a public assemblage or by manner that could be seen by those in a public place shall be punished with imprisonment not exceeding 6 months or a fine not exceeding 50 Dinars".
KUWAIT	1960 Article 198 of the Penal Code , Law No.16 of 2 June 1960, as amended in 1976, states: "Whoever makes a lewd signal or act in a public place or such that one may see it or hear it from public place, or appears like the opposite sex in any way, shall be punished for a period not exceeding one year and a fine not exceeding 1000 Dinar or one either of these punishments".
LEBANON	1943 Article 523 of the Penal Code speaks of possession, making, distributing materials that may be considered a "breach of modesty shall be punished with ... imprisonment from one month to one year and a fine ...".
QATAR	2004 Article 296 of the 2004 Penal Code states, "One is convicted to no less than a year and no more than three years in prison in case of [<i>inter alia</i>] 3- Leading, instigating or seducing a male anyhow for sodomy or immorality. 4- Inducing or seducing a male or a female anyhow to commit illegal or immoral actions".
SAUDI ARABIA	2001 According to the Council of Ministers Resolution in 2001: "All internet users in the Kingdom of Saudi Arabia shall refrain from publishing or accessing data containing some of the following: 1. Anything contravening a fundamental principle or legislation, or infringing the sanctity of Islam and its benevolent Shari'ah, or breaching public decency...".
SYRIA	1948 Article 208 of the Syrian Penal Code (stipulating that offensive public utterances in writing, graphics, images, etc., are outlawed) in combination with Article 517 (which states, "[p]unish crimes against public decency in any of the ways mentioned in paragraph 1 of Article 208 [any act carried out in a public or open area where one could possibly see, intentionally or accidentally, the act] with imprisonment of three months to three years" comprises a morality clause that is overly restrictive to LGB-identified individuals.

EUROPE (2)

Bills that target 'propagation' of 'non-traditional sexual relations' have been introduced in parliaments of **Moldova** and **Kyrgyzstan** in 2016.

LITHUANIA	2014 In January 2014, the Lithuanian Parliament introduced amendments to the Code of Administrative Violations of Law (at Section 214 and elsewhere) penalising activities or publication that violate so-called constitutionally established family values. These amendments were enacted in the context of the Law on the Protection of Minors against the Detrimental Effect of Public Information that came into effect in March 2010.
RUSSIA	2013 Article 6.21 (Promotion of Non-Traditional Sexual Relations Among Minors) of Federal Law No 135-FZ was used to prosecute the St Petersburg LGBT youth work organisation Children 404 in 2015, and has emitted a strong 'chill factor' across LGBT organising, and has detrimental effects on children and society.

BARRIERS TO THE FORMATION, ESTABLISHMENT OR REGISTRATION OF [SEXUAL ORIENTATION-RELATED] NGOS (25)

13 % of UN States

By possessing the status of NGO (non-governmental organisation), civil society mission-driven advocacy or service organisations in the non-profit sector are enabled to formally represent at national and international forums alongside the State. But increasingly that right, or the ability to exercise it, for SOGI-based groups and organisations (CSO - civil society organisations/CBO –community-based organisations) is being threatened by the introduction of burdensome or prohibitive provisions in law. However, despite criminalisation of same-sex sexual activity, in recent years courts in Kenya, Botswana, Zimbabwe and Tunisia have rejected such *de facto* censure and upheld petitioners' claims regarding the right to advocate for fundamental rights, regardless of sexual orientation. The following list locates States and their statutes of particular relevance to sexual orientation: a comprehensive and in-depth profile of the wider legal environments these laws operate in, is provided by the Civic Freedom Monitor. It is important to note that there are many States that have restrictive NGO laws but where no SOGI-based NGOs or civil society groups are known to exist, or where they do exist, nothing is known the fate of applications they may have made. There are numerous others, where for various reasons (exposure, governance, interference, cost, etc) groups choose not to pursue NGO status, and opt for other creative partnerships to be able to operate at the policy level.

AFRICA (11)

ALGERIA	<p>1990 According to ICNL (International Centre for Non-profit Law), the Law on Associations (Law 12-06 of 2012) replaces the highly restrictive Law on Associations (Law 90-31 of 1990), “but still fails to adequately guarantee the right to freedom of association consistent with Algeria’s international obligations. The new law affords the government broad discretion to refuse to register an association and suspend the activities of an association, places restrictions on the founders of associations, limits associations’ ability to receive foreign funds, imposes heavy fines and criminal penalties for members or leaders of informal associations, and fails to provide associations with an adequate remedy to appeal the rejection of their registration”. This combined with the Law on Information (Law 12-05 of 2012) and the Law on Public Meetings and Gatherings (Law 19-91 of 1990), along with the fact of criminalisation, produces an environment where it is not possible to register a SOGI-based NGO.</p>
EGYPT	<p>1964 Article 14(2) of the 1964 Law on Private Associations and Foundations (revised 2016) was the foundational legal formulation that was used by many Middle East and North African States in subsequent years: “The practice of activities that result in destabilizing the national unity, national security, public law and order, and public morals”. The law in Egypt was amended in 2016 to include some ‘novel’ provisions, such as, requiring government permission to accept foreign funding or expertise or consulting with a foreign organisation, to conduct surveys or publish reports, and at the same time increasing penalties for violation.</p>
LIBYA	<p>1928 Various articles within the Law of 21 April 1928 (amended 2016) on associations and non-profit foundations in Libya make the registration of a SOGI-based NGO completely impossible. Libya had a series of highly restrictive laws on associations (for example, Law 71 of 1972) prior to the 2011 revolution, and the level of hostility to sexual and gender diversity has severely increased in recent years, forcing individuals to flee.</p>
MALAWI	<p>2000 Although civil society participation is often welcomed by the government, Section 5 of the NGO Act of 2000 gives the State the discretion to refuse or rescind licences for groups to become incorporated, classified as “specially exempted”. In recent years, SOGI issues are being raised at the political level, causing significant backlash. It is reported (at p.122) that the government threatened to close CSOs because of their advocacy on behalf of SOGI-related rights.</p>

MAURITANIA	1964 As quoted from CERD's 7th Periodic Report on Mauritania, Article 3 of Act No. 64-098 of 9 June 1964 on associations (no online text of law located) limits the freedom to legally engage in activities unless prior authorisation has been granted from the Ministry of the Interior, whereby Article 4 states members must not "cause public demonstrations, armed or otherwise, compromising public order or security, receive subsidies from abroad or engage in antinational propaganda, undermine the State's credit through their activities or exercise an improper influence over the minds of the populace". Article 13 allows the Ministry to dissolve an association if it "conducts propaganda offending the state" or if the association "violate(s) the state's credibility," among other reasons, while Article 8 penalises individuals working for an unregistered association with up to three years in jail. The passage of a revised law is currently unclear.
MOROCCO	1958 Article 3 of the Decree Regulating the Right of Association Decree 1-58-376 of 1958 prohibits associations from engaging in activities that, <i>inter alia</i> , "breach the laws or public morals; offend Islam". Further amendments to the 1958 law were made in Decree 2-04-969 of 2005 , which include prohibitive provisions, such as capacities of the association at start-up.
MOZAMBIQUE	1991 The Law on Associations Law No. 8/91 appears not to accommodate the only SOGI-based organisation in Mozambique (a country that decriminalised same-sex sexual acts in 2014). In 2016, Human Rights Watch highlighted the case of Lambda that has been applying for eight years to be provided with legal registration, but has met with refusal around issues regarding the "urgency and the pertinence" of the registration: a standard that appears not to be applied to other applications.
NIGERIA	2013 Article 4(1) of Nigeria's Same-sex Marriage (Prohibition) Act , prohibits "the registration of gay clubs, societies and organisations, their sustenance, processions and meetings". Articles 5(2) and (3), imposes a 10-year prison sentence on anyone who "registers, operates or participates in gay clubs, societies organization" or "supports" the activities of such organisations, see HRW report . Human Dignity Trust assessed the "chilling effect on civil society by starving organisations of funding and other forms of support" having "a seriously adverse impact on bodies dedicated to addressing the HIV/AIDS and other public health needs of sexual minorities".
SUDAN	2006 Sudan applies the death sentence for some consensual same-sex sexual activity, and as such, it is virtually impossible for any SOGI-based group to even consider registering as a NGO. A rigorous registration process is mandated in Section 8(1) of the Voluntary and Humanitarian Work (Organization) Act, 2006 , and other sections impose restrictions on the work of NGOs operating in Sudan (see ICNL), and grants discretionary regulatory power to the government over the operations of NGO.
TANZANIA	2002 Article 14(1)(a) of the Non-Governmental Organisations Act prohibits registration if "the activities of a Non Governmental Organization are not for public interest or are contrary to any written law". As Tanzania has particularly harsh penalisations for both male and female same-sex sexual activity, the barriers to existing SOGI-based groups to survive are currently ominous . Further, using a protection of 'culture' argument within the current crackdown on SOGI expression, in late-2016 the Deputy Minister for Health has reportedly vowed to discontinue any current recognition of groups that support "homosexuality".
UGANDA	2016 Section 30(1)(a) of the Non-Governmental Organizations Act states that an "organisation shall not be registered under this Act, where the objectives of the organisation as specified in its constitution are in contravention of the laws of Uganda". Further sections lay out detailed corporate governance requirements for NGO registration: the act came into force in 2016. SMUG and HRAPF initiated a legal challenge (analysed in Third Issue of HRA), which is currently in process.

ASIA (13)

Although there is no formal ban on a SOGI-based NGO in **South Korea**, there have been 'technical' issues registering [Beyond the Rainbow Foundation](#), seemingly for reasons of the work they do. They have been [bounced](#) from one Ministry to another, as responsibility for registration is not centralised. There is currently a case pending at the Supreme Court level to establish who is to take responsibility for registration of this LGBT group, [noted](#) by a UN rapporteur in 2016.

BAHRAIN	1989 Article 3 of Law 21 of 1989 stipulates that a group that is deemed to “contradicts the public order or moral “ or undermines the “social order” is considered illegal. There are many restrictions and conditions set and as decision-making on what construes these is dispersed across government agencies, it is highly likely a SOGI-based application would be instantly rejected.
BANGLADESH	1961 There are significant barriers to registering as a NGO in Bangladesh, along with the fact that there has been a significant rise in threats to LGBT human rights defenders: many who have been forced to flee the country. The Voluntary Social Welfare Agencies Ordinance of 1961 requires the societies under this category to “render welfare services” but does not provide the capacities of a NGO.
CHINA	2016 Attitudes towards SOGI have been characterised as having moved from taboo to tolerance in China. Although there are over 190 LGBT groups and organisations with an online presence in China, none appear to have NGO status, and there are numerous barriers to achieving that status (see explainer). In offering ideas on volunteer-based alternatives, this article explains , “any organization is subject to the review of a “ governing unit ” (i.e., a governmental agency) and they must be approved by a government department . Both of these are highly problematic when sexual minorities are still treated as violating ‘traditional Chinese culture and the social construction of morality’”. China’s Law on the Management of the Activities of Overseas NGOs within Mainland China came into force in January 2017, which severely impedes funding capabilities, and under the 2016 Charities Law , only by charitable organisations certified by the government should conduct public fund-raising , which means that uncertified people or organisations could be penalised for their fundraising activities.
JORDAN	2008 Articles 6, 7 and 16 of the 2008 Law on Societies requires registration, personal information and annual oversight, and proposed revisions to it in 2016 regarding registration and funding will close civil society space even further, as HRW point out . The terms of the 2008 already effectively prohibits such registration for SOGI-based groups, at the reviewing Board’s discretion (with reason supplied), particularly the provision that the Registry of Societies must be informed and can send a representative to any general assembly meeting.
KAZAKHSTAN	1996 Although a Russian-type ‘propagation’ Bill passed parliament, it did not get through the Constitutional Court in mid-2015. The 1996 Law on Public Assembly already created a restricted space for SOGI-based groups and organisations achieving NGO status, but developments since mid-2015 are only limiting that space further.
KUWAIT	1962 Article 6(4) of the 1962 Law No. 24 on Clubs and Public Welfare Societies states, “[s]ocieties and clubs are not allowed to seek achieving any purpose that is illegal or defies ethics or related to purposes stipulated in the statute”. NGO registration is mandatory (Articles 2 and 3) and an implausible prospect for SOGI-based groups.
NORTH KOREA	Civil society human rights activity of the type that would produce a SOGI-based NGO is not possible in North Korea, although there is no mention of ‘illegal societies’ in the Criminal Code of 1950, which was updated in 2009.
OMAN	2000 The provisions of Law No. 14 of 2000 support an already deeply oppressive environment for sexual and gender minorities. Quoted from the Survey of Arab NGO Laws : “The Ministry of Social Affairs and Labor in Oman has the right to prevent an association from registering if it finds that the services to be provided by the association are not needed...[or] reject an application for any other reasons... an association may not ... “hold public festivals or public lectures without obtaining a prior permission and may be dissolved if i[t is determined] that it has violated public ‘norms’.
QATAR	2004 Articles 1 and 35 of the Law No. 12 of 2004 on Private Associations and Foundations disallow associations from being “involved in political issues”, as human rights advocacy is often framed as. Also, Article 2 stipulates that 20 persons are required for a group to register. Further, no organisation is permitted to propagate illegal behaviour, a caution evident in this 2016 news article .
SAUDI ARABIA	2016 The terms of the Law on Associations and Foundations [linked is the 2008 draft in English], into force in January 2017, clearly forbid SOGI-based NGOs. In the Kingdom, the death penalty is employed for same-sex sexual activity, and no records of SOGI-based groups or organisations exist: in fact, the morality law enforcement agency is known to be particularly vicious regarding LGBT people.

<p>SYRIA</p>	<p>1958 Various articles of Law No. 19/1958 (amended 1969) allow the Ministry to appoint or remove board members, disallow political participation, foreign funding, and allow the registration to be rescinded at will. Further, Article 35 allows any Board decision to be suspended “if it deems it to be against the law, the public order or morals”. No SOGI-based group could hope to operate with these restrictions, despite the onset of war and the presence of Daesh and other militia that make Syria one of the most dangerous places on earth for sexual and gender minorities.</p>
<p>UAE</p>	<p>2008 Article 27 of Federal Law 2 of 2008 confers broad powers of supervision, including sending representatives to meetings. Registration compliance is demanding and requires a degree of corporate governance. Importantly, Articles 17 and 18 state that NGOs cannot engage in “conferences, forums, assemblies or meetings outside the State”, or invite foreigners in without receiving first permission from the Ministry of Social Affairs.</p>
<p>YEMEN</p>	<p>2001 Although Article 58 of the Constitution asserts the rights on citizens to form associations, the criminal law confers the death penalty for male and female “homosexuality” and life for sexual and gender minorities is extremely challenging. However, Article 2 of Law No. 1 of 2001 mandates that at least 20 people are required as a condition of registration. Ironically, according to ICNL this is one of the most enabling pieces of law on the Arabian peninsula.</p>

EUROPE (1)

Propositions for laws that would severely limit the ability of SOGI groups and organisation to register as NGOs were introduced in parliaments in **Belarus** (pending) and **Kazakhstan** in 2015, **Moldova** and **Kyrgyzstan** in 2016, and **Hungary** in 2017.

<p>RUSSIA</p>	<p>2012 The 2012 Foreign Agents Law imposes severe limits on foreign funding of activities while requiring organisational accountability to the State: Maximum in Murmansk was fined under the law in 2015. The Council of Europe Member States passed Resolution 1948 (2013) Tackling discrimination on the grounds of sexual orientation and gender identity clearly identifying the dangers of the State employing inherently discriminatory legal and policy instruments that target SOGI, citing recent examples in Russia.</p>
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CONSTITUTIONAL PROHIBITION OF DISCRIMINATION BASED ON SEXUAL ORIENTATION (9) [inc. Kosovo]

5% of UN States

Most Constitutions **contain** general equality and non-discrimination provisions that apply to “all” persons, but do not specify sexual orientation as a protected ground: see the World Policy Analysis Centre’s in-depth 193 Constitutions **mapping** project. Jurisprudence often reads in sexual orientation into those general equality provisions (e.g. *Egan v Canada*), thus triggering inclusion of the term in State practice and in law. In some cases, the background documents (*travaux préparatoires*) reveal the intended meaning or scope of a term: for example, it is understood that the ground of “sex” (“phet”) **denotes** gender, sexual identity, and gender and sexual diversity in the 2007 Constitution of **Thailand**. Further, although supreme sources of law for nearly all States (excepting the **UK, New Zealand** that have ‘unwritten Constitutions’ protective of sexual orientation, Israel that does not have a codified Constitution, and **Saudi Arabia** where the Qur’an is given that status, at Article 1), constitutional change occurs through very different means and traditions (as illustrated in **O’Mahony** on recent US/Ireland marriage reforms). In the following list, only those that spell out an unambiguous term in a provision of the Constitutional text are listed.

AFRICA (1)

<p>SOUTH AFRICA</p>	<p>1994 Prohibition of sexual orientation discrimination was first included at Section 8 of the Interim Constitution that came into force in April 1994, and was carried through Section 9(3) of the Constitution of South Africa, 1996.</p>
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AMERICAS (3)

The Constitution of **Argentina** does not contain an explicit prohibition of discrimination based on sexual orientation. However, such prohibition is contemplated in the Constitution of the **Autonomous City of Buenos Aires** (Art. 11, 1996). The Constitution of **Brazil** does not contain an explicit prohibition of **discrimination** based on sexual orientation. However, several jurisdictions within the country do. These include the Constitutions of the States of **Alagoas** (Art. 2.1; 2001), **Federal District** (Art. 2.5; 1993), **Mato Grosso** (Art. 10.3; 1989), **Pará** (Art. 3.4; 2007), **Santa Catarina** (Art. 4.4; 2002) and **Sergipe** (Art. 3.2; 1989). In **Canada**, protection against discrimination based on sexual orientation was **introduced** in paragraph 15(1) of the **Canadian Charter of Rights and Freedoms** by a 1995 decision issued by the Supreme Court of Canada in *Egan v. Canada*. See [commentary](#) [here](#)

BOLIVIA	2009 Article 14 of the Constitution of Bolivia prohibits discrimination based on sexual orientation (among other grounds).
ECUADOR	1998 Article 11(2) of the Constitution of Ecuador prohibits discrimination based on, <i>inter alia</i> , sexual orientation. Furthermore, the Constitution contains several other relevant provisions: Article 66(9) enshrines the right of every person to make free, informed, voluntary and responsible decisions with regard to their sexuality, life and sexual orientation. Article 66(11) protects the rights of every person to the confidentiality of information on their sexual life. Article 83(14) establishes as a “duty” and a “responsibility” of every Ecuadorian to respect and acknowledge diverse sexual orientations.
MEXICO	2011 Article 1 of the Political Constitution of the United Mexican States (federal constitution) prohibits discrimination based on “sexual preferences”. Several State Constitutions also prohibit such discrimination: Campeche (Art. 7, 2015); Chihuahua ; (Art. 4, 2013); Coahuila (Art. 7, 2013) (Art. 4, 2013); Colima (Art. 1; 2012); Durango (Art. 5, 2013); Guanajuato (Art. 1, 2015); Michoacán (Art. 1, 2012); Morelos (Art. 1bis, 2016); Nuevo Leon (Art. 1, 2016); Oaxaca (Art. 4, 2016); Puebla (Art. 11, 2011); Querétaro (Art. 2, 2016); Quintana Roo (Art. 13, 2010); San Luis Potosí (Art. 8, 2014); Sinaloa (Art. 4bis, 2013); Sonora (Art. 1, 2013); Tlaxcala (Art. 14, 2012); Veracruz (Art. 4, 2016); Yucatan (Art. 2, 2014) and Zacatecas (Art. 21, 2012).

ASIA (1)

NEPAL	2015 Section 18(3) of the Constitution of Nepal specifically explains that the State shall not discriminate against, <i>inter alia</i> , “sexual minorities”.
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EUROPE (4) [inc. Kosovo]

KOSOVO	2008 Article 24(2) of the Constitution of Kosovo determines that “[n]o one shall be discriminated against on grounds of...”, <i>inter alia</i> , of their “...sexual orientation”. Kosovo is not a UN Member State.
MALTA	2014 Article 32 of the Constitution of Malta entitles the individual fundamental rights and freedoms “whatever his... sexual orientation or gender identity”, and Article 45(3) specifies such protection from discrimination.
PORTUGAL	2005 Article 13(2) of the Constitution of Portugal concerning principles of equality, states that “[n]o one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of... sexual orientation”.
SWEDEN	2003 Article 2 of the Constitution of Sweden mandates all organs of the State to exercise and promote equality and non-discrimination in health, employment, housing and education, and to promote social care and social security on the basis, <i>inter alia</i> , of sexual orientation.

OCEANIA (1)

FIJI	1997/2013 Section 38(2) of the 1997 Constitution of Fiji prohibited discrimination based on a person’s “actual or supposed personal characteristics or circumstances” including sexual orientation (among other grounds). This Constitution was repealed in 2009. However, in 2013, the prohibition was kept under section 26(3)(a) of the 2013 Constitution of Fiji .
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PROHIBITION OF DISCRIMINATION IN EMPLOYMENT BASED ON SEXUAL ORIENTATION (72)

37% of UN States

A person's ability to earn a living, and the opportunity to flourish in one's work life without discrimination based on a personal characteristic (sexual orientation), has increasingly been recognised as a fundamental right in States across the globe. We note where significant parts of a country have provincial ordinances that offer similar or partial protections, but where the law is not in force at the national or federal level.

AFRICA (6)

Although sexual orientation may be **understood** to be included in general provision relating to employment equality, Angola's 2015 **employment law** does not actually specify sexual orientation, as we erroneously listed in 2016.

BOTSWANA	2010 Section 23(d) of the Employment (Amendment) Act added sexual orientation as a prohibited grounds for discrimination regarding contracts of employment.
CAPE VERDE	2008 Section 45(2) of the New Labour Code of Cabo Verde forbids an employer from requesting information about the employee's "sexual life". Section 406(3) imposes sanctions on employers who dismiss employees based on their sexual orientation.
MAURITIUS	2008 Sections 5, 7 and 8 of the expansive Equal Opportunities Act 2008 , establish general rules on discrimination based on the "status" of the aggrieved person. Section 2 includes "sexual orientation" in the definition of "status" and defines it as "homosexuality (including lesbianism), bisexuality or heterosexuality".
MOZAMBIQUE	2007 Sections 4(1) and 108(3) of the Labour Law No. 23/2007 (in English [unofficial translation]) prohibit discrimination based on sexual orientation. Section 5 establishes the employer's obligation to respect the employee's privacy, including their sexual life.
SEYCHELLES	2006 Sections 2, 46A(1) and 46B of the Employment Act 1995 (as amended by Act 4 of 2006) prohibit discrimination and harassment based on sexual orientation.
SOUTH AFRICA	1996 Section 187(f) of the Labour Relations Act of 1995 establishes sexual orientation as a ground for dismissal as "automatically unfair". Section 6(1) of the Employment Equity Act of 1998 establishes prohibits direct or indirect discrimination on the basis of sexual orientation. Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 includes sexual orientation as one of the prohibited grounds of discrimination and within the definition of harassment.

AMERICAS (17)

At the federal level in **Argentina** there is no general law prohibiting discrimination based on sexual orientation in Argentina. Article 34(o) of **Executive Order 214/2006** prohibits discrimination on the basis of "sexual orientation or preference" (applicable only to employees in the National Administration Service only). The **Autonomous City of Buenos Aires** (2015) and the **City of Rosario** (1996) have enacted broad antidiscrimination laws that prohibit discrimination based on sexual orientation, and therefore apply to employment. In the **United States of America**, at the federal level there is no general law prohibiting discrimination based on sexual orientation. **Executive Order 13,087 (May 28, 1998)** prohibits discrimination in employment by the federal government on the basis of sexual orientation. In March 2017, the US Court of Appeals for the 7th Circuit became the first federal appeals court to **determined** that the **Civil Rights Act of 1964** protects workers from discrimination based on sexual orientation. Several states have enacted laws that prohibit such discrimination with varying levels of protection (see full list **here** by MAP).

BOLIVIA	2010 Article 281 sexies of the Penal Code of Bolivia criminalises any act of discrimination based on, <i>inter alia</i> , sexual orientation. Additionally, Law 45 of 2010 (Law against Racism and All Forms of Discrimination) also prohibits discrimination based on sexual orientation, and provides for a variety of specific remedies (particularly Articles 5, 12, 13 and 14).
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BRAZIL	2000 - 2015 At the federal level in Brazil there is no general law explicitly prohibiting employment discrimination based on sexual orientation. However, around 70% of the population reside in jurisdictions where local laws provide such protection. Article 8 of the Executive Order (Portaria) No. 41/2007 issued by the Ministry of Labour and Employment prohibits employers to request documents or information related to the employee's sexuality. Several jurisdictions have enacted local laws which prohibit discrimination based on sexual orientation with varying levels of protections. The following explicitly include employment discrimination: Amazonas (Art. 4(8), 2006); Distrito Federal (Art. 2(7), 2000); Espírito Santo (Art. 2(6), 2014); Maranhão (Art. 2(6), 2006); Mato Grosso do Sul (Art. 2(9), 2005); Minas Gerais (Art. 2(6), 2002); Pará (Art. 2(10), 2011); Paraíba (Art. 2(10), 2003); Piauí (Art. 2(6), 2004); Rio de Janeiro (Arts. 2(5) and 2(6), 2015); Rio Grande do Norte (Art. 2(6), 2007); Rio Grande do Sul (Art. 2(6), 2002); Santa Catarina (Art. 2(6), 2003); São Paulo (Art. 2(6), 2001); as well as a number of cities such as Fortaleza (Ceará) and Recife (Pernambuco).
CANADA	1996 Article 7 of the Canadian Human Rights Act prohibits discrimination in employment based on prohibited grounds of discrimination. Article 3(1) includes sexual orientation among such grounds.
CHILE	2017 Article 1(1) of Law 20,940 (Modernization of Labour Relations) amends the Article 2 of the Labour Code to include "sexual orientation" among the prohibited grounds of discrimination.
COLOMBIA	2007 Decision T-152/07 of the Colombian Constitutional Court decided on a case of employment discrimination in which sexual orientation was considered a prohibited ground of discrimination. Article 134A of the Penal Code (introduced by Law 1,482 of 30 November 2011) criminalises acts of discrimination based on sexual orientation (among other grounds).
COSTA RICA	1998 Article 10 of Law No. 7,771 (General Law on HIV/AIDS) prohibits discrimination in employment and Article 48 incorporates "sexual option" as one of the prohibited grounds of discrimination. In 2015, Article 1 of the Executive Order No. 38,999 prohibits discrimination against the "sexually diverse population" (applicable in the Executive Branch only). Other articles of this norm provide for measures to combat this discrimination.
CUBA	2014 Article 2(b) of the Labour Code establishes the right of every person to have a job according to the needs of the economy and their personal choice without discrimination based on sexual orientation (among other grounds).
ECUADOR	2005 Article 79 of the Labour Code establishes the right to equal remuneration without discrimination based on sexual orientation (among other grounds). Article 195(3) (introduced by the Organic Law on Labour Justice and the Recognition of Domestic Work of 2015) provides for special compensation in cases of discriminatory dismissal based on, <i>inter alia</i> , sexual orientation.
EL SALVADOR	2010 Section 1 of Executive Order No. 56 prohibits discrimination based on sexual orientation (applicable to employees in the Executive Branch only).
HONDURAS	2013 Article 321 of the Penal Code (as amended by Decree No. 23-2013) criminalises acts of discrimination based on sexual orientation, among other grounds. This law prohibits discrimination in broad terms and therefore applies to employment.
MEXICO	2003 Article 9(4) of the Federal Law to Prevent and Eliminate Discrimination prohibits employment discrimination. Article 1(3) includes "sexual preferences" as one of the prohibited grounds of discrimination. Article 149ter(2) of the Federal Penal Code criminalises employment discrimination based on sexual orientation and aggravates penalties for employers.
NICARAGUA	2008 Article 315 of the Penal Code of Nicaragua (Title 10, Crimes against Labour Rights) criminalises employment discrimination based on "sexual option".
PERU	2002 Article 37(1) of the Constitutional Procedural Code establishes that the writ of <i>amparo</i> is the adequate remedy in cases of discrimination based on sexual orientation. In force in 2017, Article 323 of the Penal Code (as amended by Legislative Order No. 1323) criminalises acts of discrimination based on sexual orientation. This law prohibits discrimination in broad terms and therefore applies to employment. Penalties are aggravated if act is perpetrated by civil servants or using violence.
SAINT LUCIA	2006 Section 131(1)(a), Labour Code prohibits unfair dismissal based on an employee's sexual orientation.

SURINAME	2015 Article 500a of the Penal Code (as amended by S.B. 2015 no. 44) criminalises discrimination based on sexual orientation (among other grounds). This law prohibits discrimination in broad terms and therefore applies to employment.
URUGUAY	2004 Article 2 of Law No. 17,817 (Combat Racism, Xenophobia and Discrimination) includes “sexual orientation and identity” among prohibited grounds of discrimination. This law prohibits discrimination in broad terms and therefore applies to employment. Since 2013, Article 2(a) of Law 19,133 (Law on Youth Employment) also prohibits discrimination based on sexual orientation.
VENEZUELA	2012 Article 21 of the Organic Labour Law prohibits employment discrimination based on sexual orientation, among other grounds.

ASIA (4) [inc. Taiwan]

Last year we mistakenly included Indonesia within this category - see 2017 [report](#) on the economic effects of LGBT exclusion in Indonesia.

ISRAEL	1992 Section 2(a) of the Employment (Equal Opportunities) Law provides that “an employer shall not discriminate among his employees or among persons seeking employment on account of their [...] sexual tendencies”.
SOUTH KOREA	2001 Article 30(1) and (2) of the National Human Rights Commission Act specifies the ground of sexual orientation. It mandates the Commission to investigate any “[a]ny act of favorably treating, excluding, differentiating or unfavorably treating a particular person in employment (including recruitment, appointment, training, assignment of tasks, promotion, payment of wages and payment of commodities other than wages, financing, age limit, retirement, and dismissal, etc.)” that are protected under Articles 10-22 of the Constitution . A 2016 report on the Human Rights Situation of LGBTI in South Korea provides a comprehensive overview of range of administrative law and policy regarding SOGIESC currently in operation.
TAIWAN	2004 Articles 2 and 12-15 of Gender Equity Education Act that specify discrimination against teaching staff based on sexual orientation in educational settings is forbidden. Taiwan is not a UN Member State.
THAILAND	2007 The Ministry of Labour Regulation on Thai Labour Standards, Social Responsibility of Thai Businesses B.E. 2547 (2007) (discussed here) prohibits discrimination against workers on numerous grounds, including “nationality, ethnicity, religion, language, age, sex, marital status, personal sexual attitude...”.

EUROPE (40) [inc. Kosovo]

Council Directive 2000/78/EC of 27 November 2000 establishes a general framework for equal treatment in employment and occupation regarding direct or indirect discrimination based on sexual orientation: see [FRA 2015 report](#).

ALBANIA	2010 Sexual orientation and gender identity are protected grounds from discrimination by Section 16 of the Labour Code following a 2010 amendment. Further, the comprehensive 2010 Law on Protection from Discrimination provides employment protection at Articles 12-16.
ANDORRA	2003 Law 8/2003 primarily concerns employment contracts and is inclusive of sexual orientation.
AUSTRIA	2012 The Equal Treatment Act is a federal, comprehensive anti-discrimination measure that is inclusive of sexual orientation: Chapter 2 deals with employment.
BELGIUM	2003 The Federal Anti-Discrimination Law applies to employment, as specified at Article 5.
BOSNIA & HERZEGOVINA	2009 Law on Prohibition of Discrimination is inclusive of sexual orientation in terms of non-discrimination in employment (Articles 5 and 6). Also, the Law on Gender Equality specifies that “[d]iscrimination based on sex and sexual orientation is hereby prohibited” at Article 2.
BULGARIA	2004 Section 1 of the Protection Against Discrimination Act (Protection in Exercising the Right to Work – Articles 12-28) applies to sexual orientation.

CROATIA	2003 Article 2 of the Act on Amendments to Labour Act names sexual orientation as a protected ground, and Article 8 of the 2008 Anti-Discrimination Act concerns employment.
CYPRUS	2004 Section 6(1)(a) of the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law, 2004 specifies non-discrimination in employment based on sexual orientation (as set out in Section 3(1) (c). The Equal Treatment in Employment and Occupation Act 2004 also specifies sexual orientation.
CZECH REPUBLIC	1999 The Labour Code of 1999 (Section 316, updated 2006), the Employment Act of 2004, and the 2009 Anti-Discrimination Act (Section 1) all specify sexual orientation.
DENMARK	1996 The Act on Prohibition on Discrimination on the Labour Market prohibits both direct as well as indirect discrimination and is inclusive of sexual orientation in its scope (not applicable to the Faeroe Islands or Greenland).
ESTONIA	2008 Section 10 of the Employment Contracts Act and the Equal Treatment Act (Section 2) are inclusive of sexual orientation.
FINLAND	1995 Chapter 11, Section 11 (on discrimination in "... trade, profession or service...") of the Penal Code was revised to include "sexual preference". Section 2 of the 2004 Non-Discrimination Act sets out a range of employment contexts to which the Act applies: Section 6 confirms that "[n]obody may be discriminated against on the basis of ... sexual orientation...".
FRANCE	1985 Sexual orientation was first codified in 1985 (and in 2008, gender identity was included) as named grounds protected against discrimination in the Labour Code of 2008.
GEORGIA	2014 Article 1 of the 2014 Law of Georgia on the Elimination of All Forms of Discrimination explicitly prohibits every form of discrimination, including those based on "sexual orientation, gender identity and expression", which applies to employment.
GERMANY	2006 The General Law on Equal Treatment (Part 2, Ch. 1-4) has combined previous labour legislation, streamlining non-discrimination, <i>inter alia</i> , based on sexual orientation.
GREECE	2005 Articles 1, 4 and 8 of the Law no. 3304/2005 (Act Against Discrimination) sets out that its scope applies to "employment and occupation" regarding direct and indirect discrimination.
HUNGARY	2003 Article 8 of Act on Equal Treatment and Promotion of Equal Opportunities (Act CXXV of 2003) sets out sexual orientation and 'sexual identity' as grounds covered by the Act, and Article 21 – 23 set out employment criteria.
ICELAND	1996 Although the Labour Law covers sexual orientation, it is not explicitly enumerated in the 1996 document (we include it here because State and judicial practice is positive).
IRELAND	1999 The Employment Equality Act ensures non-discrimination in the workplace on the basis of sexual orientation.
ITALY	2003 The Legislative Decree of July 9, 2003, n. 216 addressed a number of gaps in pre-existing labour laws in Italy, and instituted sexual orientation as a protected ground within employment.
KOSOVO	2004 The Anti-Discrimination Law set out its scope in Article 4, which much reflects that of 2015 Law No. 05/L-021 on the Protection from Discrimination sets out non-discrimination conditions regarding employment (Article 2), regarding SOGI.
LATVIA	2006 The Labour Law (Darba Likums) was amended at Article 7 to include sexual orientation in line with the EU Employment Directive 2000/78/EC. The Law on Prohibition of Discrimination of Natural Persons Engaged in Economic Activity specifies sexual orientation as a protected ground in economic activities.
LITHUANIA	2005 Article 7 of the Law on Equal Treatment lists the non-discrimination duties of employers regarding <i>inter alia</i> , sexual orientation. Article 169 of the Criminal Code specifies that discrimination on grounds of, <i>inter alia</i> , sexual orientation can be prosecuted with three years imprisonment.

LUXEMBOURG	1997 Articles 455(5-7) and 456 of the Criminal Code envisage sexual orientation discrimination violations regarding employment and the rights of employees, as punishable by a fine or up to three years imprisonment.
MALTA	2004 Equal Treatment in Employment Regulations (Malta/LN 461/2004) sets out sexual orientation as a named ground of protection against discrimination in employment.
MOLDOVA	2012 Article 7 of the Law on Ensuring Equality (Law nr. 121) specifies that the law apply to sexual orientation in employment only. Moldova rejected (“noted”) calls to expand the non-provision to other areas at its 2nd UPR.
MONTENEGRO	2010 Article 16 of the Law on Prohibition of Discrimination specifies discrimination in employment, having set out that SOGI is included in the law at Article 2.
NETHERLANDS	1994 Section 5(1) of the General Equal Treatment Act deals with various employment relationships and provides a series of derogations to the terms of this law at Section 5(2).
NORWAY	1998 The Working Environment Act of 2005 consolidated various labour laws, and under Sections 13-1(7) and 13-4(3), SOGI is protected from direct and indirect discrimination.
POLAND	1999 Article 11 of the Labour Code prohibits direct or indirect discrimination on the basis of sexual orientation, puts a responsibility on employers to act against such discrimination (Article 94(2)(b)), and Article 18 specifies equal treatment. Also, the 2010 Act on equal treatment Journal of Laws of 2010, No. 254, item 1700 enumerates employment.
PORTUGAL	2009 Article 24 on the right to equal access to employment and work of the Labour Code , and Article 16 on privacy explicitly protect the status of sexual orientation and gender identity.
ROMANIA	2000 Articles 5-8 of the Anti-Discrimination Law stipulates the various conditions in which discrimination on the grounds of sexual orientation in employment is forbidden.
SERBIA	2010 The Law on the Prohibition of Discrimination is a comprehensive anti-discrimination act that applies to SOGI in the sphere of employment (Articles 16 and 51).
SLOVAKIA	2008 Section 2.1 of the Act on Equal Treatment in Certain Areas and Protection against Discrimination determines sexual orientation as within the scope of this law. Sections 7 and 13 concern employer’s duties.
SLOVENIA	1995 Article 2(1) of the 2016 Law on Protection against Discrimination (unofficial translation) includes protection from discrimination in “Employment conditions and working conditions, including termination of employment and wages”.
SPAIN	1996 Law 62/2003 is a comprehensive anti-discrimination measure that covers many aspects of employment (subsuming 1996 provisions). Article 314 of the Penal Code (download in English here) penalises “serious discrimination in public or private employment” with up to two years imprisonment.
SWEDEN	1999 Various employment Acts were combined into the 2008 Discrimination Act of which Chapter 2, Sections 1-4 directly address employment.
SWITZERLAND	2007 Since registered partnerships became a possibility, there are various employment protections based on sexual orientation in the amendments to the 1911 Code of Obligations . It is understood that sexual orientation has been read into numerous laws because of the protections afforded to that status in the country’s Constitution , where the words “way of life” at Article 8 have been interpreted to include SOGI.
UKRAINE	2015 Article 2(1) of the 1971 Labour Code was amended and came into force in November 2015 to include sexual orientation and gender identity.
UNITED KINGDOM	2003 To align with Directive 2000/78/EC, the UK’s Employment Equality (Sexual Orientation) (Amendment) Regulations was introduced to protect against discrimination in the sphere of employment (a similar provision was enacted in Northern Ireland). In 2010, this was superseded by the Equality Act , of which Chapter 1 deals with employment. Gibraltar passed the Equal Opportunities Act in 2006.

OCEANIA (5)

There is no general prohibition of employment discrimination based on sexual orientation in **Vanuatu**. However, Section 18(2)(f) of the **Teaching Service Act 2013** establishes the obligation of the Vanuatu Teaching Service Commission not to discriminate the recruitment, promotion, professional development, transfer and all other aspects of the management of its employees on the basis of “sexual preference” (among other grounds) [this provision has a very limited scope].

AUSTRALIA	1996 At the level of the Commonwealth of Australia, Section 3(m) of the Workplace Relations Act 1996 includes “sexual preference” among the grounds of discrimination that the law aims at preventing and eliminating. Furthermore, Section 659(f) prohibits termination of employment based on the employee’s sexual orientation. Since 2009, Section 351 of the Fair Work Act 2009 prohibits any discrimination against an employee based on sexual orientation. Several jurisdictions have enacted local laws in this regard: Australian Capital Territory (1992) , New South Wales (1983) , Northern Territory (1993) , Queensland (1992/2016) , South Australia (1984) , Tasmania (1999) , Victoria (1996/2010) , Western Australia (2002) .
FIJI	2007 Section 6(2) of the Employment Relations Promulgation 2007 (Promulgation No. 36 of 2007) prohibits discrimination based on sexual orientation (among other grounds) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship. Articles 10B(2) and 10C of the Public Service (Amendment) Decree 2011 (Decree No. 36 of 2011) prohibit discrimination based on sexual orientation (among other grounds) within public service.
KIRIBATI	2015 Article 107(2)(b) of the Employment and Industrial Relations Code 2015 prohibits discrimination against any employee or prospective employee in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment relationship based on sexual orientation.
NEW ZEALAND	1993 Section 21(1)(m) of the Human Rights Act 1993 includes sexual orientation among the prohibited grounds of discrimination. Article 22 prohibits discrimination in employment. Since 2000, Article 105(1)(m) of the Employment Relations Act 2000 also prohibits employment discrimination based on sexual orientation. In the Cook Islands (a Stated associated to New Zealand), Article 55(e) of the Employment Relations Act 2012 prohibits employment discrimination based on “sexual preference”.
SAMOA	2013 Section 20(2) of the Labour & Employment Relations Act 2013 prohibits discrimination against an employee or an applicant for employment in any employment policies, procedures or practices based on sexual orientation (among other grounds).

VARIOUS NON-DISCRIMINATION PROVISIONS SPECIFYING SEXUAL ORIENTATION (63)

33% of UN States

We are aware that there are many pieces of specific sectorial legislation (e.g. youth, blood ban, personal data, etc.) that mention sexual orientation that are not listed here. In States where there are few such provisions we list those specific laws. In States that have comprehensive non-discrimination laws, we recognise the scope of those provisions are applicable in various fields.

AFRICA (1)

MAURITIUS	2008 Sexual orientation (Section 2) is a status (Sections 5, 7 and 8) recognised in the Equal Opportunities Act . As specified in Section 3(2), the law applies “to employment, education, qualifications for a profession, trade or occupation, the provision of goods, services, facilities or accommodation, the disposal of property, companies, partnerships, “sociétés”, registered associations, sports, clubs and access to premises which the public may enter or use”. In the section “Personal and Professional Behaviour” of the 2015 Code of Ethics for Public Officers , non-discrimination on grounds of sexual orientation is listed.
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AMERICAS (19)

ARGENTINA	2009 Article 2(a) of Law 26,529 (Law on Rights of Patients in their Relation with Health Professionals and Health Institutions) prohibits discrimination based on sexual orientation in the assistance provided by health professionals. 2013 Article 8 of Law 26,862 (Law on Assisted Reproduction) prohibits discrimination on grounds of sexual orientation in the access to assisted reproduction techniques. 2015 Health Ministry Resolution 1,507/2015 lifted the ban on gay men to donate blood with nationwide effects.
BAHAMAS	2003 Section 1 of the Data Protection (Privacy of Personal Information) Act includes “sexual life” among the protected sensitive personal data.
BOLIVIA	2001 Article 7 of Law 2,298 (Law on Criminal Enforcement) prohibits discrimination based on sexual orientation in the enforcement of criminal penalties. 2006 Article 1 of Ministerial Resolution No. 0668/06 prohibits discrimination based on sexual orientation in access to health care.
BRAZIL	2001 Article 1 of Law 10,216 prohibits discrimination against mentally disabled people based on their sexual orientation (among other grounds). 2006 Article 2 of Law 11,340 (locally known as “ Maria da Penha ” law) establishes the right of every woman to a life free of violence, regardless of her sexual orientation. 2010 Article 4(2) of Executive Order No. 7,272 includes the development of actions which are respectful of sexual diversity as on the objectives of the National Plan on Nutritional and Food Security (locally referred to as “ PNSAN ”). 2011 Article 3(3)(1) of Law 12,414 includes “sexual orientation” among the sensitive data which commercial credit history databases are not allowed to register. 2013 Article 17(2) of Law 12,852 (Statute of Youth) protects youth (aged 18 to 29, as per Article 1 of the law) from discrimination based on sexual orientation (among other grounds). 2015 Article 18(4)(6) of Law 13,146 (Statute of People with Disabilities) establishes that public health services for people with disabilities must ensure due respect for the persons’ sexual orientation. 2016 Article 6(3) of Law 13,344 provides for the protection of victims of human trafficking, catering for their specific needs based on their sexual orientation (among other grounds). Several jurisdictions (states and cities) in Brazil have enacted laws prohibiting discrimination based on sexual orientation (see different sources: 1, 2, 3).
CANADA	1996 Sections 2 and 3(1) of the Canadian Human Rights Act (R.S.C., 1985, c. H-6) prohibits discrimination on the basis of “sexual orientation”. The Act was amended in 1996 to expressly include sexual orientation. 1999 Section 44(1)(b) of the Extradition Act (S.C. 1999, c. 18) establishes that the Minister of Justice shall refuse to make a surrender order if the Minister is satisfied that the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their sexual orientation. 2004 Section 2(e) of the Assisted Human Reproduction Act (S.C. 2004, c. 2) prohibits discrimination on the basis of sexual orientation against persons who seek to undergo assisted reproduction procedures. 2016 As of 15 August, 2016, MSM are eligible to donate blood if they have not had sexual contact with a man for at least one year.

COSTA RICA	<p>2001 Article 123<i>bis</i> of the Penal Code (as amended by Law 8,189) criminalises torture based on “sexual option”. 2007 Executive Order No. 33877-S repealed Executive Order N° 19933-S which prohibited gay and bisexual men from donating blood. 2015 Article 5 of Executive Order No. 38,999 stipulates that the relevant agencies of the Executive Branch must regulate same-sex <i>de facto</i> unions, ensuring they are afforded sick leaves to care for their partner or attend their funeral.</p>
CHILE	<p>2010 Article 3 of Law 20,418 establishes that every person has a right to the confidentiality of their “sexual choices” and “sexual conduct”. 2012 Article 2 of Law 20,609 (Law on Measures against Discrimination) includes “sexual orientation” in the definition of arbitrary discrimination. 2013 Health Ministry Technical General Rule No. 146, which regulates blood donation procedures, establishes that the selection of donors must be done without any discrimination based on sexual orientation. 2014 Article 1 of Law 18,838 (as amended by Law 20,750), which creates the National Television Council, defines “pluralism” as including respect towards diverse sexual orientations. 2016 Article 150A of the Penal Code criminalizes any act of torture based on the sexual orientation of the victim (among other grounds). 2016 Article 7(c) of Law 20,845 (Law on School Inclusion) includes sexual orientation among the prohibited grounds of discrimination in schools by referring to all groups under the scope of Law No. 20,609 (Law on Measures against Discrimination).</p>
COLOMBIA	<p>1993-2016 Much of the progress made in Colombia on rights for LGB people was achieved through decisions of the Constitutional Court. The Mayorality of the City of Bogotá has summarised most of the Court’s decisions in this chart (updated 2016). The city of Bogotá has implemented public policy regulations to further equality at the local level, amongst which is Agreement 371 of 2009.</p>
DOMINICAN REPUBLIC	<p>2000 Article 2 of Law 49/2000 (General Law on Youth), prohibits discrimination on the basis of sexual orientation. 2007 Article 11 of the Code of Criminal Procedure establishes that judges and prosecutors must take into account the particular circumstances of each person involved in each case but cannot base their decisions solely based on their sexual orientation (among other grounds). 2011 Article 2 of Law 135/2011, Law on HIV/AIDS, prohibits discrimination on the basis of sexual orientation.</p>
ECUADOR	<p>2003 Article 6 of Law 100 of 2003 (Code on Youth and Adolescence) prohibits discrimination based on sexual orientation (among other grounds). 2006 Article 27 of Law 67 of 2006 (Organic Law on Health) prohibits discrimination on sexual orientation with regard to the dissemination of information of sexual and reproductive health. 2013 Article 61 of Law 0 of 2013 (Organic Law on Communications) defines “discriminatory content” as including that which is discriminatory based on sexual orientation (among other grounds). 2014 Article 12(1) of the Penal Code prohibits any form of violence based on sexual orientation against persons deprived of their liberty. 2014 Article 151(3) of the Penal Code criminalizes any act of torture (defined in broad terms) perpetrated with the intention of modifying a persons’ sexual orientation (see also, section on “Ban on Conversion Therapy” below).</p>
EL SALVADOR	<p>2004 Articles 3(1) and 6 of the Executive Order No. 40, which regulates the Law on HIV, prohibits discrimination based on sexual orientation in public health issues. 2009 Agreement No. 202, issued by the Ministry of Health and Social Assistance, provides for measures to eradicate all forms of discrimination based on sexual orientation in public health services.</p>
GUATEMALA	<p>1996 Article 10 of the Code of Childhood and Youth prohibits discrimination of children based on their sexual orientation or that of their parents (among other grounds).</p>
MEXICO	<p>2003 Article 1(3) of the Federal Law to Prevent and Eliminate Discrimination includes “sexual preferences” as one of the prohibited grounds of discrimination. This makes all provisions of the law applicable to acts of discrimination based on this ground. In 2014 Article 9(28) was amended to prohibit any kind of violence based on ways of dressing, talking, and gesticulating, or publicly assuming one’s “sexual preferences”. 2012 NOM-253-SSA1-2012, issued by the Mexican Secretariat on Health, lifted the ban on gay and bisexual men to donate blood. 2013 Article 5 of the General Law on Victims provides for a differential and specialized approach to reparations afforded to victims of crimes which were based on sexual orientation (among other grounds).</p>
NICARAGUA	<p>2012 Article 3(l) of Law 820 (Law on HIV and AIDS) prohibits discrimination based on sexual orientation (among other grounds). 2014 Article 1 of Ministerial Resolution 671-2014 prohibits discrimination based on sexual orientation in access to health services.</p>

PANAMA	<p>2002 Article 1(5) of Law 6 of 2002 (Law on Habeas Data) includes “sexual orientation” among the confidential information granted special protection under Article 13 of the law. 2002 Article 3 of Law 16 of 2002 (Law on the Right to Admission to Public Venues) prohibits discrimination based on sexual orientation.</p>
PERU	<p>2015 Article 19 of Executive Order N° 027-2015-SA prohibits discrimination based on sexual orientation in access to health services and treatment. 2009-2016 Numerous jurisdictions (districts, provinces and regions) have enacted local antidiscrimination regulations (“ordenanzas”) which prohibit discrimination based on sexual orientation. These include: Amazonas (Art. 5, 2010); Ancón (Art. 2, 2013); Apurímac (Art. 5, 2008); Ayacucho (Annex, 2009); Castilla (Art. 2, 2012); Chaclayo (Art. 2, 2012); Chanchamayo (Art. 2, 2008); Cutervo (Art. 2, 2015); Huamanga (Art. 2, 2008); Huancavelica (Art. 5, 2009); Huancayo (Art. 2, 2008); Huánuco (Art. 1, 2016); Ica (Preamble, 2013); Jesús María (Art. 2, 2008); Jesús Nazareno (Art. 2, 2008); Junín (2009); La Libertad (Art. 2, 2014); Lamas (Art. 2, 2011); Loreto (Art. 1, 2010); Madre de Dios (Annex, 2009); Matahuasi (Art. 1, 2008); Miraflores (Art. 2, 2008); Moquegua (Art. 1, 2012); Morropón (Art. 2, 2014); Nueva Requena (Art. 2, 2015); Pachacámac (Art. 2, 2013); Picota (Art. 2, 2014); Piura (Art. 1, 2016); Pueblo Libre (Art. 2, 2012); San Martín (Art. 2, 2010); San Miguel (Art. 3, 2014); Santa Anita (Art. 2, 2015); Santa María del Mar (Art. 2, 2014); Santiago de Surco (Art. 2, 2014); Ucayali (Art. 1, 2010), among others.</p>
SURINAME	<p>2015 Article 500a of the Criminal Code (as amended by S.B. 2015 no. 44) criminalises discrimination based on sexual orientation. This law prohibits discrimination in broad terms and therefore applies to employment.</p>
UNITED STATES OF AMERICA	<p>2000 Executive Order 13,160 (June 23, 2000) prohibits discrimination on the basis of sexual orientation (among other grounds) in federally conducted education and training programs and activities. 2012 The Department of Housing and Urban Development’s issued an Equal Access Rule to ensure equal access to housing in programs offered by the Department regardless of sexual orientation. Several States have enacted legislation prohibiting discrimination based on sexual orientation in housing (see full list here by MAP). 2016 USAID Rule § 752.7038 on non-discrimination against end-users of supplies or services requires that USAID contractors not discriminate against any end-user of the contract supplies or services (i.e., the beneficiaries of the supplies or services) in implementation on the basis of sexual orientation (among other grounds).</p>
URUGUAY	<p>2006 Article of Law 18,026 (Cooperation with International Criminal Court) explicitly includes “sexual orientation” among the grounds listed in the definition of genocide. 2008 Article 2 of Law 18,335 (Law on Patients and Health Service Users) prohibits discrimination based on sexual orientation. 2009 Article 18 of Law 18,437 (General Law on Education) establishes that one of the guiding principles of public education is to promote the transformation of discriminatory stereotypes based on sexual orientation (among other grounds). 2015 Article 5(d) of Law 19,353 (Law on the National Care System) protects people who are dependent on assistance from discrimination based on sexual orientation (among other grounds).</p>
VENEZUELA	<p>2010 Article 4 of the Organic Law of the People’s Power states that “the Popular Power is designed to ensure the life and welfare of the people” ensuring equal conditions for everyone freely develop their personality without discrimination on grounds of sexual orientation (among other grounds). 2011 Article 5 of the Law for the Regulation and Control of Housing Leasing bans discrimination on the basis of sexual orientation (among others).</p>

ASIA (6)

At time of writing, consequential discussions on a comprehensive non-discrimination law inclusive of SOGIE have **reportedly** commenced in **Nepal**. It should also be noted that across the Asian continent there are numerous efforts and political conversations currently at play regarding non-discrimination and SOGIESC.

EAST TIMOR	<p>2009 Article 183 of the 2009 revisions to the 1975 Penal Code protects against the unjustified public disclosure of “the private or sexual life of another person” with penalisation of one year in prison or a fine.</p>
JAPAN	<p>2017 The national Basic Policy for the Prevention of Bullying (no link available at time of writing) mentions sexual orientation and builds on a number of local provisions that had an inclusive reach, see HRW.</p>
MONGOLIA	<p>2012 The Law on Prevention of Human Immunodeficiency Virus Infection and Acquired Immune Deficiency Syndrome means to define the powers of State bodies and local self-administrative organisations, responsibilities of the health organisations, medical doctors and health workers, rights and responsibilities of citizens, and persons living with HIV.</p>

PHILIPPINES	2012 In May 2012, the Department of Education issued DepEd Order No. 40 (the DepEd Child Protection Policy), to guarantee the protection of children in schools from any form of violence, abuse or exploitation regardless of SOGI, at Section 2(J). There have been a variety of proposals for a comprehensive non-discrimination law in recent years. In late-2016, a Bill was presented to parliament.
SOUTH KOREA	2001 Article 30 of the National Human Rights Commission Act specifies the ground of sexual orientation. It mandates the Commission to investigate any “discriminatory act of violating the right of equality” regarding “2. Any act of favorably treating, excluding, differentiating or unfavorably treating a particular person in the supply or use of goods, services, transportation, commercial facilities, land and residential facilities; and ...3. ... in the use of educational facilities or vocational training institutions” that are protected under Articles 10-22 of the Constitution . A 2016 report on the Human Rights Situation of LGBTI in South Korea provides a comprehensive overview of range of administrative law and policy regarding SOGIESC currently in operation. A list of non-discrimination laws inclusive of sexual orientation can be found here .
THAILAND	2012 Articles 51-56 2012 National Social Welfare Promotion Commission (NSWPC) Regulation that identifies “persons of diverse sexualities” among 13 target population groups deemed “facing difficulties” (i.e., disadvantaged or facing discrimination) and requiring special assistance to access social services, see ILO report .

EUROPE (33) [inc. Kosovo]

Comprehensive anti-discrimination is clearly called for across the 48 Council of Europe Member States in Section 9.1.3 of [Resolution 1948 \(2013\) Tackling discrimination on the grounds of sexual orientation and gender identity](#). States should “introduce, without delay, civil legislation protecting against discrimination on grounds of sexual orientation and gender identity in all areas of life, including employment, education, health, access to goods and services, housing, access to social security and social advantages”.

ALBANIA	2010 The comprehensive 2010 Law on Protection from Discrimination provides discrimination protections to sexual orientation regarding employment, education, goods and services, social protection schemes including housing.
AUSTRIA	2012 The Equal Treatment Act is a federal, comprehensive anti-discrimination measure that is inclusive of sexual orientation and covers education and social benefits.
BELGIUM	2003 The Federal Anti-Discrimination Law (revised 2007) applies to employment, social protection (social security and healthcare), education; and access to and the supply of goods and services, including housing at Article 5.
BOSNIA & HERZEGOVINA	2009 Article 2 of the Law on Prohibition of Discrimination is inclusive of sexual orientation in terms of non-discrimination in, <i>inter alia</i> , “employment, membership in professional organisations, education, training, housing, health, social protection, goods and services designated for public and public places together with performing economic activities and public services”.
BULGARIA	2004 The Protection Against Discrimination Act (PADA) transposes appropriate European Directives into law, and applies to sexual orientation in employment, social protection (social security and healthcare), education; and access to and the supply of goods and services, including housing.
CROATIA	2008 Article 8 of the Anti-Discrimination Act sets out the wide scope of this Act that apply to sexual orientation, including employment, social protection (social security and healthcare), education, and access to and the supply of goods and services, including housing.
CYPRUS	2004 Section 6 of the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law specifies sexual orientation discrimination various fields.
CZECH REPUBLIC	2009 Anti-Discrimination Act applies to employment rights, social protection (social security and healthcare), education, and access to and the supply of goods and services, including housing.
DENMARK	2009 The Board of Equal Treatment oversees discrimination issues upheld in a number of Danish laws. It appears to respond to claims relating to sexual orientation in employment and education only.

ESTONIA	2008 The Equal Treatment Act (Section 2) is inclusive of sexual orientation, but limited to employment and education.
FINLAND	2004 The scope of protections to which the Non-Discrimination Act can be applied is set out in Section 2: social welfare, health care services, social security benefits, military service, and housing. Education is not listed.
FRANCE	1985 Various sections of French law contains equal treatment legislation on the ground of sexual orientation and these are overseen by the <i>Haute autorité de lutte contre les discriminations et pour l'égalité</i> , or HALDE .
GEORGIA	2014 Article 1 of the 2014 Law of Georgia on the Elimination of All Forms of Discrimination explicitly prohibits every form of discrimination, including those based on "sexual orientation, gender identity and expression".
GERMANY	2006 Part 1, Sections 1 and 2 of the General Law on Equal Treatment set out the target and scope of this law within employment, social protection, including social security and healthcare, education, and access to and supply of goods and services, including housing.
GREECE	2015 Article 29 in the 2015 Government Gazette adds Article 361B to the Penal Code that includes the offence of withholding good and services on the basis of, <i>inter alia</i> , SOGI is to be punished with a fine or up to three to six months incarceration.
HUNGARY	2003 Article 8 of Act on Equal Treatment and Promotion of Equal Opportunities sets out sexual orientation and 'sexual identity' as grounds covered by the Act, and Articles 24–30 within the employment area and in relation to social protection, (including social security and healthcare), education and access to and supply of goods and services, including housing.
ICELAND	2004 Article 180 of the General Penal Code specifies SOGI as being protected from discrimination in the provision of goods and services generating a penal sentence of up to six months.
IRELAND	2000 The Equal Status Act 2000 refers to non-discrimination based on sexual orientation in housing, provision of goods and services and education (with provisos favoring religious educational establishments).
KOSOVO	2015 Law No. 05/L-021 on the Protection from Discrimination is ambitious in its scope (Article 2), covering 16 areas that apply to SOGI. Kosovo is not a UN Member State.
LITHUANIA	2005 The Law on Equal Treatment applies to sexual orientation in the named spheres of employment, health-care, education, and access to and supply of goods and services, including housing. Further, Article 169 of the Criminal Code specifies that discrimination on grounds of, <i>inter alia</i> , sexual orientation can be prosecuted with three years imprisonment.
LUXEMBOURG	1997 Article 455(1-4) of the Criminal Code (with amendments) defines the scope of non-discrimination in the supply of goods and services, as punishable by a fine.
MALTA	2017 Article 6(1) of the Equality Act clarifies that direct or indirect discrimination ("ordinary or intersectional"), on the basis of SOGIESC (Article 2) is unlawful in educational 'guidance', and access to goods and services (Article 5). In 2015, Malta adopted the progressive Gender Identity, Gender Expression and Sex Characteristics Act , the first of its kind in Europe.
MONTENEGRO	2010 Amongst a variety of sites of discrimination based, <i>inter alia</i> , on SOGI the Law on Prohibition of Discrimination Article 11 deals with 'service delivery, Article 12 with health conditions, and Article 15 with education.
NETHERLANDS	1994 Section 7(1)(c) of the General Equal Treatment Act defines the scope as applying to "housing, social services, health care, cultural affairs or education" and Section 5 deals with employment.
NORWAY	1994 Article 349(a) of the Penal Code states that a six month sentence may be given for discrimination n goods and services" because of his homosexual inclination, lifestyle or orientation". The 2013 Act (No. 58 of 2013) prohibiting discrimination based on sexual orientation, gender identity and gender expression specifically focuses on employment and education (Section 14).

POLAND	<p>2010 Article 1 of the "ACT of 3rd December, 2010 on the implementation of some regulations of European Union regarding equal treatment" <i>Journal of Laws of 2010, No. 254, item 1700</i> specifies sexual orientation is within the scope of the law protecting against discrimination in employment, social security, health care, education and higher education, services, including residential services (Article 4), and Article 2 specifies equal treatment. In 2016, it was reported that government moved against the Council mandated to uphold the Act.</p>
ROMANIA	<p>2000 Articles 10-16 of the <i>Anti-Discrimination Law</i> stipulates the various conditions in which discrimination on the grounds of sexual orientation in, <i>inter alia</i>, housing, education, provision of services and healthcare are forbidden.</p>
SERBIA	<p>2010 The <i>Law on the Prohibition of Discrimination</i> is a comprehensive anti-discrimination act that applies to SOGI in employment, education, social welfare and all other "public administration organs" (Article 2).</p>
SLOVAKIA	<p>2008 Section 2.1 of the Act on <i>Equal Treatment in Certain Areas and Protection against Discrimination</i> determines sexual orientation as within the scope of this law: and Article 5 lists housing, social security, education and goods and services.</p>
SLOVENIA	<p>2016 <i>Law on Protection against Discrimination</i> (unofficial translation) fully includes SOGIE within its mandate. It is applicable to housing, social benefit, social protection, education, employment, goods and services, and involvement in organisations. Further, Article 131 (Violation of Right to Equality) of the <i>Penal Code</i> provides a wide ranging non-discrimination provision on grounds of sexual orientation (breaches of which may carry up to three years imprisonment)</p>
SPAIN	<p>2003 <i>Law 62/2003</i> is a comprehensive anti-discrimination measure that covers many aspects of discrimination that applies to sexual orientation: employment, social protection, social security and healthcare, education, and access to and supply of goods and services, including housing.</p>
SWEDEN	<p>2008 Various laws were combined into the comprehensive 2008 <i>Discrimination Act</i> that at Chapter 2, Sections 5-19 directly address social protection, social security and healthcare, education; access to and supply of goods and services, including housing. Also <i>Chapter 16, Section 9</i> of the <i>Penal Code</i> penalises a "businessman" who discriminates in provision of services with a fine or up to one year in prison.</p>
UNITED KINGDOM	<p>2010 The <i>Equality Act</i> comprises Chapters on employment, education, social protection, housing, etc., compiling prior non-discrimination provisions laws into one legal instrument. Gibraltar passed the <i>Equal Opportunities Act</i> in 2006 that operates similarly.</p>

OCEANIA (4)

AUSTRALIA	<p>1996 Section 151(3)(b) of the <i>Workplace Relations Act 1996</i> establishes that the Employment Advocate must have particular regard to the need to prevent and eliminate discrimination based on sexual orientation (among other grounds). 2007 Section 55-5(2)(b) of the <i>Private Health Insurance Act 2007</i> prohibits private health insurers to discriminate against people who are or wish to be insured on the basis of sexual orientation. 2013 The <i>Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013</i> inserts new grounds into the <i>Sex Discrimination Act 1984</i>. 2014 Section 5J(3)(c)(vi) of the <i>Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014</i> establishes that the assessment of the well-founded fear in an asylum petition cannot consider the possibility of requiring the petitioner to alter or conceal their sexual orientation to avoid persecution.</p>
FIJI	<p>2000 Article 19(2)(a) of the <i>Fundamental Rights and Freedoms Decree 2000</i> prohibits discrimination based on sexual orientation (among other grounds). 2009 Section 19 of the <i>Human Rights Commission Decree 2009</i> prohibits discrimination based on sexual orientation and stipulates specific protections against discrimination on such ground in various aspects of employment [ss. 3(a), (b) and (f)], education [ss. 3(e) and (j)], trade and services [ss. 3(c), (d) and (g)], public accommodations [ss. 3(h)], and housing [ss. 3(i)]. 2010 Articles 6(a) and 6(b) of Schedule 2 of the <i>Media Industry Development Decree 2010</i> (Decree No. 29 Of 2010) establishes that media organisations shall avoid discriminatory or denigrating references, or in a prejudicial or pejorative context, to people's sexual orientation or preference (among other characteristics). 2011 Article 3(1)(a) of the <i>HIV/AIDS Decree 2011</i> (Decree No. 5 of 2011) prohibits discrimination based on "gender orientation or sexual orientation".</p>

<p>NEW ZEALAND</p>	<p>1993 The Human Rights Act (1993) provides for an over-arching ban on discrimination based on sexual orientation. 2008 Section 10(g) of the Cook Islands Disability Act 2008 (Act No. 10) prohibits discrimination against persons with disability based on sexual orientation. 2015 Section 6 of the Harmful Digital Communications Act 2015 establishes the guiding principle that digital communications should not denigrate an individual by reason of their sexual orientation (among other grounds).</p>
<p>TONGA</p>	<p>2010 Principle 5 of the Judicial Code of Conduct Rules 2010 prohibits judges to discriminate against any person based on “irrelevant grounds”. Principle 5(1) includes sexual orientation as one of those grounds.</p>

HATE CRIMES BASED ON SEXUAL ORIENTATION CONSIDERED AN AGGRAVATING CIRCUMSTANCE (43)

23% of UN States

The UN Human Rights Committee has **urged** States to specifically criminalise acts of violence that are based on sexual orientation or gender identity, for example, by enacting hate crimes legislation concerning sexual orientation and gender identity).

AMERICAS (13)

In **Mexico**, there are no federal provisions aggravating penalties for crimes motivated by the victim’s sexual orientation. Some jurisdictions have included such provisions in their local Penal Codes, such as **Coahuila** (Art. 103(A)(5), 2005), **Colima** [*homicide only*] (Art. 123bis, 2015); **Federal District** (Art. 138(8), 2009); **Michoacán** [*homicide only*] (Art. 121, 2014); **Puebla** (Art. 330bis, 2012); and **Querétaro** (Art. 131(4), 2015).

<p>ARGENTINA</p>	<p>2012 Article 80(4) of the Penal Code establishes aggravated penalties only for homicides and assaults motivated by “hate towards the sexual orientation of the victim” (among other grounds).</p>
<p>BOLIVIA</p>	<p>2010 Articles 40bis of the Penal Code aggravates the penalties of crimes motivated by any of the discriminatory grounds included in Article 281 <i>quinquies</i> and <i>sexies</i> (the latter includes sexual orientation).</p>
<p>BRAZIL</p>	<p>There are no federal provisions aggravating penalties for crimes motivated by the victim’s sexual orientation in Brazil, although around 78% of the population live in jurisdictions where local laws specify such protection. Some states have enacted local laws that impose penalties —such as fines and revocation of licences— to acts of violence and/or acts of discrimination based on sexual orientation. These include: Amazonas (2006); Bahía (1997), Distrito Federal (2000); Espírito Santo (2014); Maranhão (2006); Mato Grosso do Sul (2005); Minas Gerais (2002); Pará (2011); Paraíba (2003); Piauí (2004); Rio de Janeiro (2015); Rio Grande do Norte (2007); Rio Grande do Sul (2002); Santa Catarina (2003); São Paulo (2001); as well as cities such as Fortaleza (Ceará) and Recife (Pernambuco).</p>
<p>CANADA</p>	<p>1996 Article 718.2(a)(i) of the Canadian Criminal Code establishes that a sentence should be increased if there is evidence that the offence was motivated by bias, prejudice or hate based on sexual orientation (among other grounds).</p>
<p>CHILE</p>	<p>2012 Article 12(21) of the Penal Code (as amended by Article 17 of Law No. 20,609) includes “sexual orientation” among the aggravating circumstances that trigger harsher penalties.</p>

COLOMBIA	2000 Article 58(3) of the Penal Code determines that motivation based on the victim's sexual orientation constitutes an aggravating circumstance. Furthermore, Article 134A (introduced by Law 1,482 of 30 November 2011) criminalises acts of racism and discrimination, including those based on sexual orientation.
ECUADOR	2009 Article 177 of the Penal Code criminalises acts of hate, whether physical or psychological, based on sexual orientation. This provision also establishes aggravated penalties for physical harm and death caused by acts of hate based on sexual orientation (among other grounds).
EL SALVADOR	2015 Article 129(11) of the Penal Code (as amended by D.L. No. 106/2015) aggravates the crime of homicide when it is perpetrated based on the victim's sexual orientation.
HONDURAS	2013 Article 27(27) of the Penal Code (as amended by Decree No. 23-2013) establishes that motivation based on the victim's sexual orientation (among other grounds) operates as an aggravating circumstance.
NICARAGUA	2008 Article 36(5) of the Criminal Code of Nicaragua establishes aggravated penalties for crimes motivated by the victim's sexual orientation.
PERU	2017 Article 46(d) of the Penal Code (as amended by Legislative Order No. 1,323) aggravates penalties for crimes motivated by the victim's sexual orientation.
UNITED STATES OF AMERICA	2009 Section 249(a)(2) of the United States Code provides for enhanced penalties for crimes motivated by perceived or actual sexual orientation (also known as the <i>Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act</i>). Numerous States have enacted hate crimes laws that include sexual orientation (see full list here by MAP).
URUGUAY	2003 Article 149ter of the Penal Code (as amended by Law 17.677 of 2003) provides for enhanced penalties for crimes motivated by "sexual orientation" or "sexual identity".

ASIA (1)

EAST TIMOR	2009 Article 52.2(e) of the Penal Code 2009 lists hate crime motivated by, <i>inter alia</i> , sexual orientation as an aggravating factor.
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EUROPE (27) [inc. Kosovo]

Two parts of **Bosnia-Herzegovina**, representing around 35% of the population, have enacted hate crime legislation that is inclusive of sexual orientation: see **Criminal Code of Republika Srpska (2013) (excerpts)** and **Criminal Code of the Brcko District (2003, amended 2006) (excerpts)**. The Federation of Bosnia and Herzegovina has no such legislation.

ALBANIA	2013 Albania's parliament amended Section 50(j) of its Criminal Code to strictly punish a crime "when the offense is committed due to reasons related to "... gender identity, sexual orientation...".
ANDORRA	2005 Article 30 of the Criminal Code considers sexual orientation an 'aggravating circumstance' for crimes motivated by hate or bias.
BELGIUM	2003 Section 285 of the Penal Code , specifies the aggravating circumstances of crimes that include a 'discriminatory motive'.
CROATIA	2006 Article 151a of the 1977 Penal Code (amended 2006) specifies a criminal offence (act motivated by hatred) based on, <i>inter alia</i> , "sexual preference".
DENMARK	2004 The Criminal Code was revised to include sexual orientation regarding hate crimes: at Section 266(b)(1) - hateful speech and Section 81(6) - hate motive as an aggravating circumstance.
FINLAND	2011 Legislative changes to Chapter 6, Section 5(1)(4) of the Criminal Code extended the possibility to use aggravating circumstances in sentencing hate crime motivated by, <i>inter alia</i> , sexual orientation.

FRANCE	2003 Article 222-12 of the Criminal Code criminalises violence specifically on the grounds of sexual orientation. Article 132-77 makes discrimination on the grounds of sexual orientation an aggravating factor. (The law applies to overseas departments and territories: French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Réunion, St Barthélemy, St Martin, St Pierre & Miquelon and Wallis & Futuna.)
GEORGIA	2012 Article 53(3) of the Penal Code applies that the law to SOGI, and hate crimes are referenced in the provisions of Articles 117-126 regarding various forms of violence.
GREECE	2013 Article 79 of the Penal Code includes “sexual orientation” within its scope as an aggravating circumstance of an “act of hatred”, penalised with up to three years imprisonment.
HUNGARY	2013 The Criminal Code of Hungary was amended to include Section 216: Violence Against a Member of the Community, which explicitly lists SOGI.
KOSOVO	2012 Article 74 (2.12) and Article 333(4) of the Criminal Code of Kosovo penalises crimes motivated by animus towards, <i>inter alia</i> , sexual orientation, with up to one year in prison.
LITHUANIA	2009 Article 60(12) of the Criminal Code lists sexual orientation under ‘aggravating circumstances’, under murder (Article 129), severe and not severe health impairments (Article 138, 138), with various sentences.
LUXEMBOURG	1997 (with 2007 amendments) Article 457(1)(1) of the Criminal Code may penalise acts of hatred or violence motivated by, <i>inter alia</i> , sexual orientation with five to ten year’s imprisonment.
MALTA	2012 Articles 83B, 222A, 215D and 325A(1) of the Criminal Code of Malta (amended by ACT No. VIII of 2012) set out the circumstances and penalties for hate crimes based on, <i>inter alia</i> , sexual orientation.
MONACO	2005 Article 16 of the Law on Public Freedom of Expression stipulates up to five years imprisonment or a significant fine for those who cause violence to be perpetuated because of actual or perceived sexual orientation.
MONTENEGRO	2013 Amendments to the Criminal Code in 2013 introduced the named categories of sexual orientation and gender identity as aggravating circumstances at Article 42a.
NETHERLANDS	2008 Article 137(c, d and e) of the Dutch Penal Code that penalises incitement based on “homosexual orientation” was amended to include sexual orientation as an aggravating factor.
NORWAY	1994 Article 117(a) Penal Code specifies hatred and violence motivated by sexual orientation.
PORTUGAL	2007 The Penal Code considers sexual orientation an aggravating factor at Article 132 (homicide) and Articles 143, 144 and 145(1)(a), concerning assault. Sentences range from a fine up to ten years imprisonment.
ROMANIA	2006 Article 77 of the Penal Code recognises a homophobic motive as an aggravating factor in the commission of a criminal offence of violence or hatred.
SAN MARINO	2008 Law no. 66 amends Article 179 the Penal Code of San Marino to include sexual orientation as an aggravating factor regarding hate crimes (Article 179 <i>bis</i>).
SERBIA	2012 Article 54a of the Criminal Code stipulates that sexual orientation and gender identity, <i>inter alia</i> , are aggravating circumstances for hate crime, and punishable with imprisonment (Article 45).
SLOVAKIA	2013 Article 140(f) of the 2006 Criminal Code was updated in 2013 to include sexual orientation as an aggravating factor.
SPAIN	2003 Articles 510 and 511 of the Penal Code (download in English here) penalises “[t]hose who provoke discrimination, hate or violence” on the grounds of “sexual preference” with up to two years imprisonment.
SWEDEN	2003 Due to the Constitutional protections afforded to sexual orientation in 2003, the text of the Penal Code is taken to automatically read in sexual orientation. Chapter 29, Section 2 contains provisions regarding aggravated penalties regarding crime motivated by hate or bias.

SWITZERLAND	2017 Article 261bis of the Criminal Code is to be read to include 'sexual identity' following a decision by the Legal Affairs Committee .
UNITED KINGDOM	2004 In England and Wales, Section 146 of the Criminal Justice Act 2003 empowers courts to impose enhanced sentences for offences motivated or aggravated by the victim's sexual orientation. Section 2 of the Scottish Offences (Aggravation by Prejudice) (Scotland) Act 2009 (into force 2010) pertains to SOGI and "intersexuality" (8(a)) on a similar basis.

OCEANIA (2)

There is no federal law in **Australia** establishing that motivation based on sexual orientation is an aggravating circumstance. **New South Wales** (Art. 21A(2)(h), 2002) appears to be the sole state with such provisions in force.

NEW ZEALAND	2002 Article 9 of the Sentencing Act 2002 determines that it is an aggravating factor that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as sexual orientation (among other grounds).
SAMOA	2016 Section 7(1)(h) of the Sentencing Act 2016 aggravates penalties for crimes committed partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as sexual orientation (among other grounds).

INCITEMENT TO HATRED BASED ON SEXUAL ORIENTATION PROHIBITED (39)

21% of UN States

AFRICA (1)

SOUTH AFRICA	2000 The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 , prohibits unfair discrimination, hate speech and harassment and requires the State to promote the constitutional imperatives enshrined in section 9 of the Constitution . In September 2016, on the basis of protecting individuals from hate speech, the Minister for Home Affairs forbid entry to South Africa of an American evangelical preacher who makes virulently anti-LGBT sermons.
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AMERICAS (9)

Although there is no provision in the Penal Code of **Brazil** criminalizing incitement to hatred based on sexual orientation, several jurisdictions have enacted local provisions that expressly prohibit such conduct. These include: **Amazonas** (Art. 4(7) 2006); **Mato Grosso do Sul** (Art. 2(8), 2005); **Pará** (Arts. 2(8) and 2(9), 2011); **Paraíba** (Art. 2(9), 2003); **Rio de Janeiro** (Arts. 2(9), 2015); and the city of **Recife** (Pernambuco).

BOLIVIA	2010 Article 281 <i>septies</i> of the Penal Code of Bolivia criminalises any act of dissemination or incitement to hatred based on sexual orientation (among other grounds). Sexual orientation is included by reference to Article 281 <i>quinquies</i> .
CANADA	1996 Section 318(4) of the Penal Code includes "sexual orientation" within the definition of "identifiable group" against which genocide may be perpetrated. Section 319(7) applies the same definition of "identifiable group" with regard to the crime of public incitement of hatred. Under Section 320 publications deemed to be hate propaganda can be confiscated.
COLOMBIA	2011 Article 134B of the Penal Code (as amended by Law 1,482 of 30 November 2011) criminalises any incitement to acts of harassment aimed at causing harm based on a person's (or a group of persons') sexual orientation.
ECUADOR	2009 Article 176 of the Penal Code criminalises the incitement to discrimination based on sexual orientation.

HONDURAS	2013 Article 321-A of the Penal Code (as amended by Decree No. 23-2013) criminalises incitement to hatred or discrimination based on sexual orientation.
MEXICO	2014 In 2014 Article 9(27) of the Federal Law to Prevent and Eliminate Discrimination was amended to outlaw incitement to hatred and violence. Article 1(3) of this law includes “sexual preferences” as one of the prohibited grounds.
PERU	2017 Article 323 of the Penal Code (as amended by Legislative Order No. 1323), entitled “discrimination and incitement to discrimination,” criminalises acts of discrimination based on sexual orientation carried out “by means of third persons”.
SURINAME	2015 Articles 175a and 176 of the Criminal Code (as amended by S.B. 2015 no. 44) criminalise incitement to hatred based on sexual orientation (by reference to Article 175 which includes the list of prohibited grounds).
URUGUAY	2003 Article 149bis of the Penal Code (as amended by Law 17.677 of 2003) criminalises the incitement to hatred or any form of violence against a person or group of persons based on their sexual orientation or “sexual identity”. Since 2015, Article 28 of Law 19,307 (Law on Audio Visual Communication Services) prohibits the dissemination of contents which promote or incite to violence based on sexual orientation (among other grounds).

EUROPE (29)

ALBANIA	2013 Section 19(a) of the Criminal Code penalises those who provide or distribute “deliberate materials” targeting “... gender identity, sexual orientation...” with a fine or imprisonment up to two years”.
AUSTRIA	2011 Section 283(1-4) of Criminal Code of Austria (1974, amended 2011); lists sexual orientation as a protected ground against incitement to hatred.
BELGIUM	2007 Articles 22(1-4) of the Anti-Discrimination Law specify various forms of incitement and penalties, reflecting those of Article 137 the Belgian Penal Code .
BOSNIA & HERZEGOVINA	2013 The 2003 Criminal Code (amended 2013) includes both sexual orientation and gender identity as protected grounds regarding incitement to hatred. Article 30 (Incitement) read against Article 145 (Crimes against the citizen – right to equality), penalises offences with up to five years imprisonment.
BULGARIA	2004 The Protection Against Discrimination Act “harassment” (which includes hate speech and incitement) applies to sexual orientation, at Articles 1(1) and 5.
CROATIA	2006 Article 151a of the 1977 Penal Code (amended 2006) specifies incitement to hatred based on, <i>inter alia</i> , “sexual preference”.
CYPRUS	2011 Incitement to hatred based on sexual orientation was added to existing law through the Combating of Certain Forms and Expression of Racism and Xenophobia by means of Criminal Law in 2011.
DENMARK	1987 The Criminal Code at Section 266(b)(1) includes “sexual inclination” in the statuses which a person who “makes a statement or imparts” threats may get up to two year’s imprisonment. The law is applicable to Faeroe Islands (2007) and to Greenland (2010).
ESTONIA	2006 Section 151(1) of the Penal Code specifies sanctions for incitement to hatred on the basis of sexual orientation.
FINLAND	2011 Chapter 24, Sections 8 -11 of the Criminal Code specifies various conditions of hate speech, see 2014 report (at 20) for in-depth discussion.
FRANCE	2005 Article 222-18-1 of the Criminal Code allows specific incrimination for a threat based upon the “victim’s true or supposed sexual orientation”, with a penalty of up to seven years imprisonment. The law applies to the overseas departments and territories: French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Réunion, St Barthélemy, St Martin, St Pierre & Miquelon and Wallis & Futuna.

GREECE	2013 Article 79 of the Penal Code includes incitement to hatred regarding sexual orientation. The prior law (2008/913 / JHA) was modified in 2013 to include homophobic hate.
HUNGARY	2013 The Criminal Code of Hungary was amended to include Section 332 Incitement Against a Community (up to three years in prison), which lists sexual orientation.
ICELAND	2004 Article 233a of the General Penal Code (1940, amended 2003) (excerpts) General Penal Code specified “sexual inclination” as being protected from “[a]nyone who publicly mocks, defames, denigrates or threatens”, generating a penal sentence of up tot two years. The Code was amended in 2014 to include both sexual orientation and gender identity.
IRELAND	1989 The Prohibition of Incitement to Hatred Act 1989 penalises incitement to hatred, violence or discrimination on the ground, <i>inter alia</i> , of sexual orientation, with six months to two years imprisonment.
LITHUANIA	2005 Article 170 of the Criminal Code , Incitement to Violence, specifies if a person incites a group or a person to violence on the basis, <i>inter alia</i> , of sexual orientation they maybe liable to three years imprisonment.
LUXEMBOURG	1997 (with amendments) Article 457(1)(1) of the Criminal Code outlaws incitement to hatred or violence based on, <i>inter alia</i> , sexual orientation.
MALTA	2012 Articles 82A and 82C of the Criminal Code of Malta (amended by ACT No. VIII of 2012) set out the circumstances and penalties for incitement to hatred based on, <i>inter alia</i> , sexual orientation.
MONACO	2005 See: Articles 24, 25, and 44 of the Law on Public Freedom of Expression (amended 2014) protect against defamation and ‘insult’ regarding sexual orientation.
MONTENEGRO	2013 Amendments to the Criminal Code in 2013 introduced the named categories of sexual orientation and gender identity as protected against incitement to hatred at Article 443.
NETHERLANDS	1994 Article 137(c, d and e) of the Dutch Penal Code penalises incitement based on “homosexual orientation”.
NORWAY	1981 Article 135(a) Penal Code specifies “[a] discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her... c) homosexuality, lifestyle or orientation”.
PORTUGAL	2007 Article 240(1) and (2) of the Portuguese Penal Code address homophobic incitation to hatred with prison terms of up to eight years.
SAN MARINO	2008 Law no. 66 amends Article 179 the Penal Code of San Marino to include sexual orientation within protections from incitement to hatred and violence (Article 179 bis).
SERBIA	2010 The Law on the Prohibition of Discrimination is a comprehensive anti-discrimination act that applies to SOGI in regarding incitement to hatred and humiliating treatment (Articles 11 and 12).
SLOVENIA	2008 Article 297(1) of the 2008 Penal Code enumerates sexual orientation within its protection, penalising infringements with three to five year’s imprisonment. Article 10(1) of the 2016 Law on Protection against Discrimination (unofficial translation) enumerates incitement to hatred.
SPAIN	2003 Articles 510, 511 and 515 of the Penal Code (download in English here) penalises “[t]hose who provoke discrimination, hate or violence” on the grounds of “sexual preference” with up to two years imprisonment. Article 22 establishes sexual orientation as grounds for aggravated circumstance.
SWEDEN	2003 Due to the Constitutional protections afforded to sexual orientation in 2003, the text of the Penal Code is taken to automatically read in sexual orientation. Chapter 16, Section 8 states that those who “disseminate statement or communication, threatens or expresses contempt” may be subject to a fine or up to two years in jail.

UNITED KINGDOM

2010 Section 74 and Schedule 16 of the *Criminal Justice and Immigration Act 2008* (into force 2010) protects from hatred being incited on the ground of sexual orientation, as explained [here](#). Section 2 of the *Scottish Offences (Aggravation by Prejudice) (Scotland) Act 2009* (into force 2010) pertains to SOGI and “intersexuality” (8(a)) on a similar basis. In 2004, Section 8 of the *Public Order (Northern Ireland) Order 1987* was amended to comprehensively deal with incitement to hatred based on sexual orientation (Sections 9 -13).

OCEANIA (0)

There is no federal provision prohibiting incitement to hatred based on sexual orientation in **Australia**, and less than half (41%) the population live in areas where provincial laws specify such protection. However, Article 123(3)(e) of the *Broadcasting Services Act 1992* stipulates that Codes of Practice should take into account “the portrayal in programs of matter that is likely to incite or perpetuate hatred against, or vilifies, any person or group” on the basis of sexual orientation (among other grounds). Furthermore, several states have enacted laws which prohibit incitement based on sexual orientation: *Australian Capital Territory* (Art. 67A(1)(f), 2004); *New South Wales* (Sec 49ZT(1), 1993); *Queensland* (Sec. 124A(1), 2003); *Tasmania* (Sec. 19(c), 1999).

BAN ON 'CONVERSION THERAPIES' (3)

1,5% of UN States

The importance of ensuring protection of vulnerable individuals from the unregulated and often torturous processes entailed in 'techniques' of so-called 'conversion therapy' cannot be understated. However, discourse on the use of such practices is frequently **normalised** in States, with little informed dissent.

AMERICAS (2)

In **Argentina**, Section 3(c) of **Law 26,657**, Law on Mental Health, of 2010 establishes that a person cannot be diagnosed on their mental health exclusively on the basis of their "sexual choice or identity". This law does not ban conversion therapies explicitly. However, prohibiting a diagnosis based exclusively on a person's sexual orientation prevents health professionals, in general, and psychiatrists, in particular, from legally engaging in sexual orientation change efforts (SOCE). In **Canada** there is no federal ban on conversion therapies, although around 42% of the population live under local laws that contain such prohibition. However, **Manitoba** (2015) and **Ontario** (2015) have taken steps to prohibit them at the provincial level. In the **United States of America**, there is no federal law banning conversion therapies, and it appears that only just over 20% of the population live in areas where such practices are outlawed. However, several States have enacted local bans which prevent licensed professionals from legally providing these "therapies" to minors: **California** (2012); **District of Columbia** (2014); **Illinois** (2015); **New Jersey** (2013); **New Mexico** (2017); **Oregon** (2015) and **Vermont** (2016). For a detailed explanation and a full list of jurisdictions with bans in force and proposed bills, see [The Growing Regulation of Conversion Therapy](#).

BRAZIL	1999 Resolution 1/99 , issued by the Federal Council of Psychology , prohibits pathologisation of homoerotic behaviours and practices and orders all licenced psychologists to refrain from coercive or unsolicited treatment to homosexuals. It also prohibits their participation in events or services offering a "gay cure". In 2013, the Commission for Human Rights of Brazil's lower house of Congress approved a bill that would repeal Resolution 1/99. The proposal was later abandoned.
ECUADOR	2012 Section 20(a) of the Ministerial Order No. 767 prohibits conversion therapies in rehabilitation institutions. 2014 Article 151(3) of the Penal Code criminalizes any act of torture (defined in broad terms) perpetrated with the intention of modifying a persons' sexual orientation.

ASIA (0)

Even though so-called 'conversion therapy' is not expressly banned by law, a few countries in the region have seen some progress in this regard. In December 2014 in **China**, the court **determined** that the conversion therapy to which a 30-year-old man had been subjected was illegal, and demanded that the clinic give 3,500 yuan (£359) in compensation and post an apology to its website. In late-2016 the Ministry of Health and Welfare in **Taiwan** published a draft regulation listing 'conversion therapy' as a prohibited treatment. According to **Central News Agency** the ministry could issue regulations based on the draft in early-2017, after holding a 60-day public consultation. In 2014, the Ministry of Health in **Israel** issued a **statement** against sexual reorientation therapy. However, it should be noted that negative developments are occurring in this area also, for example the Psychiatrists Association in **Indonesia** **appears** to be moving towards the promotion of such pseudo-scientific treatments.

EUROPE (1)

MALTA	2016 The Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act (<i>an act to prohibit conversion therapy, as a deceptive and harmful act or practice against a person's sexual orientation, gender identity and, or gender expression, and to affirm such characteristics</i>) prohibits the performance of conversion therapy both by professionals (Section 3(b)) and by non-professionals (Section 3(a)). See press release issued by the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties.
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OCEANIA (0)

As in the case of Argentina, there are laws that do not ban 'conversion therapies' explicitly in this region. However, prohibiting a diagnosis based exclusively on a person's sexual orientation prevents health professionals, in general, and psychiatrists in particular, from legally engaging in sexual orientation change efforts (SOCE). In **Fiji**, Section 3(1)(d) of the **Mental Health Decree 2010** (Decree No. 54 of 2010) establishes that a person is not to be considered mentally ill because they express or refuse or fail to express a particular sexual preference or sexual orientation. In **Samoa**, Section 2 of the **Mental Health Act 2007** establishes that a person is not to be considered mentally ill because they express or refuse or fail to express a particular sexual preference or sexual orientation. Last, but not least, in February 2017, the state of Victoria in **Australia** enacted the **Health Complaints Act** that, according to a [press release](#) published by the Health Ministry, creates a new watchdog for cracking down on providers of "gay conversion therapy".

MARRIAGE FOR SAME-SEX COUPLES (22)

12% of UN States

AFRICA (1)

SOUTH AFRICA	2006 Despite the title of the law, the Civil Union Act, 2006 confers the right to marriage to persons of the same-sex.
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AMERICAS (7)

ARGENTINA	2010 Law 26,618 (Law on Marriage Equality) is the federal law that provides for same-sex marriage nationwide.
BRAZIL	2013 Resolution No. 175 of 14 May 2013 , issued by the National Council of Justice states that notaries from all over the country can no longer refuse to register same-sex marriage. Previously in May 2011, the Supreme Federal Court of Brazil had issued a decision indicating that same-sex 'stable unions' should be converted to marriage and recommended the Congress to do so (no legislative action has been taken so far). Another decision (Ação Direta de Inconstitucionalidade 4.277 Distrito Federal) recognised same-sex couples living in 'stable unions' as "family units" and therefore entitled to the same rights of heterosexual couples living in the same kind of unions.
CANADA	2005 The Civil Marriage Act 2005 is the federal law by which same-sex marriage was recognised nation-wide. Starting with Ontario in 2003, most jurisdictions (provinces and territories) allowed for same-sex marriage before the federal law was enacted. The provinces of Alberta and Prince Edward Island, and the territories of Nunavut and the Northwest Territories were the only jurisdictions without such laws before 2005.
COLOMBIA	2016 After several years of legal uncertainty, on 7 April 2016, Colombia's Constitutional Court issued Decision SU214/16 , establishing that notaries could no longer refuse to register same-sex marriages. In 2011, the Court had issued Decision C-577/11 recognising same-sex couples as "family entities" and ordered the Congress to legislate on the matter. To date, no law has been adopted by that legislative body.
MEXICO	There is no federal law on same-sex marriage in Mexico. The current state of the law in Mexico regarding same-sex marriage is complex. Some jurisdictions have enacted local laws providing for this right, including Campeche (2016); Coahuila (2014), Colima (2016), Mexico City (2009); Michoacán (2016); Morelos (2016) [constitutional amendment]; and Nayarit (2015). In Quintana Roo (2011) same-sex marriages were allowed by local authorities through a progressive construction of local regulations. In several other States, judicial decisions have ordered the celebration of same-sex marriages. However, the lack of <i>erga omnes</i> effect of these decisions (they do not repeal legislation) means that same-sex marriages have been celebrated on a case-by-case basis in States where legislation still does not provide for such unions. Furthermore, in June 2015, the Supreme Court of Mexico declared that it was against the Constitution for any state to deny recognition to marriages between persons of the same sex validly celebrated in another state.
UNITED STATES OF AMERICA	2015 The Supreme Court of the United States rules that same-sex couples had a constitutional right to marry in <i>Obergefell v. Hodges</i> , making same-sex marriage available in all 50 states. Prior to this decision, only 13 of the 50 states still outlawed same-sex marriage. Same-sex marriage is also legal in US territories: Guam (2015), Puerto Rico (2015), Northern Mariana Islands (2015), US Virgin Islands (2015), except for American Samoa.
URUGUAY	2013 Law 19,075 (Law on Marriage Equality) redefined marriage as the union of two persons "of different or same-sex".

EUROPE (13)

BELGIUM	2003 Article 143 of the Belgian Civil Code was, by act of Parliament, amended to read; "Marriage is contracted by two persons of different-sex or of the same-sex" in 2003.
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DENMARK	2012 Section 2 of Law No.532 of 6 June 2012 incorporates marriage between “two persons of different sexes and between two people of the same sex” into existing marriage laws. As a part of the Danish Realm and a sub-autonomous entity, same-sex marriage came into force in Greenland in early April 2016. At the end of the same month, the Faroe Islands became the last Nordic region to legalise same-sex marriage, coming into force in December 2016.
FINLAND	2017 In February 2015, the Finnish government signed a gender-neutral marriage law that amends the text of the law through Act 156/2015 to the marriage of “two persons” and which came into force on 1 March 2017.
FRANCE	2013 Article 1 of LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe , in force 17 May 2013, establishes marriage as available to persons of the same, or different, sex. The discussion on the Law Providing for Same-Sex Marriage of the Constitutional Committee describes the process of developing the changes to the Civil Code . The law also applies to the overseas regions of Guadeloupe and Martinique .
ICELAND	2010 In 2010, the parliament passed Bill 138 on changes to the Marriage Act , of which Article 3.1 establishes the right to marry regardless of gender, thereby repealing the 1996 registered partnership law.
IRELAND	2015 In October 2015, the Marriage Act 2015 was signed into law specifying its application to same-sex couples. The law replaced the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 . Interestingly, the 2015 law was enacted six months after the success of a legally binding Constitutional referendum to alter Article 41(4) to reframe marriage as gender –neutral.
LUXEMBOURG	2015 Article 143 of the Civil Code was amended in 2014 (in force 1 January 2015) to simply say that two people of the same-sex can marry.
NETHERLANDS	2001 Article 30 of the Act on the Opening up of Marriage states “[a] marriage can be contracted by two persons of different-sex or of the same-sex”, thereby making the Netherlands the first country in the world to enact same-sex marriage laws.
NORWAY	2009 Chapter 1, Section 1 of the 1993 Marriage Act (amended 2009) states “[t]wo persons of opposite sex or of the same-sex may contract marriage”.
PORTUGAL	2010 Article 1 of Law No 9/2010 of 31 May states that the law allows for marriage of persons of the same-sex.
SPAIN	2005 The 2005 amendments made to Article 44(2) of the Civil Code state that marriage confers the same rights and responsibilities on same-sex couples as it does on spouses of different-sex.
SWEDEN	2009 In 2009 the 1987 Swedish Marriage Code was revised to be gender-neutral, as described in this factsheet .
UNITED KINGDOM	2014 Section 1(1) of the Marriage (Same-sex Couples) Act 2013 (in force 2014) simply states “[m]arriage of same-sex couples is lawful”. This Act is only applicable in England and Wales, where it repealed the Civil Partnership Act 2004 . The Scottish Marriage and Civil Partnership (Scotland) Act of 2014 defines ‘spouse’ as being both different as well as same-sex. Northern Ireland does not enjoy marriage equality. The Crown Dependencies of the Isle of Man introduced the Marriage and Civil Partnership (Amendment) Act 2016 , and Guernsey approved the Same-sex Marriage (Guernsey) Law 2016 . In British Overseas Territories: in Pitcairn, same-sex marriage was voted for in 2015, and in Gibraltar the Civil Marriage Amendment Act 2016 was introduced (supplanting the Civil Partnership Act 2014), but in Bermuda a non-binding referendum on same-sex marriage failed in June 2016.

OCEANIA (1)

NEW ZEALAND	2013 Marriage (Definition of Marriage) Amendment Act of 2013 amended the Marriage Act 1955 to allow for marriage between 2 people “regardless of their sex, sexual orientation, or gender identity”. This law is not effective in any of New Zealand territories (Cook Islands, Niue or Tokelau).
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PARTNERSHIP FOR SAME-SEX COUPLES (28) [inc. Taiwan]

15% of UN States

Previous editions of this publication have differentiated between forms of relationship recognition between those that offer a minimum protection and those conferring many of rights enshrined in heterosexual traditional marriage (although often not dealing with parental and family rights). However, we find that this distinction is no longer as active as it was since the concept of recognition of same-sex couples' relationships first emerged through the 1990s and 2000s, as the status of those relationships have generally been strengthened. As such, we title this category simply as "Partnership for Same-Sex Couples"

AFRICA (1)

SOUTH AFRICA

2006 The *Civil Union Act, 2006* confers the right to civil unions to persons of the same-sex. This is the same piece of legislation that allows for same-sex marriage.

AMERICAS (5)

There is no federal law providing for civil unions in **Argentina**. However, civil unions are recognised in the **Province of Río Negro** (2003), and the cities of **Buenos Aires** (2002), **Villa Carlos Paz** (2007) and **Río Cuarto** (2009). Besides marriage (see entry above), civil unions, domestic partnerships and other forms of unions are available to same-sex couples in several jurisdictions in **Canada**: **Alberta** (2002); **Manitoba** (2001/2002); **Nova Scotia** (2001); **Quebec** (2002). In **Costa Rica**, a **2013 amendment** to the **2002 Law on Youth** inserted a non-discrimination clause with regard to *de facto* unions which appeared to allow for same-sex civil unions (even though *progressive caselaw* used this clause as the legal basis to recognise same-sex *de facto* unions, **Article 242** of the Family Code still restricts these unions to different-sex couples). In recent years considerable progress has been made: in 2014, Governmental Social Security Agency (CCSS) granted health insurance benefits for same-sex couples, and in 2015 the **Executive Order No. 38,999** was issued, addressing agencies within the Executive Branch to regulate certain rights for same-sex *de facto* unions (sick leave, care-leave, etc). In 2016, survivor's pensions were granted to same-sex couples. In May, the government submitted a **request for an advisory opinion** to the Inter-American Court of Human Rights on same-sex patrimonial rights under the ACHR. There is no federal law providing for civil unions in **Mexico**. However, civil unions and other forms of registered partnerships are recognised in several jurisdictions within Mexico, such as **Campeche** (2013); **Coahuila** (2007); **Colima** (2013); **Jalisco** (2013); **Federal District** (2007); **Morelos** (2016); **Nayarit** (2015). There is no federal law providing for civil unions in the **United States of America**, although several states do provide them – see, **report** by the National Center for Lesbian Rights (NCLR) and this **webpage** of the National Conference of State Legislatures.

BRAZIL

2011 Supreme Federal Court of Brazil recognised same-sex civil unions with *erga omnes* effects in two joint decisions (**Ação Direta de Inconstitucionalidade 4,277** and **Arguição de Descumprimento de Preceito Fundamental 132**).

CHILE

2015 Law 20,830 (Law on Civil Union Agreement) provides for civil unions, open to all couples (same-sex or not) that share a home, with the purpose of regulating the legal effects derived from their common affective life, and with a stable and permanent nature.

COLOMBIA

2007-2011 Several decisions issued by the Constitutional Court of Colombia have granted rights to same-sex couples since 2007. For a complete list of these decisions and links to the decisions, see this **summary** prepared by Colombia Diversa.

ECUADOR

2008 Article 68 the *Constitution of Ecuador* provides for civil unions regardless of the gender of spouses and establishes that these unions will be granted the same rights afforded to married couples, with the exception of adoption. On 22 August 2014, the Civil Registry issued **Resolution No. 174** to allow same-sex couples to register their unions. On 21 April 2015, the National Assembly approved the **Civil Code Amendment Law**, which amends the Civil Code to incorporate the regulation of civil unions.

URUGUAY

2008 Law 18,246 affords same-sex couples the right to have their union recognized (locally referred to as "union concubinaria").

ASIA (2) [inc. Taiwan]

ISRAEL	1994 No single law has been created in Israel to recognise same-sex partnership (seen as merely a contract), which may give the impression such protections are weak in Israel. In fact, the rights of same-sex 'reputed spouses' (all extra-marital cohabitants) have equivalence to those of married couples, as has been established through case law.
TAIWAN	Currently, around 80% of the population in Taiwan live under local and provisional rules that do in fact recognise very basic forms of civil partnership, therefore we include Taiwan in this category. In December 2016 a parliamentary committee approved the preliminary amendment of the legal proposals of marriage equality.

EUROPE (17)

ANDORRA	2014 In November 2014, the General Council of Andorra introduced Law 34/2014 that recognised same-sex civil unions as holding equivalence to marriage in terms of most rights and the basis on which family can be founded.
AUSTRIA	2010 The Registered Partnership Act (Text No. 135/2009) that came into force in 2010 has strong contractual and financial securities enshrined, but offers no recognition of family life, including in family name (see below at 'joint adoption').
CROATIA	2014 The Same-sex Life Partnership Act of July 2014 provides comprehensive civil union protections regarding recognition and maintenance, but in regards to parenting the law is weak.
CYPRUS	2015 The Civil Partnership Law (L184(1)/2015) applies to same-sex and different-sex couples regarding financial and accommodation issues, but with limited familial protection.
CZECH REPUBLIC	2006 The Registered Partnership Act (Law No. 115/2006) confers comprehensive civil union protections to same-sex partners only, but not same-sex adoption rights, as tested in a 2016 case. Article 3020 of the 2012 Civil Code makes the provision that "the rights and responsibilities of spouses shall apply <i>mutatis mutandis</i> to registered partnership and the rights and obligations of partners" (referring to the first, third and fourth part of section on Marriage at Section 655).
ESTONIA	2016 The Registered Partnership Act 2014 that entered into force on 1 January 2016 is open to same-sex and different-sex couples and contains limited adoption rights, but 'family' in Estonian law requires a union between a man and a woman.
FRANCE	1999 Law 99-944 of 15 November 1999 (on the Civil Solidarity Pact) offered same-sex couples some level of legal recognition.
GERMANY	2001 The Act on Registered Life Partners provides significant protections for same-sex partners (to whom the Act is limited), and some familial scope regarding adoption (Section 9). A late-2016 study finds that 83% of respondents support marriage equality.
GREECE	2015 Article 1 of Law No. 4356 on Covenant Partnership of December 2015 confers gender-neutral partnership rights, and limited co-parenting provisions.
HUNGARY	2009 Section 6:514 of the 2009 Civil Code sets out quite limited provisions pertaining to gender-neutral civil partnership in Hungary.
ITALY	2016 Article 1 of Law May 20 n. 76 regarding civil partnership and cohabitation establishes it is limited to same-sex couples. This legislation provides for equality in matters of tax, social security and inheritance. In 2012, the Court of Cassation denied a petition to recognise a same-sex marriage, but with a reasoning that represented a fundamental change in approach to the issue.
LIECHTENSTEIN	2011 The Act on Registered Life Partnership confers limited protections to same-sex partners, but overtly denies joined parental rights at Section 9.

MALTA	2014 Section 4(1) of the Civil Unions Act confers “the corresponding effects and consequences in law of civil marriage”, and applies to same-sex and different couples equally (Section 3(2)).
NETHERLANDS	1998 Co-existing with same-sex marriage, Article 1:80(a)-(e), Book 1 of the Civil Code confers comprehensive protections to both same-sex and of different-sex civil partners, analysed as virtually equivalent to marriage. The Netherlands’ constituent country, Aruba, does not allow same-sex marriage, but in September 2016 voted to allow civil partnerships.
SLOVENIA	2006/2016 Following a 2015 referendum that failed to secure marriage equality in Slovenia, the Civil Partnership Registration Act 2016 passed through parliament, coming into force February 2017. This Act strengthens the legal position of same-sex partners from that which existed under the weak 2006 partnership legislation, but it is still silent on issues of adoption.
SWITZERLAND	2004 The Federal Law on Registered Partnership Between Persons of the Same-sex (RS 211.231) contains protective financial and property provisions.
UNITED KINGDOM	2005 The UK’s Civil Partnership Act 2004 was adopted in Northern Ireland in 2005, but not rescinded when marriage equality emerged in all other parts of the UK in 2013. In 2012, the Crown Dependency of Jersey introduced Civil Partner (Jersey) Law . In the UK in early 2017, the High Court rejected a challenge to allow different-sex civil partnership.

OCEANIA (2)

AUSTRALIA	2008 In 2008, the Australian Government introduced reforms to remove the discriminations between <i>de facto</i> same-sex and different-sex <i>de facto</i> couples. Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 and Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008 . <i>Civil unions</i> are available (only to same-sex couples) in the Australian Capital Territory (2012) [domestic partnerships had been available in the ACT since 1994]. <i>Registered partnerships</i> are available in New South Wales (2010); Queensland (2012); South Australia (2016); Tasmania (2003); Victoria (2008). <i>Domestic partnerships</i> are available in South Australia (2007). <i>De facto relationships</i> are also recognized in Western Australia (2002) and in the Northern Territory (2004). For more information, see Chapter 2 of the Advisory Report by the Standing Committee on Social Policy and Legal Affairs of the Australian House of Representatives.
NEW ZEALAND	2005 The Civil Union Act 2004 provides for civil unions, available to same-sex or different-sex couples.

JOINT ADOPTION BY SAME-SEX COUPLES (26)

14% of UN States

AFRICA (1)

SOUTH AFRICA	2002 In the 2002 Constitutional Court case <i>Du Toit & Or</i> , it was ordered that the words "or by a person whose permanent same-sex life partner is the parent of the child" be adjoined to bring Section 17(c) of the 1983 Child Care Act in line with the Constitution .
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AMERICAS (6)

There is no federal law allowing for joint adoption by same-sex couples in **Mexico**. The situation of same-sex marriage is legally complex (see marriage entry above). In some jurisdictions, which cover around 15% of the nation's population, legislation provides for joint adoption of married couples: [Campeche](#) (Art. 407, 2016); [Coahuila](#) (Art. 253, 2014); [Chihuahua](#) (2015); [Colima](#) (Art. 391(b), 2016); [Mexico City](#) (2010); [Michoacán](#) (2016); [Morelos](#) (2016); [Nayarit](#) (Art. 385, 2016); [Veracruz](#) (2011).

ARGENTINA	2010 Law 26,618 (Law of Marriage Equality) grants same-sex couples all rights derived from marriage, including joint adoption.
BRAZIL	2010 The Superior Court of Justice of Brazil (STJ) ruled in April 2010 that same-sex couples may adopt children. This judgment was upheld in the Supreme Federal Court of Brazil in August 2010.
CANADA	1996-2011 Joint adoption by same-sex couples is legal in all Canadian provinces and territories. Every jurisdiction has its own laws and regulation on the matter. Alberta (2007), British Columbia (1996), Manitoba (2002), New Brunswick (2008), Newfoundland & Labrador (2003), Northwest Territories (2002), Nova Scotia (2001), Nunavut (2011), Ontario (2000), Prince Edward Island (2009), Quebec (2002), Saskatchewan (2001).
COLOMBIA	2015 In November 2015, the Constitutional Court issued Decision C-683/15 that same-sex couples in Colombia can jointly adopt children. This page prepared by Colombia Diversa explains the implications and reach of this decision and compares it to other similar cases decided by the Court.
UNITED STATES OF AMERICA	2015 As a result of the Supreme Court decision in <i>Obergefell v. Hodges</i> , joint adoption by same-sex married couples is now available in all 50 states. However, as MAP reports , there are several states that have laws permitting state-licensed child welfare agencies to discriminate against LGBT people, including married couples (see full list here). Mississippi was the last State in the USA to remove blocks to joint adoption.
URUGUAY	2013 Law 19,075 (Law on Marriage Equality) redefines marriage as the union of two persons "of different or same-sex", thereby granting same-sex couples all rights derived from marriage, including joint adoption.

ASIA (1)

ISRAEL	2008 Although revisions to the 1981 Adoption Law make no reference to 'reputed spouses', in 2008 the Attorney General declared it should nonetheless be interpreted as also relating to them, see Einhorn (at p.230). Further, in its 2nd periodic report concerning the implementation of the Convention on the Rights of the Child, at paragraph 242 the State claim that the status same-sex couples is equal to that of legally married couples.
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EUROPE (16)

On 6 December 2016, the European Parliament adopted a [Report](#) calling for the automatic recognition of domestic adoption orders to non-biological parents across EU Member States. The report stresses that refusing to recognise an adoption order, as countries can do through a 'public order' argument, may lead *de facto* to discrimination prohibited by Article 21 of the [Charter of Fundamental Rights of the European Union](#), an article that prohibits discrimination, including that based on sexual orientation. The report highlights that the lack of provisions for such recognition currently causes significant problems, and exposes families to multiple legal risks if they move from one Member State to another.

ANDORRA	2014 Article 1(2-4) of the Law 34/2014 recognises same-sex civil unions as holding direct equivalence to marriage, and Article 24 applies this to adoption rights of same-sex couples.
AUSTRIA	2016 In late-2014, the Constitutional Court in Austria ruled that provisions barring joint adoption by same-sex couples contravened the right to equality, and not in the best interest of the child. As such, Articles 178-185 of Civil Code are applicable to same-sex couples as of early-2016.

BELGIUM	2006 Articles 4 and 5 of the "Law amending certain provisions of the Civil Code with a view to enabling adoption by persons of the same-sex" primarily concern Article 353 of the Civil Code and ensures full joint-parental rights.
DENMARK	2010 Section 5.1 of 2010 Adoption Act (updated Adoption (Consolidation) Act 2014) sets out that a partner or spouse can jointly adopt. Greenland enacted such legislation in 2016.
FINLAND	2017 Section 9 of the 2012 Adoption Act stipulates that only persons who are married may adopt. On 1 March 2017, amendments to the Marriage Act that allow for gender-neutral marriage came into force.
FRANCE	2013 Articles 7-9 of the LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe updates at Articles 345(1), 360 and 371(4) in the Civil Code regarding joint adoption.
ICELAND	2010 Articles, 2, 8 and 29 of the 2010 Marriage Act stipulate the joint parental responsibilities of spouses: these apply to adoption.
IRELAND	2015 Part 11 of the Children and Family Relationships Act 2015 (introduced a month before a Constitutional referendum on same-sex marriage) amends prior legislation to allow for joint adoption by same-sex couples.
LUXEMBOURG	2015 With the introduction of full marriage equality in force in January 2015, Article 203 of the Civil Code was amended in 2014 (in force 1 January 2015) to assert the obligation of parents to their children, including those jointly adopted.
MALTA	2014 As reflected in Section 12 the Civil Unions Act 2014, Article 100B(1) of the Civil Code was amended to guarantee full joint adoption rights to same-sex partners, with the first same-sex adoption approved by the Maltese Family Court in July 2016.
NETHERLANDS	2001 Article 1 of the Dutch law on adoption by persons of the same-sex amends Article 227(1) of the Civil Code to allow for joint adoption by same-sex couples.
NORWAY	2009 In line with recent marriage provisions, Section 5 of the Adoption Act was amended to include same-sex partners as eligible to jointly adopt.
PORTUGAL	2016 Articles 1-7 of the Law No.2/2016 establish that same-sex couples enjoy all the adoption rights of different-sex couples, and amends the appropriate areas of the Civil Code.
SPAIN	2005 Article 67(7) of Law 13/2005 amends Article 175 of the Civil Code to specify spouses can jointly adopt.
SWEDEN	2003 Articles 4-8 of the 2003 Act on Parenting lay out the conditions for joint adoption for married couples, same-sex and different-sex.
UNITED KINGDOM	2005 Sections 144 and 150 of the Adoption and Children Act 2002 that entered into force in England and Wales in 2005, establish that joint adoption applies to same-sex couples. Section 2 of the Adoption Agencies (Scotland) Regulations 2009 in Scotland defines civil partners as subject to the law, and in 2013 in Northern Ireland, the Court of Appeal mandated that civil partners can jointly adopt. Among British Overseas Territories, Section 3(3) of the Adoption of Infants Ordinance 2015 of Pitcairn Islands, and the Civil Partnership Act 2014 (converted to marriage in 2016) in Gibraltar both allow joint adoption, as does the law in Bermuda following a 2015 decision. The Crown Dependencies of the Isle of Man introduced joint adoption in 2011 to civil partners, and Jersey legislated for joint adoption in 2012 through the Civil Partner (Jersey) Law.

OCEANIA (2)

AUSTRALIA	2002-2017 Joint adoption by same-sex couples is currently possible in all Australian States and Territories, except in the Northern Territory. Australian Capital Territory (2004); New South Wales (2010); Queensland (2016); South Australia (2017); Tasmania (2013); Victoria (2016); Western Australia (2002).
NEW ZEALAND	2013 Schedule 2 of the Marriage (Definition of Marriage) Amendment Act of 2013 amended the Adoption Act 1955 to allow for joint adoption by same-sex married couples. This law is not effective in any of New Zealand territories (Cook Islands, Niue or Tokelau).

SECOND PARENT ADOPTION (27)

15% of UN States

AFRICA (1)

SOUTH AFRICA	2006 Section 231(1)(c) of the Children's Act of 2005 stipulates that married persons or those in life partnerships are eligible to adopt, and the Civil Union Act, 2006 confers those status to persons of the same-sex.
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AMERICAS (5)

In **Mexico**, second parent adoption for same-sex couples is not available in all states. Some jurisdictions have local regulations on the matter, among them: **Campeche** (Art. 408B, 2016); **Federal District** (Art. 391(5), 2010); **Coahuila** (Art. 377, 2015), **Colima** (Art. 391(b), 2016); **Nayarit** (Art. 389(2), 2016).

ARGENTINA	2010 Law 26,618 (Law of Marriage Equality) grants same-sex couples all rights derived from marriage, including adoption. Article 631 of the Civil Code lays out the conditions by which the spouse of the biological parent may adopt their child. As per Article 621, courts may decide on the subsistence of links with other parents.
CANADA	2005 Adoption is regulated at the provincial level in Canada. Second parent adoption is available in several provinces and territories, including Alberta (1999), British Columbia (1996), Manitoba (2002), New Brunswick (2008), Newfoundland & Labrador (2003), Northwest Territories (2002), Nova Scotia (2001), Nunavut (2011), Ontario (2000), Prince Edward Island (2009), Quebec (2002), Saskatchewan (2001).
COLOMBIA	2014 The Constitutional Court of Colombia determined in its Decision SU-617 of 2014 that same-sex couples have the right to adopt the biological child of their partner.
UNITED STATES OF AMERICA	2015 The availability and conditions for second parent adoption vary by state. For detailed information see this datasheet prepared by the National Center for Lesbian Rights (NCLR).
URUGUAY	2013 Law 19,075 (Law on Marriage Equality) grants same-sex couples all rights derived from marriage, including adoption. Article 139 of Law 17,823 (as amended by Law 18,590) establishes that adoption by the spouse of the biological parent is possible only if the link with the child and the other parent is terminated.

ASIA (1)

ISRAEL	2005 In <i>Yaros-Hakak v. Attorney General</i> two women had each given birth via ART and were raising their children together. The Supreme Court of Israel judged that the State's adoption law permitted second-parent adoption (without curtailing the first parent's rights), according to the "supreme principle" that the best interests of the child should prevail, see ICJ .
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EUROPE (18)

In **Croatia**, Articles 45-49 of **Same-sex Partnership Act** 2014 falls short of providing second parent adoption rights, but the court can be petitioned to establish the right *de facto*. In **Italy**, there are no federal laws protecting second parent adoption, but there has been important activity at the court level in this regard. A high profile case involving the adoption of the birth daughter of a lesbian partner was **resolved** in the couple's favour in late 2016. The Court of Appeal of Naples **ordered** full recognition of second-parent adoptions on 5 April 2016, and the Court of Appeal in Trento **recognised** the second father as a co-parent of twins through surrogacy.

ANDORRA	2014 Article 2 of the Law 34/2014 recognises same-sex civil unions as holding direct equivalence to marriage: and Article 24 applies this to adoption rights of same-sex couples, revising the 1996 Adoption Law .
AUSTRIA	2013 Following the return of <i>X. and others v. Austria</i> to the European Court of Human Rights in early 2013, Article 182 of the Civil Code was amended to allow same-sex second parent adoption.

BELGIUM	2006 Articles 8 of the “Law amending certain provisions of the Civil Code with a view to enabling adoption by persons of the same-sex” primarily concern Article 353 of the Civil Code and ensures second-parent adoption rights.
DENMARK	1999 Section 4(1) of the Law amending the law on Registered Partnership expressly sets out that a registered partner may adopt their partner’s child. Greenland enacted second parent adoption to same sex couples in 2009. The Faroe Islands passed second parent adoption legislation which will come into force later in 2017. Section 4a(2) of 2010 Adoption Act (updated Adoption (Consolidation) Act 2014) sets out that a partner or spouse can adopt the other’s child.
ESTONIA	2016 Section 15(1-4) of the Registered Partner Act offer limited joint adoption rights to same-sex couples, but court appeal may be made regarding a third party adoption to avoid the creation of an “extremely unfair” situation.
FINLAND	2009 Section 9 of the 2001 Registered Partnership Act was amended in 2001 to clarify that civil partners could adopt, but not as constructed in adoption legislation. However, since coming into force in March 2017 Act 156/2015 confers full joint adoption rights to same-sex couples in Finland.
FRANCE	2013 Article 7 of LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe, inserted a paragraph (345(1)(a)) to the existing Civil Code that establishes second parent adoption. The law also applies to the overseas regions of Guadeloupe and Martinique.
GERMANY	2005 Act on Registered Life Partners at Section 9(7) (to be read in conjunction with Title 2 [Adoption] of the Civil Code) allows for second parent adoption by same-sex ‘spouses’.
ICELAND	2000 Section 6 of the 2000 Law amending the 1996 Registered Partnership Act specifies that civil partners can adopt one another’s children.
IRELAND	2015 Article 5 of the Children and Family Relationships Act 2015 (introduced a month before a Constitutional referendum on same-sex marriage) defines the civil partner and spouse under ‘parentage’.
LUXEMBOURG	2015 With the introduction of full marriage equality in force in January 2015, Article 203 of the Civil Code was amended to assert the obligation of parents to their children, including those in second parent adoption.
NETHERLANDS	2001 Article 1 of the Dutch law on adoption by persons of the same-sex amends Article 228(f) of the Civil Code to allow for second parent adoption by same-sex couples, but only through a court application procedure which was eased in 2014.
NORWAY	2002 The 1993 Adoption Act was amended to include civil partners by a 2001 Act.
PORTUGAL	2016 Articles 1-7 of the Law No.2/2016 establish that same-sex couples enjoy all the adoption rights of different-sex couples, and amends the appropriate areas of the Civil Code.
SLOVENIA	2011 The right to step-parent adoption was recognized by the Ministry of Labour, Family, Social Affairs and Equal Opportunities in 2011 on the basis of the 1976 Law on Marriage and Family Relations, despite the fact that Article 135 stipulates adopters must be married.
SPAIN	2005 Article 67(7) of Law 13/2005 amends Article 175(4) of the Civil Code to specify that spousal second-parents can adopt.
SWEDEN	2003 Article 8 of the 2003 Act on Parenting lay out the conditions for second parent adoption for married couples, same-sex and different-sex.

UNITED KINGDOM	<p>2005 Sections 144 and 150 of the Adoption and Children Act 2002 that entered into force in England and Wales in 2005, establish that second parent adoption applies to same-sex couples. Section 2 of the Adoption Agencies (Scotland) Regulations 2009 in Scotland defines civil partners as subject to the law, and in 2013 in Northern Ireland, the Court of Appeal mandated that civil partners enjoy second parent adoption. Among British Overseas Territories, Section 3(4) of the Adoption of Infants Ordinance 2015 of Pitcairn Islands, and the Civil Partnership Act 2014 (converted to marriage in 2016) in Gibraltar both accommodate second parent adoption. The Crown Dependencies of the Isle of Man introduced second parent adoption at Section 98 of the Civil Partnership Act 2011, Jersey legislated for second parent adoption in 2012 through the Civil Partner (Jersey) Law, and Guernsey approved second parent adoption coming into force in 2017 through the 2016 Same-Sex Marriage Law.</p>
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OCEANIA (2)

AUSTRALIA	<p>2002-2017 Second parent adoption by same-sex couples is currently possible in all Australian States and Territories, except in the Northern Territory. Australian Capital Territory (2004); New South Wales (2010); Queensland (2016); South Australia (2017); Tasmania (2013); Victoria (2016); Western Australia (2002).</p>
NEW ZEALAND	<p>2013 A step-parent in a same-sex couple is able to adopt their spouse's child under the Adoption Act 1955 (as amended by the Marriage (Definition of Marriage) Amendment Act of 2013). This law is not effective in any of New Zealand territories (Cook Islands, Niue or Tokelau).</p>



ilga

CRIMINALISATION

KEY / SYMBOLS

Throughout this section, we use several symbols to communicate key information regarding the socio-legal situations in those States that criminalise consensual same-sex sexual activity between adults in private.

CRIMINALIZATION OF SEXUAL ACTIVITY: WHICH GENDER DOES THE LAW TARGET?

In many countries where the law criminalises same-sex sexual activity between consenting adults in private, criminalising provisions are expressed in gender neutral terms, thus targeting sexual activity both between men and between women. In some others, the law specifically targets one gender alone (generally men). Criminalizing laws do not see beyond the fixed categories of the gender binary (male/female) so it is not always easy to ascertain how these provisions would play out for adults who are trans and engage in sexual activity with persons who were assigned the same sex marker at birth.



When this symbol appears next to the name of the country, it means that sexual acts between consenting **male** adults in private are in some way criminalized.



When this symbol appears next to the name of the country, it means that sexual acts between consenting **female** adults in private are in some way criminalized.

ENFORCEMENT OF CRIMINALISING PROVISIONS

Information on actual enforcement of criminalising provisions can be very hard to gather. Most of the information regarding enforcement in this report comes from media outlets or reports by civil society organisations working on the ground. Official records are rarely available and when they are, they may not fully reflect actual enforcement of criminalising provisions. Furthermore, in many contexts, media reports use the word "sodomy" or "buggery" in *broad* terms to refer to "anal intercourse", which may include non-consensual sexual activity or sexual activity involving minors. This report focuses **exclusively** on same-sex sexual activity between consenting adults in private.



When this symbol appears next to the name of the country, it means that our research was able to find information on **arrests** (either leading to prosecution or not) in the past **three (3) years**, based on provisions which criminalise same-sex consensual activity between adults in private and *enforced* on consenting adults. Note: where there is no arrest symbol on a country, this does **not** mean there have not been arrests – it just means our limited research has not located documentation of any.

DOES THE NATIONAL HUMAN RIGHTS INSTITUTION INCLUDE SEXUAL ORIENTATION CONCERNS IN ITS WORK?

National Human Rights Institutions (NHRIs) are independent bodies with a mandate to protect, promote, and monitor the human rights situation in a given country and operate under the **Paris Principles**. They have varying denominations (human rights commission, ombudsman office, public defender, equality authority, etc.) and operate in most countries in the world (see full list [here](#)). NHRIs may play a crucial role in the furtherance of equality with regard to sexual orientation issues if they include this topic in their working agenda. We indicate whether a NHRI includes sexual orientation concerns in its work in the following way:



Yes, it does



No, it does not



Unclear



There is no NHRI

ALGERIA



Penal Code (Ordinance 66-156 of 8 June 1966).

Art. 338

[*HOMOSEXUAL ACT*]

"Any person who commits an act of homosexuality against a person of the same sex shall be punished with imprisonment from two months to two years and a fine of 500 to 2,000 dinars."

Article 333 (modified) [in 1982]

[*INDECENT ACT*]

"When the indecent exposure consisted of an act against nature with an individual of the same sex, the penalty is imprisonment for six months to three years and a fine of 1,000 to 10,000 dinars."

Article 333 Reiterated

[*BREACH OF MODESTY - LIMITING SOGI PUBLIC EXPRESSION*]

"The making or possession, importing or attempts to import for trade, distribution, for payment, copying, exhibition or display or attempts to display to the public, or for selling or attempts to sell, or distribution or engaged in the distribution of each publication, an editor or a drawing or a declaration or pictures or paintings or photographs, or the origin of the image or its template or produced anything in breach of modesty shall be punished with imprisonment from two months to two years and a fine of 500 to 2,000 dinars. A breach of decency punished by two months to two years in prison and a fine of 500 to 2000 Algerian dinar. The punishment for those convicted of "abnormal sexual acts" is six months to three years in prison and a fine of 1,000 to 10,000 Algerian dinars."

In the 2014 and 1982 revisions of this gender-neutral Penal Code, Article 338 outlaws "d'homosexualité", while Article 333 (modified) increases the penalty for public indecency if it is same-sex. The second part of Article 333 (new) makes the publication of writings, images, etc, contrary to 'modesty' punishable. This provision goes beyond the scope of traditional sexual behaviour-based regulation, and akin to the codes of other MENA States, targets expression of around sexual and gender diversity.

An overview of the SOGI situation in Algeria in late-2014 was provided by [Muftah](#). However, an [article](#) from October 2015 points to a resilient LGBT community despite their vilification by some religious leaders. In 2016, a gay Algerian man's [refugee asylum claim](#) to the UK was rejected, in part based on the lack of prosecutions or arrests in recent years, but it evidently did not account for the extremes of family and societal shame, threats and violence that [pervades](#) rural and urban Algeria regarding diverse sexual orientations in men and women.

In its 2nd cycle UPR in May 2012, Algeria 'noted' (functionally rejected) two recommendations (Spain and Canada) to decriminalise same-sex sexual relations, "and take measures to ensure equality and non-discrimination on all grounds" in conformity with Articles 17 and 26 (privacy and non-discrimination) of the International Covenant on Civil and Political Rights (ICCPR). Algeria's 3rd cycle UPR commences in May 2017.

ANGOLA



Penal Code of 16 September 1886, as amended in 1954 (inherited from the Portuguese colonial era).

Articles 70 and 71 (4) [text not available]

[*ACTS AGAINST NATURE*]

These Articles provide for the imposition of 'security measures' on people who habitually practice acts against nature. The security measures may include: a bond of good behavior, being put on probation for a certain period, or even internment in a workhouse or agricultural colony (from 6 months to 3 years).

In 2006 the first draft of a new Penal Code was mooted in Angola, and in 2014 a final [draft](#) was [submitted](#) to Cabinet. In

late-February 2017, the Angolan parliament went through the first phase of **adopting** this version of the draft Penal Code (125 in favour, none against and 36 abstentions). This Code does not outlaw consenting, same-sex sexual activity between adults in private, and therefore when it does come into force (currently unknown), Angola will have repealed such offending provisions. Further, Article 197 of the new Code proposes up to two year's imprisonment for discrimination in employment and in the supply of goods and services on the basis [*inter alia*] of sexual orientation. However, at time of writing, the parliamentary process is not complete and, as such, the old Penal Code remains in force.

It is notable that the African Commission on Human and Peoples' Rights **Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity** was adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April - 12 May 2014.

In 2013, the Angolan delegation to the UN Human Rights Committee **replied** to a query about societal discrimination of individuals based on their sexual orientation, saying: "The principle of equality was enshrined in the Constitution, but measuring discrimination against homosexuals in society was difficult. Cultural attitudes seemed to be changing, however: for example, the portrayal of two same-sex couples in a soap opera on Angolan television had not been condemned by the viewing public."

Even though Angola rejected two recommendations related to the decriminalisation of same-sex sexual relations made by France and the Czech Republic at its 1st cycle UPR, there is no mention (recommendations or Interactive Dialogue) of SOGI in its 2nd cycle UPR in October 2014. Angola's 3rd UPR is in April 2019.

BOTSWANA

Penal Code [Chapter 08:01], 1964 (**amended** by the Penal Code Amendment Act 14, 2005).

Section 164. Unnatural offences

[AGAINST ORDER OF NATURE]

"Any person who;

- (a) has carnal knowledge of any person against the order of nature;
 - (b) has carnal knowledge of any animal; or
 - (c) permits any other person to have carnal knowledge of him or her against the order of nature,
- is guilty of an offences and is liable to imprisonment for a term not exceeding seven years."

Section 165. Attempts to commit unnatural offence

[ATTEMPTED UNNATURAL OFFENCE]

"Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years."

Section 167. Indecent practices between persons

[GROSS INDECENCY]

"Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence."

A **case** about the right of a SOGI-based organisation, LeGaBiBo, to register as a NGO dates back to 2012, with a decisive win in late-2014 where the High Court said not allowing it to register would be an unconstitutional violation of the applicants' right to freedom of expression, freedom of association and free assembly. The State then appealed the decision on the grounds that its recognition would erode public morality, and that appeal was heard in mid-January 2016. In mid-March 2016, **judgment** from that appeal was unsuccessful and that NGO is now registered, thereby providing an example of positive jurisprudence regarding the reach of the State.

In both of its UPR sessions to date (December 2008, January 2013) Botswana refused all recommendations for decriminalisation and non-discrimination based on SOGI (7 recommendations in 2008, and 8 in 2013). In its response to recommendations the delegation for Botswana said (at para. 92) that other than including sexual orientation in the amended Employment Act of 2010, “[r]egarding cultural sensitivities that have a bearing on existing legislation, the delegation confirmed Botswana’s commitment to comply with its treaty obligations” and “determined to undertake educational awareness campaigns...”. Despite a CCPR recommendation (at para. 22) that Botswana should amend Section 164, and the *Kanane* case of 2003 that found the provisions at Sections 164 and 167 discriminatory, the law has remained in place.

It is notable that Botswana’s ambassador to the UN led the second wave of opposition to the establishment of the SOGI Independent Expert to the UN in November 2016, saying “[n]o nation or group of nations should pretend to hold a monopoly over cultural norms and therefore seek to impose those values on others”.

BURUNDI



Law No. 1/05 of 22 April 2009 concerning the revision of the **Penal Code**.

Article 567

[SEXUAL RELATIONS WITH... SAME SEX]

“Whoever has sexual relations with someone of the same sex shall be punished with imprisonment for three months to two years and a fine of fifty thousand to one hundred thousand francs or one of those penalties.”

Burundi received 11 direct recommendations in its 2nd UPR in 2015 regarding sexual orientation, the majority regarding decriminalisation, to which the delegation is recorded as saying: “With regard to discrimination against homosexuals, the delegation acknowledged that the Criminal Code of 2009 still punished homosexuality. That situation was in line with the country’s customs and values, and the delegation asked for the international community’s understanding while Burundian society prepared for a change in mentality. The head of the delegation did emphasise, however, that he would raise the issue with the Government.” Burundi’s 3rd UPR will be in October 2017.

A **Shadow Report** to the Human Rights Committee (HRCee) that oversees the ICPPR describes the repressive conditions under which LGBT people live in Burundi. In November 2014, the HRCee unambiguously **stated** that Burundi, “... should decriminalise homosexuality; amend the ministerial order of the Minister of Basic Education in order to forestall its discriminatory application to young homosexuals; remove any *de jure* or *de facto* obstacle to or any restriction on the establishment of associations by homosexuals; and take all necessary steps to provide effective protection for homosexuals from threats to their physical integrity and from discrimination of any kind”.

In December 2014, the Committee Against Torture (CAT) **spoke** directly to discrimination based on SOGI, referring to Article 16 of the Convention: “[t]he State party should decriminalize homosexuality and take all necessary measures to effectively protect homosexuals from threats and any form of violence [...]; and ... investigate any cases involving violations of their physical integrity”.

In relation to Burundi’s presence at United Nations human rights mechanisms in the recent past, Burundi was **examined** by CESCR (the Committee on Economic, Social and Cultural Rights) in October 2015, which “recommends that the State party repeal all provisions that could lead to the discrimination, prosecution or punishment of individuals on the basis of their sexual orientation or gender identity and that it take all appropriate steps to ensure that lesbian, gay, bisexual and transgender individuals may exercise all the rights enshrined in the Covenant”.

The legal and social situation of LGBT people in Burundi is captured in a 2016 **report** produced by the East African Sexual Health and Rights Initiative.

CAMEROON



Penal Code of 1965 / 2016.

Article 347bis

[SEXUAL RELATIONS WITH... SAME SEX]

'Whoever has sexual relations with a person of the same sex shall be punished with imprisonment from 6 (six) months to 5 (five) years and fine of from CFAF 20,000 (twenty thousand) to CFAF 200,000 (two hundred thousand).'

The country's three leading (and only) lawyers who represent LGBT people **described** a slight moderation of official attitudes to same-sex sexual relations in the recent period, following international pressure and national advocacy. However, Cameroon remains extremely hostile and dangerous to LGBT people, according to a year-end **report** from Humanity First, a Yaoundé-based organisation seeking improved health care for LGBTI Cameroonians and recognition of their human rights.

Cameroon rejected all seven SOGI recommendations in its 1st cycle UPR in April 2008. Other than accepting one recommendation to, "[i]nvestigate police violence that took place on persons because of their actual or perceived sexual orientation", it rejected a further 14 recommendations on non-discrimination and decriminalisation made in its 2nd UPR in January 2013, amidst a violent period in the country regarding SOGI issues. The State voluntarily pledged the following: "[f]or instance, regarding the issue of homosexuality, Cameroon was committed not to aggravate current criminal penalties, to continue to apply legal provisions, guarantee a fair trial to alleged homosexuals, and continue not to apply any discriminatory measure against them".

In February 2014, in its concerns about LBT women, the Committee on the Elimination of Discrimination against Women at para. 37(c) **urged** that Cameroon should "[r]aise awareness among political, traditional and religious leaders, as well as members of civil society, about the possible withdrawal of article 347bis of the Penal Code".

In its review of 2016, *76 Crimes* reports that anti-gay Cameroonians **threatened and harassed** LGBTI rights advocates in Douala, Cameroon, driving some of them from their homes. In Yaoundé, Cameroon, Jules Eloundou, president of Humanity First, was the **target** of two homophobic attacks in the guise of burglaries. In early-2017, efforts commenced to **create** a Human Rights Observatory that will act as a urgently needed watchdog against violations of the rights of LGBT people and human rights defenders.

COMOROS



Penal Code of the Federal Islamic Republic of Comoros, 1981.

Article 318:

[UNNATURAL ACT]

'(3) Without prejudice to the more serious penalties provided for in the preceding paragraphs or by articles 320 and 321 of this Code, whoever will have committed an improper or unnatural act with a person of the same sex will be punished by imprisonment of between one and five years and by a fine of 50 000 to 1 000 000 francs. If the act was committed with a minor, the maximum penalty will always be applied.'

The Government of Comoros **rejected** its 2nd cycle UPR recommendations to "review provisions of the criminal law penalizing consensual same-sex activity between adults" (Czech Republic) and to "initiate a debate on the decriminalization of homosexuality" (Spain). The Netherlands reminded Comoros of its international law commitments by referring it to the Office of the High Commissioner for Human Rights' **report** of 2011, and Brazil called for the country to "take step to avoid discrimination and violation of the human rights of the LGBT population". The State **responded** (at para. 73) that there is no political energy (or "currently a political majority") against this "invisible minority", or will to change the law at this time.

EGYPT



Sexual relations between consenting adult persons of the same sex in private are not prohibited in Egyptian law. However, as recorded the Law on the Combating of Prostitution, and the law against debauchery have been used liberally to imprison gay men in recent years.

Law 58/1937 amended by Law 95-2003 (English translation download)

Article 98(f):

[PROPAGATION]

"Detention for a period of not less than six months and not exceeding five years, or paying a fine of not less than five hundred pounds and not exceeding one thousand pounds shall be the penalty inflicted on whoever exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist thoughts with the aim of instigating sedition and division or disdain and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace."

Article 269 bis:

[INCITEMENT TO INDECENCY]

"Whoever is found on a public road or a traveled and frequented place inciting the passersby with signals or words to commit indecency shall be punished with imprisonment for a period not exceeding one month. If the felon recurs to committing this crime within one year of the first crime, the penalty shall become imprisonment for a period not exceeding six months and a fine not exceeding fifty pounds. A ruling of conviction shall necessitate placing the convict under police supervision for a period equal to that of the penalty."

Article 278:

[SCANDALOUS ACT]

"Whoever commits in public a scandalous act against shame shall be punished with detention for a period not exceeding one year or a fine not exceeding three hundred pounds."

Law 10/1961 on the Combating of Prostitution

Article 9:

[PRACTICING OR INCITEMENT TO DEBAUCHERY]

"Punishment by imprisonment for a period not less than three months and not exceeding three years and a fine not less than 25 LE and not exceeding 300 LE [...] or one of these two punishments applies in the following cases:

- (a) Whoever lets or offers in whatever fashion a residence or place run for the purpose of debauchery or prostitution, or for the purpose of housing one or more persons, if they are to his knowledge practicing debauchery or prostitution.
- (b) Whoever owns or manages a furnished residence or furnished rooms or premises open to the public and who facilitates the practice of debauchery or prostitution, either by admitting persons so engaged or by allowing on his premises incitement to debauchery or prostitution.
- (c) Whoever habitually engages in debauchery or prostitution.

Upon the apprehension of a person in the last category, it is permitted to send him for a medical examination. If it is discovered that he is carrying an infectious venereal disease, it is permitted to detain him in a therapeutic institute until his cure is completed.

It is permitted to determine that the convicted person be placed, upon completion of his sentence, in a special reformatory until the administrative agency orders his release. This judgment is obligatory in cases of recidivism, and the period spent in the reformatory is not allowed to be more than three years. [...]"

Article 178

[PUBLIC DECENCY - MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]

"A penalty of up to two years in prison and/or a fine of between 5,000 and 10,000 Egyptian pounds shall be imposed on anyone who produces or procures for the purpose of marketing, distributing, leasing, advertising or offering printed matter, files, pictures, advertisements, graphic or engraved images, hand-made drawings, photographs, signs, or any other articles or images which offend against public decency."

Article 178 restrictions explain why there is so little positive or balanced discussion of same-sex relationships in Egypt. In 2016, Egyptian novelist Ahmed Naji was sentenced to two years in jail following the publication of a "sexually explicit" [heterosexual] excerpt from his novel 'The Use of Life' in state-owned literary magazine *Akhbar al-Adab*. Public morality is recognised by international law as grounds for limiting expression, but that limitation must not be overly broad or vague, and it must be necessary and proportionate relative to the harm that may be incurred. Likewise, individuals who, through

their sexual or gender expression, disrupt conservative binary gender models are especially vulnerable in Egypt, according to an activist who was based in Egypt through recent years. Through 2015 and 2016, widely publicised arrests continue.

Egypt's 2nd cycle UPR began in November 2014. Of the 28 NGO submissions to this session, only four mentions sexual orientation directly. However, there is no mention of sexual orientation in recommendations to Egypt or in that State's formal responses to its 2nd UPR.

According to *76 Crimes*, the largest reported number of arrests of LGBT people has been in Egypt, where a crackdown has been under way since 2013 as part of a larger government effort to arrest and harass political opponents, human rights defenders and journalists. In late-2016, LGBT community leaders estimate that as many as 500 LGBT people have been sent to prison.

ERITREA

Penal Code of 1957 (inherited from Ethiopian rule).

Art. 600. Unnatural Carnal Offences

[SAME SEX ACT]

"(1) Whosoever performs with another person of the same sex an act corresponding to the sexual act, or any other indecent act, is punishable with simple imprisonment".

In its 1st cycle UPR in 2009, the Government of Eritrea rejected the recommendations made by Canada and the USA to repeal the above-mentioned article, arguing that repeal is "...in direct conflict with the values and traditions of the Eritrean people".

A Joint Submission to its 2nd cycle UPR described the situation in Eritrea as of June 2014: "(Attacks on Lesbian Gay Bisexual and Transgender Intersex (LGBTI) Activists) Consensual same-sex conduct is criminalised under the Eritrean Transitional Penal Code and punishable by prison terms ranging from 10 days to three years. It is noted that the Eritrean Government rejected a recommendation by the Working Group on the Universal Periodic Review in 2010 to legalise same-sex activity. No LGBTI organisations publically exist in Eritrea and it is reported that the authorities have carried out periodic round-ups of LGBTI people".

At their 2nd cycle UPR, the Eritrean delegation stated that "consensual same sexual conduct was against the values and culture of the Eritrean society" in answer to the only SOGI recommendation it received (Italy): "Launch a national dialogue, as well as a campaign through media and in the schools, to tackle all forms of discrimination against lesbian, gay, bisexual and transgender (LGBT) persons". Eritrea's next UPR review is October 2018.

The Concluding Observations delivered to Eritrea by the United Nations Committee on the Rights of the Child in June 2015, make direct reference to SOGI: "Repeal the legal provisions criminalizing homosexuality and, by raising public awareness of equality and non-discrimination on the basis of sexual orientation, ensure that children who belong to groups of lesbian, gay, bisexual and transsexual persons or children from families formed by such persons are not subject to any form of discrimination", (para. 25(d)).

ETHIOPIA



The **Criminal Code** of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004.

Article 629. Homosexual and other Indecent Acts

[HOMOSEXUAL ACT]

"Whoever performs with another person of the same sex a homosexual act, or any other indecent act, is punishable with simple imprisonment."

Article 630. General Aggravation to the Crime

"(1) The punishment shall be simple imprisonment for not less than one year, or, in grave cases, rigorous imprisonment not exceeding ten years, where the criminal:

- a) takes unfair advantage of the material or mental distress of another or of the authority he exercises over another by virtue of his position, office or capacity as guardian, tutor, protector, teacher, master or employer, or by virtue of any other like relationship, to cause such other person to perform or to submit to such an act; or
- b) makes a profession of such activities within the meaning of the law (Art. 92).

(2) The punishment shall be rigorous imprisonment from three years to fifteen years, where:

- a) the criminal uses violence, intimidation or coercion, trickery or fraud, or takes unfair advantage of the victim's inability to offer resistance or to defend himself or of his feeble-mindedness or unconsciousness; or
- b) the criminal subjects his victim to acts of cruelty or sadism, or transmits to him a venereal disease with which he knows himself to be infected; or
- c) the victim is driven to suicide by distress, shame or despair."

At its 2nd cycle UPR that commenced in April 2014, Ethiopia 'noted' (did not accept) three Level 5 (act immediately) recommendations from France, Portugal and Argentina to decriminalise same-sex sexual activity. Ethiopia made no responses to the decriminalisation issue in the UPR Interactive Dialogue or in its formal responses to recommendations in this regard.

In its submission to the 56th session of the African Commission on Human and Peoples' Rights on the situation of human rights defenders the International Service for Human Rights (ISHR) observes: "... that Ethiopia's repressive laws provoke fear and self-censorship among HRDs and that HRDs frequently face threats, acts of intimidation, judicial harassment and arbitrary arrest", with "...surveillance and official restrictions on the movement of HRDs." The document goes on to say: "Defenders of lesbian, gay, bisexual, transgender and intersex (LGBTI) rights in Ethiopia operate in a particularly hostile environment, with organised anti-homosexuality organisations calling upon the government to close spaces for the LGBTI rights movement and tighten 'anti-gay' legislation, punishing 'homosexual acts' with the death penalty. LGBTI organisations have been consistently accused of being Western proxies seeking to subvert Ethiopian cultural values. Many clerical leaders have made statements against sexual diversity in a country where 'homosexual acts' are punishable with one to fifteen years imprisonment pursuant to Articles 629 and 630 of Ethiopia's Criminal Code".

The difficult legal and social situation of LGBT people in Ethiopia in 2014 and 2015 is described in a 2016 report produced by the East African Sexual Health and Rights Initiative, and the immense challenges faced by LGBT refugees is described in an article of March 2017.

GAMBIA

**Criminal Code 1965, as amended in 2005****Article 144: Unnatural offences***[AGAINST ORDER OF NATURE]*

“(1) Any person who—

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits any person to have carnal knowledge of him or her against the order of nature;

is guilty of a felony, and is liable to imprisonment for a term of 14 years.

(2) In this section- “carnal knowledge of any person against the order of nature” includes-

- (a) carnal knowledge of the person through the anus or the mouth of the person;
- (b) inserting any object or thing into the vulva or the anus of the person for the purpose of simulating sex; and
- (c) committing any other homosexual act with the person.”

[ATTEMPTED UNNATURAL OFFENCE]

Gambia’s Criminal Code states that a “person who has carnal knowledge of any person against the order of nature ... or permits any person to have carnal knowledge of him or her against the order of nature” commits a felony known as an “unnatural offense”, and on conviction is punishable by a fourteen-year prison term. An attempt to commit an “unnatural offense” is also a felony, on conviction, punishable by seven years of imprisonment.

Article 147(2) (as amended by the 2005 Act)*[GROSS INDECENCY]*

“Any female person who, whether in public or private, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, is guilty of a felony and liable to imprisonment for a term of five years. Section 147(3) further specifies that act of indecency includes any homosexual act.”

On 25 August 2014, the Parliament approved the **Criminal Code (Amendment) Act 2014**, which punishes ‘aggravated homosexuality’ with imprisonment for life. The Act came into effect on 9 October 2014 and includes the following article:

144A. Aggravated homosexuality*[SERIAL OFFENDER]*

“(1) A person commits the offence of aggravated homosexuality where the –

- (a) person against whom the offence is committed is below the age of eighteen years;
- (b) offender is a person living with HIV;
- (c) offender is a parent or guardian of the person against whom the offence is committed;
- (d) offender is a person in authority over the person against whom the offence is committed;
- (e) victim of the offence is a person with disability;
- (f) offender is a serial offender; or
- (g) offender applies, administers or causes to use by any man or woman any drug, matter this with intent to stupefy or overpower him or her, so as to enable any person to have unlawful carnal connection with any person of same sex.

(2) A person who commits the offence of aggravated homosexuality is liable on conviction to imprisonment for life.”

Although The Gambia received and rejected (‘noted’) 12 recommendations regarding decriminalisation and non-discrimination based on SOGI at its 2nd cycle UPR process in October 2014, the State made no reference to this issue. Gambia’s 3rd UPR will be in April 2019.

In February 2015, the Committee on Rights of the Child **entreated** (at para. 29) The Gambia to, “[e]nsure that children who belong to LGBTI groups and children from LGBTI families are not subjected to any form of discrimination, and repeal the legal provisions criminalizing homosexuality”.

In March 2015, the Committee on Economic Social and Cultural Rights (CESCR) **recommended** (para.12) that The Gambia adopt non-discrimination legislation in line with its obligations under the Treaty (Art. 2(2)), and in line with its general Comment 20. It also urged the State to repeal or amend all legislation that could “result in discrimination, prosecution and punishment” to people based on SOGI, and to “take all the necessary steps to combat and prevent discrimination” for LGBT people.

In July 2015, the **CEDAW** Committee urged “... the State party to repeal the provisions of the Criminal Code on “unnatural offences” and “aggravated homosexuality”, end the arbitrary detention of lesbians and provide them with effective protection from violence and discrimination and provide appropriate training to law enforcement officials”.

In its significant report on The Gambia (February 2016), Human Rights Watch **observes** that section 144A ‘Aggravated homosexuality’, “is taken literally verbatim from section three of Uganda’s **Anti-Homosexuality Act**, which was later overturned by Uganda’s Constitutional Court in August 2014 on technical grounds”. It is **also clear** that The Gambia is increasingly embracing Islamic law in its governance practices, which will lead to further erasure of the rights of sexually diverse people in a country where they are **already** vilified, suspected and targeted in a climate of political unsteadiness.

GHANA

Criminal Code, 1960 (Act 29), as amended to 2003.

Section 99. Evidence of Carnal Knowledge.

“Whenever, upon the trial of any person for an offence punishable under this Code, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge shall be deemed complete upon proof of the least degree of penetration.”

Section 104. Unnatural Carnal Knowledge

[UNNATURAL CARNAL KNOWLEDGE]

“(1) Whoever has unnatural carnal knowledge—

- (a) of any person of the age of sixteen years or over without his consent shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than five years and not more than twenty-five years; or
- (b) of any person of sixteen years or over with his consent is guilty of a misdemeanour; or
- (c) of any animal is guilty of a misdemeanour.

(2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal.”

Article 296(4) of the Criminal Procedural Code

“A misdemeanour shall be liable to imprisonment for a term not exceeding three years.”

In December 2012, the Working Group on Ghana’s 2nd cycle UPR **reported** the State’s delegation as follows: “Concerning whether Ghana will end its policy of non-equal treatment of homosexuals and lesbian, gay, bisexual and transgender (LGBT) people in general (Germany) and how Ghana will apply the principle of non-discrimination in relation to the issue of homosexuality, (the Netherlands), the delegation emphasised that Ghana does not have a policy of non-equal treatment of its citizens. The Constitution entrenches the fundamental principles of non-discrimination and equality. It also guarantees the freedom of religion and the rights of persons to practise that religion. The Constitution also provides for the legislature to enact laws that further the social cohesion and economic development of the people”.

Although Section 104 of Act 29 is understood to apply to males only, there have been media reports of **mob attacks** on lesbians. Incidents of violence and responses to that violence have been **recorded** in Ghana, and the social hostility is described in an October 2015 **Shadow Report** to the UN Human Rights Committee (HRCee), while an overview of LGBT life in Ghana to early-2014 is **described** in Being LGBT in West Africa. Information to February 2016 is **contained** in the

UK Home Office's 'Country Information and Guidance Ghana: Sexual orientation and gender identity'. Fears of a 'backlash' following the Ghanaian Prime Minister's visit to Scotland in March 2016, where he was pressurised by activists, have been expressed.

In August 2016, the HRCee's [Concluding Observations](#) (paras. 43 and 44) expressed concern at the "discrimination, intimidation and harassment" directed at LGBT people, as well as at the State's laconic response that same sex sexual activity falls under Section 104. The HRCee recommended the law be revised and efforts to address discrimination be instituted.

GUINEA



Penal Code of 1988.

Article 325:

[ACT AGAINST NATURE]

"Any indecent act or act against nature committed with an individual of the same sex will be punished by six months to three years of imprisonment and a fine of 100,000 to 1,000,000 Guinean francs.

If the act was committed with a minor under 21 years of age, the maximum penalty must be pronounced.

If the act was consummated or attempted with violence, the guilty will suffer the penalty of imprisonment for period of 5 to 10 years".

The atmosphere within which nascent LGBT organising has been happening in the recent period is both **volatile and hostile**. Amnesty's 2015/2016 [report](#) on Guinea notes: "[a]t least three people were arrested because of their perceived sexual orientation. Two men were arrested on 22 April in Conakry. In May, the Tribunal of Mafanco sentenced them to three months' imprisonment".

In its 2nd cycle UPR in January 2015, Guinea 'noted' two recommendations from Italy and Argentina to remove discriminatory measures based on SOGI, including criminalisation. The State's delegation appeared not to have made any comment regarding SOGI.

KENYA



Penal Code (as amended by Act No. 5 of 2003).

Section 162

[AGAINST ORDER OF NATURE]

"Any person who:

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony

is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

(i) the offence was committed without the consent of the person who was carnally known; or

(ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act."

Section 163

[ATTEMPTED ACTS AGAINST THE ORDER OF NATURE]

"Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years."

Section 165**[SODOMY / GROSS INDECENCY]**

"Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years." Sodomy is prohibited as a common-law offence. It is defined as "unlawful and intentional sexual relationship through the anus between two human males".

On 24 April 2015, in *Gitari v Non-Governmental Organisations Co-ordination Board* the High Court of Kenya found that the State had violated Article 36 (freedom of association) of the newly (2010) *Constitution of Kenya*, by frustrating the process of registering the NGO, the National Gay & Lesbian Human Rights Commission (NGLHRC). The Court found that LGBTI people are a constituent part of the "every person" enumerated in Article 36, that the limitation of the current criminalising legislation refers to same-sex sexual acts and not one's sexual orientation *per se* (quoting *Kasha Jaqueline v Rolling Stone*, 2010, Uganda). It said it appears that, "the Board has acted in a manner that is both unconstitutional and unlawful, and amounts to an abuse of power", (para. 136) and also that the Board's reliance on its "own moral convictions as a basis for rejecting an application is outside the Board's mandate and a negation of its constitutional obligations" (para. 127), and cannot be used to deny others their constitutional rights.

As Jonah Chinga of the Gay and Lesbian Coalition of Kenya (GALCK) remarked in late-2015 "[d]espite ... barriers [such as homophobic remarks made by President Kenyatta, amongst others], Kenya has a somewhat exceptional position in the region and stands out as an East African country with a thriving LGBTQ movement. Unlike neighbouring countries, there are strong ongoing initiatives and growing activism". For example, see 'Research on the Lived Experiences of LBQ Women in Kenya' report produced by GALCK in February 2016.

It is notable that Kenya's first appearance at its 2nd cycle UPR was in January 2015, where according to the report of the Working Group, Chile and Poland recommended decriminalising "... consenting relationships between adults of the same sex", and both Denmark and Chile referred to enacting legislation combatting hatred, while France and Sweden referenced non-discrimination, and Brazil referenced freedom of association and expression "and rights of LGBT persons". The State responded that, "it had come through a long period of national dialogue on the new Constitution. Critical social issues were put to the various fora [...] particularly the use of criminal law in these cases. These issues were really divisive and the requisite political and social consensus on these issues was a working [sic] progress [...] On the rights of LGBT, not a single individual could confirm the application of the criminal law on the basis of his/her sexual orientation".

At paras. 21 and 22 of its *Concluding Observations* on Kenya in March 2016, the Committee on Economic, Social and Cultural Rights (CESCR) cites LGBTI, decriminalisation, discrimination, health, and stigmatisation. In April, the National Gay and Lesbian Human Rights Commission filed a case to challenge the law penalising same sex sexual relations, whilst making security provisions for staff. In June 2016, the Mombasa High Court ruled that forced anal examinations and forced HIV and Hepatitis B tests of men suspected of same sex sexual conduct, are constitutional. According to the National Gay and Lesbian Human Rights Commission (NGLHRC) the ruling sets a "devastating precedent" that allows suspicion of someone's sexual orientation as grounds for "stripping them of their dignity and their fundamental rights".

LIBERIA

Penal Law of 1976, §§ 14.74 & 50.7, IV Liberian Codes Revised tit. 26 (rev. ed. 1998).

Section 14.74. Voluntary sodomy.**[SODOMY]**

"A person who engages in deviate sexual intercourse under circumstance not stated in Section 14.72 or 14.73 has committed a first-degree misdemeanour."

Section 14.79. Definitions relating to sections on sexual crimes against the person

In this subchapter: "sexual intercourse" occurs upon penetration, however slight; ejaculation is not required; "deviate sexual intercourse" means sexual contact between human beings who are not husband and wife or living together as man and wife though not legally married, consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and vulva; "sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of arousing or gratifying sexual desire."

Section 50.7. Sentence to imprisonment for misdemeanour.

"A person who has been convicted of a misdemeanour may be sentenced to imprisonment for the following terms:
For a misdemeanour of the first degree, to a definite term of imprisonment to be fixed by the court at no more than one year;
For a misdemeanour of the second degree, to a definite term of imprisonment to be fixed by the court at no more than thirty days."

The forces motivating and resisting sexual and gender diversity in Liberia since 2011 are well described in a [country information note](#) by the UK Home Office (December 2015), and in [Rodenbough](#) (2014).

Liberia received 12 recommendations, three of which they accepted, regarding SOGI in their [2nd UPR review](#) in May 2015, concerning criminalisation, non-discrimination. Interestingly, Madagascar, another African Union (UN bloc) member State, made the recommendation to "condemn discrimination", and the US made a call to implement the terms of their new National Human Rights Action Plan, which is inclusive of LGBT people, while Italy's call for Liberia to "combat all forms of discrimination and abuse against LGBTI persons" were all accepted.

CEDAW made an [unusual call](#) (at para. 43) in its latest Concluding Observations in November 2015, recognising the actuality of lesbian lives in Liberia: "The Committee (...) also calls upon the State Party to adopt necessary legislative measures to ensure to protect the economic rights of women in *de facto* unions".

LIBYA


Penal Code of 1953 as amended by [Law 70 of 1976](#)**[ZINA]**

"Regarding the Establishment of the Hadd Penalty for Zina and Modifying Some of the Provisions of the Penal Law". The law of 1976 added a fourth paragraph to Articles 407 and 408 respectively that criminalises consensual same-sex behavior.

Article 407(4) of 1953**[ILLICIT SEXUAL INTERCOURSE]**

"Whoever has [illicit] sexual intercourse with another person with his consent shall be punished along with his partner with imprisonment for a period not exceeding 5 years".

Article 408(4) of 1953

"Whoever disgraced the honor of a person with his consent shall be punished along with his partner with imprisonment".

Article 421 of 1953**[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]**

"Anyone who commits an act of indecency in a public place will be liable to detention for up to one year and a fine of up to 50 Dinars. The same penalty will apply to anyone who offends public decency by the distribution of writings, pictures or other articles of an indecent nature, or who publicly exposes the same for sale".

SOGI issues appear not to have been bought up in recommendations to Libya in either of their 1st or 2nd UPR cycles (November 2010 or May 2015). However, ARC International, IGLHRC and ILGA made a [Joint Submission](#) in 2010, and Amnesty International [made](#) mention of SOGI. Again in 2015, Amnesty [repeated](#) its earlier mention, and a recently-formed (2014) online organisation of LGBT Libyan activists, Quzah, submitted a [report](#) on the current SOGIESC situation in Libya, demonstrating how LGBTI Libyans are forced to hide their identities and go without protection from discrimination.



Penal Code Cap. 7:01 Laws of Malawi.

Section 153. Unnatural offences

[AGAINST THE ORDER OF NATURE]

“Anyone who –

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of any animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.”

Section 154. Attempt to commit unnatural offences

[ATTEMPTED UNNATURAL OFFENCE]

“Any person who attempts to commit any of the offences specified in the last preceding section shall be guilty of a felony and shall be liable to imprisonment for seven years, with or without corporal punishment.”

Section 156 Indecent practices between males

[GROSS INDECENCY - MALE]

“Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.”

In December 2010, the Parliament passed a bill amending the Penal Code of Malawi. In late January 2011, President Bingu Wa Mutharika assented to the bill, thus completing its enactment into law.

The new Section 137A:

[GROSS INDECENCY - FEMALE]

captioned “Indecent practices between females” provides that any female person who, whether in public or private, commits “any act of gross indecency with another female” shall be guilty of an offence and liable to a prison term of five years. The term “gross indecency” remains undefined in this legislation.”

In the year following the introduction of Section 137A, which had **expanded** the reach of the law to women, the government introduced a suspension on arrests under the ‘Unnatural offences’ provisions. However, as widely **reported**, two men were arrested (filed under ‘sodomy’) in December 2015, which then led to a reaffirmation of the moratorium. In 2016, **arrests** were made under the Act, while acts of violence against LGBT have gone unaddressed by authorities.

While SOGI issues have got greater visibility in Malawi (for example decriminalisation is called for in the **National Strategic Plan** for HIV and AIDS.2015–2020), with strengthening advocacy from within the country, there has been an increasing political hostility by political and religious opposition. In this context, increasing attention from other States is reflected in the **appeals** to Malawi to regularise its legislation in line with its international law commitments.

In January 2016, the United Nations cautioned against a rising **backlash** in the country. Regarding the failure to prosecute a politician for blatant hate speech, the UN said “this case sends a dangerous message that inciting others to kill gay people is legitimate and will be tolerated by the authorities – in effect encouraging violent threats and attacks on the gay and lesbian community in Malawi”. At time of writing, this case, certified as a constitutional case, is **ongoing**. **76 Crimes reports** on a variety of developments in Malawi in this past year.

Of the 18 recommendations concerning SOGI that Malawi received in its 2nd UPR in May 2015, the State accepted two: the first agreeing to “take effective measures to protect” LGBTI persons from violence and to prosecute perpetrators (Austria), and the second guaranteeing “effective access” to health services (Honduras).

The Human Rights Committee that oversees the ICCPR **expressed** concern in 2014 that the newly-formed Human Rights Commission did not include SOGI within its mandate. It said Malawi “should review” its discrimination legislation to include SOGI, decriminalise same-sex sexual relations, implement a monitoring mechanism for violence directed at LGBTI people

and prosecute perpetrators, ensure public officials do not incite violence and should positively raise public awareness, and finally guarantee “effective access” to health services for LGBTI people.

In November 2015, the Committee on the Elimination of Discrimination against Women welcomed the adoption of the Gender Equality Act that prohibits discrimination, but **expressed** concern about the 2011 amendments to the Penal Code that “criminalizes same-sex relationships between women”, and it recommended that Malawi “Envisage decriminalizing sexual relationships between adult women” (paras. 10 and 11).

MAURITANIA



Penal Code of 1984 (Français).

Article 308.

[ACT AGAINST NATURE]

“Any adult Muslim man who commits an indecent act or an act against nature with an individual of his sex will face the penalty of death by public stoning. If it is a question of two women, they will be punished as prescribed in article 306, first paragraph” [Three months to two years imprisonment and a fine of 5,000 to 60,000 UM].

Both in its 1st UPR (November 2010) and in its 2nd UPR (November 2015) sessions, Mauritania was urged to remove criminalisation of same-sex sexual relations. Importantly, in both the interactive dialogue and in written recommendations in 2015, it **received** numerous calls to uncouple the death penalty from same-sex sexual behavior. The State addressed the issues of death penalty by mentioning (at para. 54) that the country “had observed a *de facto* moratorium” for the past 28 years, but did not commit to remove it from the statute. It appears that the issue of criminalizing same sex sexual relations was not addressed despite various recommendations. However, the delegation **indicated** a wish to have the OHCHR work with them in-country (para.16), and: “[t]he delegation emphasised that the Government had cooperated with all partners in developing an action plan against racial discrimination, xenophobia and intolerance and in drafting a national strategy for promoting social cohesion”.

MAURITIUS



Criminal Code of 1838.

Section 250. Sodomy and bestiality

[SODOMY]

“(1) Any person who is guilty of the crime of sodomy or bestiality shall be liable to penal servitude for a term not exceeding 5 years.”

In 2007, the Government introduced the **Sexual Offences Bill**, which *would delete the crime of sodomy (see Section 24) and set an equal age limit of 16 years for sexual acts (Sections 11 to 14).*

*However, the bill was never passed in the Parliament, and in 2013 the Government **announced** its decision (at para 17) to amend the Criminal Code instead, “in order to make better provisions for the criminalisation of various acts of sexual perversion” (this was later **clarified** (at para. 121) to refer to such acts as marital rape).*

*It its 2nd cycle UPR cycle in 2013, the State of Mauritius received three recommendations (Ireland, Australia and Canada) to decriminalise sodomy, but **responded** that further consultations on the matter were necessary.*

In the section “Personal and Professional Behaviour” of the 2015 “Code of Ethics for Public Officers”, non-discrimination on grounds of sexual orientation is **listed**. Following a **complaint** to the Equal Opportunities Commission of Mauritius in 2012, the ban on men who have sex with men giving blood was lifted in 2013.

MOROCCO



Penal Code of 26 November 1962.

Article 489*[UNNATURAL ACTS]*

“Any person who commits lewd or unnatural acts with an individual of the same sex shall be punished with a term of imprisonment of between six months and three years and a fine of 120 to 1,000 dirhams, unless the facts of the case constitute aggravating circumstances.”

Article 483*[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION- OBSCENITY]*

“[W]hoever commits an act of public indecency, whether by nudity or obscenity in his actions, shall be punished by imprisonment of one month to two years and a fine of 200 to 500 dirhams.”

Although there were no direct references to SOGI in Morocco's 2nd UPR sessions in October 2015, the USA made a recommendation to “Promptly approve the license applications for all civil society organisations that meet legal requirements, including those organisations advocating for minority populations” (para. 39)

The Committee on Economic, Social and Cultural Rights made specific SOGI **recommendations** in their Concluding Observations on Morocco in October 2015

In para. 14. The Committee said that “(d) Ensure that [...] homosexuals can enjoy the rights recognized in the Covenant, particularly access to employment, social services, health care and education”. In para. 15, “the Committee is concerned that the State party criminalizes consensual sexual relations between same-sex adults (art. 489 of the Criminal Code). The Committee expresses its concern about discrimination on grounds of sexual orientation and gender identity and about the stigmatisation and violence to which these persons are subjected”.

Numerous reports of arrests and police intimidation appeared in the recent period with a particularly **alarming** event recorded in Rabat, March 2016. In August 2016, in its **Concluding Observations**, the Human Rights Committee said “11. The Committee expresses its concern about the criminalization of homosexuality punishable by up to three years’ imprisonment and the arrests made on that basis. It is also concerned about allegations of incitement to hatred, discrimination and violence against persons on the grounds of their sexual orientation or gender identity (Arts.2, 9 and 26).”

NAMIBIA



Sodomy remains a crime in Namibia according to the Roman-Dutch common law. There is no codified sodomy provision in Namibia, although despite the fact that the provision has been **triggered** (see Ch. 4) extremely rarely its ‘chill factor’ has effect. Section 299 of the 2004 **Criminal Procedure Act** groups sodomy together with a list of other crimes for which police are authorised to make an arrest without a warrant or to use of deadly force in the course of that arrest.

The calls for legal congruence with the country’s 1990 Constitutional **principles** (Articles 8, 10 and 13 – dignity, equality and non-discrimination, and privacy) have been **repeatedly** echoed, as has consistency with its international law obligations. However, despite the fact that the country has accepted LGBT Ugandan asylum seekers in the last three years, there have been worrying **utterances** by political and religious representatives in Namibia, according to advocates.

At its 2nd UPR session in January 2016 the Namibian government rejected five recommendations for decriminalization, and accepted two to do with strengthening of institutional capacities to address violence, and the adoption of measures to combat violence. A Shadow Report by SALC and other groups pointed out that: “Namibia has also not yet extended

the grounds for non-discrimination in the Constitution. They remain quite restricted and do not include grounds such as sexual orientation or disability. The 1992 Labour Act included both sexual orientation and disability as a ground for non-discrimination, but sexual orientation was removed from the 2007 **Labour Act**.

The [Namibian] delegation **stated** that, "LGBT persons were not victimized or persecuted for practicing their preferred sexual orientation. Article 13 of the Constitution protects the right to privacy. No person is requested to disclose his or her preferred sexual orientation in any official Government form or document and no person can be refused access to public or private services based on their preference. The laws do not make provision for marriage between same sex adults."

In April 2016 in its **Concluding Observations** on Namibia, the Human Rights Committee that oversees the ICCPR made substantial recommendations regarding non-discrimination policy and law in key areas, awareness-raising, police ill-treatment, and *refoulement* of refugees regarding SOGI. In its **Concluding Observations** on Namibia in April 2016, the Committee on Economic, Social and Cultural Rights (CESCR) recommends the Constitutional provision against discrimination be extended to enumerate sexual orientation (GI is not named), as well as HIV status. Comprehensive anti-discrimination legislation is also called for, as is the call for decriminalisation of sexual relations between consenting individuals of the same sex. In November 2016, the **Committee Against Torture** spoke (para. 30) of severe issues regarding detention, harassment, police brutality, sexual violence, stigmatisation, violence, access to justice, and criminalisation.

NIGERIA



Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria 1990.

Section 214

[AGAINST ORDER OF NATURE]

"Any person who-

- (1) has carnal knowledge of any person against the order of nature; or
- (2) has carnal knowledge of an animal; or
- (3) permits a male person to have carnal knowledge of him or her against the order of nature;

is guilty of a felony, and is liable to imprisonment for fourteen years."

Section 215

[ATTEMPTED CARNAL KNOWLEDGE]

"Any person who attempts to commit any of the offences defined in the last preceding section is guilty of a felony, and is liable to imprisonment for seven years. The offender cannot be arrested without warrant."

Section 217

[GROSS INDECENCY]

"Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for three years. The offender cannot be arrested without warrant."

Note that several Northern Nigerian states have adopted Islamic Sharia laws, criminalising sexual activities between persons of the same sex. The maximum penalty for such acts between men is death penalty, while the maximum penalty for such acts between women is a whipping and/or imprisonment. As **scholarship** shows (see p. 60) these laws **differ** from the federal law, as most of these prohibit also sexual relations between women. The states which have **adopted** such laws are: Bauchi (the year 2001), Borno (2000), Gombe (2001), Jigawa (2000), Kaduna (2001), Kano (2000), Katsina (2000), Kebbi (2000), Niger (2000), Sokoto (2000), Yobe (2001) and Zamfara (2000).

The Same-Sex Marriage (Prohibition) Act

[LAWS LIMITING SOGI PUBLIC EXPRESSION]

Passed on 17 December 2013, by the Senate and the House of Representatives and signed by the President on 7 January 2014.

- “§1. (1) A marriage contract or civil union entered into between persons of same sex:
 (a) is prohibited in Nigeria; and
 (b) shall not be recognised as entitled to the benefits of a valid marriage.
 (2) A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there-from by virtue of the certificate shall not be enforced by any court of law.
- §2. (1) A marriage contract or civil union entered into between persons of same sex shall not be solemnised in a church, mosque or any other place of worship of Nigeria.
 (2) No certificate issued to persons of same sex in a marriage or civil union shall be valid in Nigeria.
- §3. Only a marriage contracted between a man and a woman shall be recognised as valid in Nigeria.
- §4. (1) The registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited.
 (2) The public show of same sex amorous relationship directly or indirectly is prohibited.
- §5. (1) A person who enter into a same-sex marriage contract or civil union commit an offence and are each liable on conviction to a term of 14 years in prison.
 (2) A person who registers, operates or participates in gay clubs, societies and organisations or directly or indirectly makes public show of same-sex amorous relationship in Nigeria commits an offence and shall each be liable on conviction to a term of 10 years in prison.
 (3) A person or group of persons who administers, witnesses, abets or aides the solemnisation of same-sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years of imprisonment.”

In 2011, 2012 and in 2007, the Special Rapporteur on the rights to freedom of peaceful assembly and of association highlighted human rights violations, torture and other cruel, inhuman or degrading treatment or punishment, and the Special Representative of the Secretary-General on the situation human rights defenders, issued a Joint Statement on the [then] proposed prohibition in a 2007 Bill outlawing same-sex marriage.

Regarding Nigeria's responses to its international human rights law obligations in United Nations fora regarding SOGI, the country offered 'no response' to its 1st cycle Universal Periodic Review recommendations in 2009 to decriminalise and to withdraw its prohibition of same-sex marriage. In its 2nd cycle in October 2013, the Government rejected all 12 LGBTI-related recommendations to do with decriminalisation, discrimination, international law obligations and the release of individuals imprisoned because of their sexual practice.

An overview of the country situation to late-2015 in Nigeria was produced in November 2015, and a discussion of the 2014 legislation is provided by Rudman. Kaleidoscope Trust's *Speaking Out* report (at 22) provides an insightful snapshot of the socio-political context in which SOGI issues are being responded to currently. In a very rare case of accountability, in March 2016, the Federal High Court accepted evidence of violence, humiliation, and attempted extortion, eliciting a monetary award and public apology by the police force of Abuja against a well-known HIV activist.

In May 2016, TIERS published a review of the previous year regarding human rights violations against LGBTI people in Nigeria, recording at least 152 violations against 232 persons. In January 2017, survey results concerning the current life situations of LGBT Nigerians were published, illustrating the great pressures that LGBT Nigerians live under whilst going about daily lives.

SENEGAL



Penal Code of 1965.

Article 319(3)

[UNNATURAL ACT]

“Without prejudice to the more serious penalties provided for in the preceding paragraphs or by articles 320 and 321 of this Code, whoever will have committed an improper or unnatural act with a person of the same sex will be punished by imprisonment of between one and five years and by a fine of 100,000 to 1,500,000 francs. If the act was committed with a person below the age of 21, the maximum penalty will always be applied.”

On 24 December 2015, 11 men were **arrested** on suspicion of offenses under Section 319. The court released them four days later, but their faces and identities had been shared on social media, stirring huge public homophobia. The **backlash** to their release was led by the Islamic organisation, Jamra. Around 90% of the population is estimated to be Muslim (Sufi), but Senegal borders with Northern Nigeria where Boko Haram are active, and its neighbor, Gambia, recently declared itself an Islamic state.

In its 2nd cycle UPR cycle in October 2013, the Government of Senegal received 13 SOGI recommendations, seven of them (from Belgium, Greece, Germany, Ireland, Netherlands, Switzerland and Mexico) to repeal the above-mentioned article. The Government **rejected** them and argued that Article 319 must be interpreted as a punishment for “unnatural acts committed in public”, and that nobody has been imprisoned for same-sex sexual activity in the country.

In March 2016, in the context of discussions around Constitutional reform, the President of Senegal was **unequivocal** that the law penalising same sex sexual relations will never be repealed under his tenure. Later in March, campus **violence** broke out concerning a young gay man.

SIERRA LEONE



Offences against the Person Act 1861.

[BUGGERY]

Section 61

“Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than ten years.”

Both the *Being LGBT in West Africa report* (at 63) and Kaleidoscope Trust’s *Speaking Out* (at 24) describe very hostile socio-political environments in Sierra Leone.

In April 2014, the Human Rights Committee made a strong clear **statement** to Sierra Leone in its first Concluding Observations for that State under the ICCPR: “The State party should review its Constitution and legislation to ensure that discrimination on the grounds of sexual orientation and gender identity is prohibited, including by decriminalizing sexual relations between consenting adults of the same sex, in order to bring its legislation into line with the Covenant. The State party should also take the necessary steps to put an end to the social stigmatisation of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity”.

In its 2nd UPR in January 2016 six States made recommendations to Sierra Leone (three Latin American, three European). Four of these **urged** the State to repeal the 1861 Act (decriminalise), while five contain language urging non-discrimination or anti-stigmatisation initiatives. The Sierra Leone delegation ‘noted’ (functionally rejected) all six recommendations.

SOMALIA



Penal Code, Legislative Decree No. 5/1962.

Article 409. Homosexuality

[INTERCOURSE WITH A PERSON OF THE SAME SEX]

“Whoever has carnal intercourse with a person of the same sex shall be punished, where the act does not constitute a more serious crime, with imprisonment from three months to three years. Where the act committed is an act of lust different from carnal intercourse, the punishment imposed shall be reduced by one-third.”

Article 410. Security Measures

"A security measure may be added to a sentence for crimes referred to in Articles 407, 408, and 409." (Unofficial Translation)

Article 400

Under the heading of sexual violence, specifies increased punishment when such violence is done to a person of the same sex in the context of "against nature".

Article 406

[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]

"Whoever, in a public place or a place open to the public, incites anyone to lewd acts, even in an indirect manner, shall be punished, where the act does not constitute a more serious offence, with imprisonment up to one year or with fine up to Sh.So. 2,000."

The political situation in Somalia has been complicated since the fall of the dictator Mohamed Siad Barre in 1991, and the appropriate enforcement of the national Penal Code is **questionable**. However, Somaliland in the north has declared itself independent, and it still **applies** the Penal Code.

However, further south and central in the country, as **recorded** in Christman's 2016 report, "Al-Shabaab's beliefs stem from a Salafi-Wahhabi strand of Sunni Islam (an ultra conservative movement within Sunni Islam). They enforce a strict interpretation of Shariah law. Shariah law explicitly forbids homosexuality - the punishment for those 'found guilty' is at a judge's discretion, and may be punished by death".

Writing in 2014, the Somali artist and writer Diriye Osman, now resident in the UK, **says** to come out in Somalia one must be prepared for, "...physical abuse, ceaseless harassment, imprisonment or death". Osman's own family threatened him with violence upon learning that he is gay. In early 2017, it is **reported** that al Shabaab (a militant group allied to al-Qaeda) murdered two individuals on account of their sexual orientation.

In its 2nd UPR in early-2016, Somalia appears to have received only one recommendation (Canada) regarding SOGI: "Address widespread impunity—including for attacks against journalists, civil society and human rights defenders, women and LGBTI persons—by conducting timely and impartial investigations, investigating threats of violence, and prosecuting perpetrators". The State 'noted' this recommendation, and no other comment was recorded in the Working Group's **report**.

SOUTH SUDAN



Penal Code Act No. 9 of 2008, § 248, 1(1) Acts Supplement to the Southern Sudan Gazette (Feb. 10, 2009).

Section 248. Unnatural Offences

[AGAINST THE ORDER OF NATURE]

"(1) Whoever, has carnal intercourse against the order of nature with any person and whoever allows any person to have such intercourse with him or her commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding ten years and may also be liable to a fine. [...]"

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Section 151. Indecent Acts

[GROSS INDECENCY]

"Whoever commits an act of gross indecency upon the person of another person or any sexual act which does not amount to Zina or Sodomy shall be punished with not more than forty lashes and shall also be liable for imprisonment for a term which may not exceed one year or fine."

157 Qadhf (Casting Accusation of In chastity)

[QADHF]

"(1) Whoever imputes to any honourable living or dead person by express words, implicitly, by writing or indicative signs accusation of Zina or Sodomy or illegitimacy is said to commit Qadhf.

(2) A person is said to be honourable (Chaste) if he has not been convicted for Zina, Sodomy, Rape, Incest or Practising Prostitution.

(3) Whoever commits Qadhf shall be punished with flogging eighty lashes."

South Sudan achieved its independence from Sudan on 9 July 2011, three months after Sudan's 1st cycle UPR. Therefore, South Sudan did not in fact get an independent first review. At the 2nd cycle UPR, South Sudan's first review was **reported** on in November 2016. It appears that no civil society organisations raised SOGI issues in their submissions to South Sudan, and only Uruguay made a recommendation (128.33) to decriminalise same sex sexual relations between consenting adults. In its **responses**, the State indicated that Uruguay's and other recommendations were "in conflict with the national laws, government structures, policies or customs".

SUDAN

Penal Code 1991 (Act No. 8 1991).

Section 148. Sodomy

[SODOMY]

- "(1) Any man who inserts his penis or its equivalent into a woman's or a man's anus or permitted another man to insert his penis or its equivalent in his anus is said to have committed Sodomy.
- (2) (a) Whoever commits Sodomy shall be punished with flogging one hundred lashes and he shall also be liable to five years imprisonment.
- (b) If the offender is convicted for the second time he shall be punished with flogging one hundred lashes and imprisonment for a term which may not exceed five years.
- (c) If the offender is convicted for the third time he shall be punished with death or life imprisonment."

Section 151. Indecent Acts

[GROSS INDECENCY]

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- (3) Whoever commits Qadhf shall be punished with flogging eighty lashes."

In its 1st cycle UPR in 2011, the State made no mention of the civil society submissions (JS 5, JS 7 and JS 11) that were **available** to it that referenced sexual orientation or gender identity. In its 2nd cycle review in May 2016, Sudan '**noted**' (declined to accept) two recommendations given by Honduras ("Adopt measures in the legislative and political spheres, including appropriate budget allocation, to guarantee, prevent and eradicate discrimination on religious grounds, ethnic composition, gender or sexual orientation"), and Chile ("Push forward for the elimination of discriminatory provisions affecting lesbian, gay, bisexual, transgender and intersex persons"). In early-2017, an insightful short **video** on LGBT life in Sudan was released, illustrating an underlying brutality in social attitudes towards sexual and gender diversity.

SWAZILAND

Same-sex sexual relations are a **common law offence** in Swaziland, under which there have been **convictions**. There has been a considerable lack of clarity whether lesbian sexual activity is outlawed, and by **analysis** to date it appears not to be, although violence against gay and lesbian persons is **evident**.

In its 1st cycle UPR review in 2011, the Government clearly **stated** its position on the matter of decriminalisation of same-sex sexual relations by rejecting five UPR recommendations (Spain, USA, Portugal). However, Swaziland did **accept** two

further recommendations to, “[i]mplement measures to prevent violence against the LGBT community, through training and advocacy campaigns” (USA) and to ensure access to health without discrimination based on SOGI (Portugal).

There is no mention of sexual orientation or SOGI in the State’s report to its voluntary Mid-term Implementation Assessment (MIA) in early-2015. In their commentary on the Government’s activity in relation to recommendations they accepted at the UPR in 2011, Lawyers for Human Rights in Swaziland (LHRS) explain the State’s non-action as being based on the homophobia inherent in indigenous tradition in the country, and they observe “[h]omosexuality is not a priority for Swaziland at the moment it seems”. A 2015 report (at p.26) suggests that homophobic violence is on the rise in the country. In 2016, a ‘gay group’ was set up to create a support network and help counter stigmatisation.

In its 2nd cycle UPR review in May 2016, Swaziland received three recommendations, but accepted only two of them: “Prohibit discrimination on the basis of sexual orientation and gender identity, particularly concerning the enjoyment of the right to health” (Slovenia) and “Ensure and guarantee non-discriminatory access to health services, education, justice and employment for all persons, irrespective of their actual or perceived sexual orientation or gender identity” (Spain). However, it again rejected a recommendation to decriminalise “same sex relations”, also from Slovenia.

TANZANIA



(Zanzibar)



Penal Code of 1945 (as amended by the **Sexual Offences Special Provisions Act, 1998**).

Chapter XV: Offences Against Morality

Section 154. Unnatural offences

[AGAINST THE ORDER OF NATURE]

“(1) Any person who—

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment.”

Section 155. Attempt to commit unnatural offences

[ATTEMPTED UNNATURAL OFFENCE]

“Any person who attempts to commit any of the offences specified under section 154 commits an offence and shall on conviction be sentenced to imprisonment for a term of not less than twenty years.”

Section 157. Gross indecency

[GROSS INDECENCY]

“Any male person who, whether in public or private, commits any act of gross indecency with another male person or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person, with himself or with another male person, whether in public or private, commits an offence and is liable to imprisonment for five years.”

Section 138A. Gross indecency

[GROSS INDECENCY]

“Any person who, in public or private commits, or is party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, commits an offence and is liable on conviction to imprisonment for a term of not less than one year and not exceeding five years or to a fine not less than one hundred thousand shillings and not exceeding three hundred thousand shillings; save that where the offence is committed by a person of eighteen years of age or more in respect of any person under eighteen years of age, a pupil of a primary school or a student of a secondary school the offender shall be liable on conviction to imprisonment for a term not less than ten years, with corporal punishment, and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for any injuries caused to that person.”

The Penal Decree (Amendment) Act, 2004 of Zanzibar

Section 145:

[LESBIANISM]

"Any woman who commits an act of lesbianism with another woman whether taking an active or passive role shall be guilty of an offence and liable on conviction to a term not exceeding five years or to a fine not exceeding 500,000 shillings".

Tanzania 'noted' three recommendations to decriminalise and provide equal opportunity legislation across its civil code in its 1st cycle UPR in 2011. Interestingly, although there were no recommendations for same-sex marriage given, in its responses to recommendations the delegation for Tanzania mentioned, "Tanzania had no law on same-sex marriage, as the practice of homosexuality went against its traditional, cultural and religious rights. Homosexuality was illegal and punishable by law".

At its 2nd cycle UPR in May 2016, Tanzania received six recommendations regarding decriminalisation, non-discrimination and access to justice, health and rights to assembly and expression. Further, Canada called for the implementation of Tanzania's National Human Rights Action Plan (2013-2017) and for the State to publicly call for an end to attacks. The delegation 'noted' (functionally rejected) all recommendations.

The Concluding Observations of the Committee for the Rights of the Child in March 2015, at Tanzania's 3rd review, overtly specified sexual orientation when the CRC spoke of being, "... concerned about reports that attitudes towards the sexual orientation of some HIV-infected children prevent these children from seeking and receiving proper HIV services and community health services (para 56). It thus recommended, *inter alia*, that Tanzania "(d) Ensure access to proper HIV services and community health services for all children, regardless of their sexual orientation, throughout the territory of the State party; and (e) Engage in public-education campaigns to combat discriminatory attitudes towards children on the grounds of their sexual orientation".

The Human Dignity Trust records a number of arrests made in recent years. The harsh legal and social situation of LGBT people in Tanzania in 2015/2016 is captured in a 2016 report 'The Other Tanzania' produced by the East African Sexual Health and Rights Initiative. Reports in late-2016 and early-2017 suggest an increased State-representative hostility, with raids on HIV organisations for 'promotion' activities, and specific targeting of [gay] male sex workers. LGBT people have had to conceal their identities under the pressure of the law, thereby few voices have been able to advocate. But the marked escalation of political attention regarding SOGI, and a severe and dangerous crackdown on activities are currently intensifying in Tanzania.

TOGO



Penal Code of 13 August 1980 (revised April 2000)

Article 88

[CRIMES AGAINST NATURE]

"Impudent acts or crimes against nature with an individual of the same sex are punished with imprisonment from one to three years and 100,000-500,000 franc in fine".

The socio-political environment for discourse on SOGI in Togo has been challenging over the past number of years, while there is some organising and activity around SOGI. Further, police are known to crack down on the vulnerable LGBT community at certain times, and according to a recent article (at 66), "... the biggest threat to the Togo LGBT community is the church and religious leaders. The Catholic church is very powerful there, strongly influencing moral, political and other issues".

Togo's 1st cycle UPR was in October 2011, where the State received five recommendations relating to sexual orientation. It 'noted' all of them. However, in its response to the recommendations, the delegation said, "Togo was not prepared to

legislate on the question of homosexuality, given that homosexuals were not subject to any form of discrimination. Such legislation might in fact be counterproductive, given the attitude of the population". It did not address the recommendation by Spain to "... launch public awareness-raising campaigns on this issue".

At Togo's 2nd UPR in November 2016, Australia, Argentina, Brazil, Mexico, Spain, Slovenia, France and Belgium all made **recommendations** to decriminalise same sex sexual activity. Slovenia and Argentina also made recommendation regarding discrimination, and Uruguay called for Togo to "[i]nvestigate all allegations of attacks and arbitrary detentions of LGBTI persons and bring the perpetrators to justice". The Netherlands noted restrictions on the right to peaceful assembly, especially for women and those advocating for LGBTI rights, and the excessive use of force on demonstrators. At time of writing, the State's response is pending, but without evidence of a positive alteration in attitude to date.

TUNISIA



Penal Code of 1913 (as modified)

Article 230.

[SODOMY]

"The sodomy, that is not covered by any of the other previous articles, is punished with imprisonment for three years. (Unofficial translation) [The Arabic version of the text verifies that sexual acts between women are included within the restriction.]

Article 230 also states:

[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]

"Anyone who intentionally and publicly promotes "indecency" is punishable by imprisonment for six months and subject to a fine of 48 dinars (about US \$30)."

Despite ardent opposition following its formation as a NGO in June 2015, the Tunisian organisation SHAMS (Sun) managed to get NGO accreditation as the deadline for complaint had expired in May 2015. However, the organisation was court-ordered to **suspend** its activities for 30 days in early-January 2016.

SHAMS came to prominence around its December 2015 demonstrations **centered** on a young gay Tunisian man arrested in September 2015 who had been jailed after undergoing a **forced anal exam** to establish his sexual orientation. On Human Rights Day 2015 (10 December), six students were each given three years jail time under Article 230, but following an Appeals Court **ruling** in early-March 2016, their sentences were reduced to time already served. It is reported that one of these students refused to undergo a forced anal examination, and was subsequently **tortured**. Similar **violations** have since been reported, such as the **arrest** of two young men in Sousse in December 2016 and their **conviction** in early 2017.

Tunisia's last session at the UPR was in May 2012, where it **received** (at para. 40) three recommendations to decriminalise same-sex sexual relationships and repeal the Article 230. It rejected all these recommendations, but did give the somewhat positive response that, "Regarding the decriminalization of homosexuality, Tunisia stated that it would be possible to conduct an objective and transparent national dialogue on the subject. However, it was not ready at this stage to adopt a decision". Tunisia's 3rd UPR commences in May 2017.

In its **Concluding Observations** on Tunisia in October 2016, the Committee on Economic, Social and Cultural Rights (CESCR) recommends that the State immediately repeal article 230 of the Penal Code, and train law enforcement officials to respect the diversity of sexual orientation and gender identities (discussion had been raised around freedom of expression regarding SOGI). The Committee Against Torture's **Concluding Observations** of November 2016 also called for decriminalization but also stressed the States should "prohibit intrusive medical examinations" [to determine sexual activity] "that have no medical justification and cannot be performed with the free and informed consent of the persons subjected to them, who consequently will then be prosecuted".

UGANDA



Penal Code of 1950, VI Laws of Uganda, Cap. 120 (rev. ed. 2000).

Section 145. Unnatural offences

[AGAINST THE ORDER OF NATURE]

"Any person who—

- (a) has carnal knowledge of any person against the order of nature;
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life."

Section 146. Attempt to commit unnatural offences

[ATTEMPTED UNNATURAL OFFENCE]

"Any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years."

Section 148. Indecent practices:

[GROSS INDECENCY]

"Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years."

On 20 December 2013, the Parliament adopted the **Anti-Homosexuality Act**, which sought to punish same-sex sexual relations with imprisonment for life, and prohibited same-sex marriage and "homosexual propaganda". However, on 1 August 2014, the Act was **annulled** by the Constitutional Court, which ruled that parliament lacked a required quorum when the law was approved, thereby retaining the previous 1950 Penal Code.

On 29 October 2014, members of Uganda's ruling party circulated a draft of a **new bill** entitled, "The Prohibition of Promotion of Unnatural Sexual Practices Bill", which was intended to replace the annulled 2013 Act by categorizing same-sex sexual acts alongside pedophilia, bestiality and other heinous acts. The Human Rights Awareness and Promotion Forum **sought** a ruling from the East African Court of Justice in February 2015, to clarify that laws such as the Ugandan Anti-homosexuality Act, are unacceptable and violate human rights. That Court **found** that because the law was not enacted, the case was moot, but under a public interest exception the court did not find the [government] evidence sufficient to "... establish the degree of public importance attached to the practice of homosexuality in Uganda...".

In July 2015, the Uganda Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation **published** a detailed report on violations based on SOGI in 2014 with targeted recommendations, and in September 2016 produced a **report** outlining 171 recorded violations in the previous period.

The Human Dignity Trust **records** that in September 2015, the Prime Minister on being asked about the passage of the 2014 Bill stated: "That law [anti-homosexuality legislation] was not necessary, because we already have a law which was left by the British which deals with this issue". Convictions were on-going in 2015.

In March 2016, the **NGO Act** entered into force, representing "**legalised repression**" according to an article in the Third Issue of the *Human Rights Advocate* (download [here](#)), produced by the Human Rights Awareness and Promotion Forum (HRAPF) in December 2016.

Sexual Minorities Uganda (SMUG) launched an important **case** regarding the effects of the evangelical pastor Scott Lively anti-LGBT rhetoric, which is ongoing. In August 2016, Pride week in Kampala was **violently upset** by police raids and **planning**.

Uganda has been directly addressed by various UN mandate-holders, amongst which the following are of relevance to the current legislation: criminal laws, human rights defenders, HIV/AIDS in relation to SOGI in 2010, criminal laws, hate crime

in 2010, hate crimes, death, human rights defenders in 2011, death and criminal laws in 2012, and human rights defenders in 2013. In July 2015, the Concluding Observations of the Committee on Economic, Social and Cultural Rights, identified (paras. 15 and 16) that the lack of anti-discrimination law called for Uganda to urgently take steps to amend the Penal Code to decriminalize consensual same-sex sexual conduct”, as well as to prevent discrimination against LGBTs [sic] and “bring perpetrators to justice”.

In October 2011, at its 1st UPR review, Uganda received 19 recommendations, only three of which it accepted (all to do with prosecution of individuals who perpetrate violence against LGBT people). The rest of the recommendations concerned existing and proposed new legislations. At Uganda’s 2nd UPR in November 2016, the Draft Report of the Working Group appears to contain 18 sexual orientation recommendations that the State received – at time of writing (March 2017) the Delegation has not yet delivered its responses. However, in its Interactive Dialogue it claimed that LGBTI people are not discriminated against and can petition any complaint like all citizens (para. 56).

In May 2016, the Committee overseeing the Convention of the Rights of People with Disabilities noted “the absence of concrete measures to prevent and eradicate discrimination against women and girls with disabilities... especially on the grounds of sexual orientation and gender identity.”

In light of the extreme repression visited on LGBTI people in Uganda, the universal principle of non-discrimination was evident in the ruling given in the High Court of Uganda in *Mukasa and Oyo*, where although acts of “carnal knowledge against the order of nature” were penalised, the sexual orientation of the plaintiffs was not at issue, but what was being adjudicated on was the police ill-treatment (search and seizure of property and physical abuse) of them based on that sexual orientation. Likewise, two years later in *Kasha Jacqueline, David Kato, and Onziema Patience v. Rolling Stone*, the question was about whether, in the heightened atmosphere around the proposed Anti-Homosexuality Bill (AHB) in Uganda, the constitutional rights of the plaintiffs had been breached, and not about “homosexuality *per se*”.

ZAMBIA



Penal Code Act (as amended by Act No. 15 of 2005).

Section 155. Unnatural offences

[AGAINST THE ORDER OF NATURE]

“Any person who-

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature;

commits a felony and liable, upon conviction, to imprisonment for a term not less than fifteen years and may be liable to imprisonment for life:

Provided that where a person-

- (i) has carnal knowledge of a child against the order of nature;
- (ii) causes a child to have carnal knowledge of an animal; or
- (iii) permits a male person to have carnal knowledge of a male or female child against the order of nature;

that person commits an offence and is liable, upon conviction, to imprisonment for not less than twenty-five years and may be liable to imprisonment for life.”

Section 156. Attempt to commit unnatural offences

[ATTEMPTED UNNATURAL OFFENCE]

“Any person who attempts to commit any of the offences specified in section one hundred and fifty-five commits a felony and is liable, upon conviction of not less than seven years but not exceeding fourteen years.”

Section 158. Indecent practices between persons of the same sex**[GROSS INDECENCY]**

"(1) Any male who, whether in public or private, commits any act of gross indecency with a male child or person, or procures a male child or person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.

(2) Any female who, whether in public or private, commits any act of gross indecency with a female child or person, or procures a female child or person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with himself or with another female child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.

(3) A child who, whether in public or private, commits any act of gross indecency with another child of the same sex or attempts to procure the commission of any such act by any person with the child's self or with another child or person of the same sex, whether in public or private, commits an offence and is liable, to such community service or counseling as the court may determine in the best interests of the child."

Despite having received 11 recommendations – only one which was accepted (regarding "impartial investigations" on attacks against LGBT people) – Zambia made no mention of sexual orientation issues in its responses to the recommendations at its 2nd cycle UPR in December 2012. In reference to HIV/AIDS, it said that: "Protection and promotion of human rights was intended to be one of the guiding pillars in the construction and implementation of the new national HIV and AIDS policy", but otherwise directly or indirectly no mention of SOGI-related content was referenced. Zambia's 3rd cycle UPR will commence in November 2017.

In April 2013, having spoken on national television about the need to repeal Articles 155, 156 and 158 of the Penal Code (which are categorised under 'Offences Against Morality'), activist Paul Kasonkomona was arrested and stood before Lusaka Magistrates Court. On 25 February, the court acquitted him of charges of "soliciting for immoral purposes in a public place" (which is a Nuisance offence under Article 178(g) of the Penal Code), holding that the State has failed to present a sufficient case for the defence to answer resulting in the acquittal of Kasonkomona. The State appealed this ruling to the High Court. On 15 May 2015, Justice Mulongoti confirmed the acquittal of Kasonkomona and ruled that the State had not made out a case against Kasonkomona.

ZIMBABWE**Criminal Law (Codification and Reform) Act (Effective 8 July 2006).****Section 73. Sodomy****[SODOMY]**

"(1) Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both.

(2) Subject to subsection (3), both parties to the performance of an act referred to in subsection (1) may be charged with and convicted of sodomy.

(3) For the avoidance of doubt it is declared that the competent charge against a male person who performs anal sexual intercourse with or commits an indecent act upon a young male person—

(a) who is below the age of twelve years, shall be aggravated indecent assault or indecent assault, as the case may be; or

(b) who is of or above the age of twelve years but below the age of sixteen years and without the consent of such young male person, shall be aggravated indecent assault or indecent assault, as the case may be; or

(c) who is of or above the age of twelve years but below the age of sixteen years and with the consent of such young male person, shall be performing an indecent act with a young person."

In its 1st cycle UPR in October 2011, Zimbabwe **received** only one recommendation: to repeal the 2006 law “as soon as possible” (France) – this was, unsurprisingly, rejected and the State made no reference to SOGI in its final report or in its Interactive Dialogue. At Zimbabwe’s 2nd UPR session in November 2016, the State receives 12 SOGI-related recommendations, mostly to do with decriminalisation. At date of writing the State has not yet delivered its response to these, while the Report of the Working Group **records** no mention of sexual or gender minorities in the State’s Interactive Dialogue.

Despite the atmosphere of severe socio-political hostility and rhetoric directed at sexual and gender minorities over the past years, in October 2016 the country’s Labour Court (based in Bulawayo) accepted the plea of a youth worker who had been fired from the civil service because he had been arrested and paid a fine following a police raid on a party held by GALZ in 2014. This court **found** that the dismissal based on sexual orientation was unconstitutional (although sexual orientation is not expressly named in the Constitution document).

In April 2016 in its **Concluding Observations**, the UN Committee on the Rights of the Child expressed concern that national legislation “remains inconsistent with the non-discrimination of the Constitution”, regarding, *inter alia*, LGBTI children.

ANTIGUA AND BARBUDA

**Sexual Offences Act of 1995 (Act No. 9)****Article 12. Buggery****[BUGGERY]**

- “(1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment—
- (a) for life, if committed by an adult on a minor;
 - (b) for fifteen years, if committed by an adult on another adult;
 - (c) for five years, if committed by a minor.
- (2) In this section “buggery” means sexual intercourse per anum by a male person with a male person or by a male person with a female person.”

Article 15. Serious indecency**[SERIOUS INDECENCY]**

- “(1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment—
- (a) for ten years, if committed on or towards a minor under sixteen years of age;
 - (b) for five years, if committed on or towards a person sixteen years of age or more.
- (2) Subsection (1) does not apply to an act of serious indecency committed in private between—
- (a) a husband and his wife; or
 - (b) a male person and a female person each of whom is sixteen years of age or more;
- (3) An act of “serious indecency” is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of genital organ for the purpose of arousing or gratifying sexual desire.”

During its 1st cycle UPR in 2011, the delegation of Antigua and Barbuda **stated** (para. 35) that although “criminalisation was on the books... it was only in the very rare instances that the law had actually been enforced”. Citing “society’s leanings” and “public opinion” they spoke of the need for “extensive public consultation” and “the current pre-disposition of its people and their religious influences and indoctrination” [these two last arguments were added in its **final response** (para. 29)]. The State received eight **recommendations** directly related to SOGI, rejecting six (decriminalisation and public awareness campaigns on discrimination), while it accepted two (condemning SOGI-related acts of violence and instituting policies and initiatives addressing discrimination). The delegation **indicated** (para. 48) that “the government would continue its efforts on education and information to ensure that the public opinion would in time adopt the international standards”.

In its 2nd cycle UPR in 2016, the delegation **insisted** on the fact that “it would take time to sensitize Antiguan society, which was very moral and religious”, and that “if the Government were to force these issues, the reaction from society would be negative and regressive” (para. 53), while **acknowledging** criminalising laws “had to change at some point if the Government was serious about human rights” (para. 39). The State received 13 SOGI-related **recommendations**, accepting only one generalist recommendation regarding discrimination, while rejecting ten which specifically referred to decriminalisation and a further two on specific SOGI discrimination. Antigua and Barbuda’s next UPR cycle will take place in January 2021.

Antigua and Barbuda has joined all the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by the General Assembly of the Organisation of American States (OAS). Most notably, it has not joined other OAS Member States in adding footnotes in an attempt to limit or reject the content of these resolutions (see all **OAS-GA Resolutions** since 2008).

In 2011, the Antiguan Attorney General **openly supported** buggery laws. Media outlets (see **here** and **here**) quoted him stating: “There will be no change in the law on buggery in Antigua & Barbuda, at least not if I can help it. Being gay is morally wrong, and to be honest personally, I am still homophobic.” A **detailed report** of 2014 describes the legal and living conditions of “sexual minorities”, and a 2015 Kaleidoscope Trust report, *Speaking Out*, **illustrates** a very mixed landscape of strong societal and official homophobia, some official address (in terms of limited police training), and limited advocacy resources.

In May 2016, Minister of Social Transformation, Samantha Marshall, **defined** the buggery law as “antiquated,” and resolved to advance a decriminalisation recommendation to Cabinet. In September the government **issued a statement** that “[a]ll persons irrespective of sex, sexual orientation, or gender identity are entitled to enjoy in Antigua & Barbuda the protections provided for by our constitution and by international human right law”. This **public statement**—‘*Policy on Protection from violence and discrimination of persons of the LGBTI community*’—reminded the public of the State’s international law obligations. However, even after these statements, and in the aftermath of the decriminalisation of same-sex sexual acts between consenting adults in Belize, in August 2016, the Cabinet of Antigua and Barbuda **proclaimed** that “the buggery law will remain unchanged” in the country.

BARBADOS



Sexual Offences Act 1992, Chapter 154.

Section 9. Buggery

[BUGGERY]

“Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.”

Section 12. Serious indecency

[SERIOUS INDECENCY]

“(1) A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.

(2) A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.

(3) An act of “serious indecency” is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.”

At its 2nd cycle UPR in January 2013, Barbados received 13 SOGI-related **recommendations**. None of the recommendations that urged decriminalisation of same-sex sexual acts (7) were accepted. Barbados argued “because it is a democracy,” the Government “was hesitant to go against the wishes of its people” (para. 22). Furthermore, the delegation alleged that “prosecution [of same-sex sexual activity] could only occur if a minor was involved or a non-consenting adult”. Of the remaining recommendations, two related to discrimination were also rejected, and one accepted in part.

The three **recommendations** that were accepted urged the Government to protect “all human rights, including those LGBT [sic]”; to “protect the LGBT population from harassment, discrimination and violence”; and to provide “human rights education, including related to sexual orientation and gender identity, to all law enforcement officials.” Barbados’ next UPR cycle will take place in January 2018.

As a member of the General Assembly of the Organisation of American States (OAS), Barbados has joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by that body since 2008 (see all **OAS-GA Resolutions** since 2008). However, since 2013 Barbados has included footnotes to these annual resolutions in an attempt to limit or reject their content, alleging “a number of the issues and terms contained therein are neither reflected in its national law nor the subject of national consensus”.

The 2015 Inter-American Commission on Human Rights (IACHR) report on violence against LGBTI persons **states** that the so-called “gay panic” defence (defined as the attempt to justify the killing of a person by arguing that the violence was prompted by alleged same-sex sexual advances made by the victim) has been accepted by local courts in Barbados (see paras. 491, 494).

In May 2015, *76 Crimes* published an **article** by lawyer and HIV activist Maurice Tomlinson that provides incisive insight into how national and institutional dialogues on SOGI-related issues are developing in Barbados, as well as a description

of some recent institutional initiatives. A few months later, the Immigration and Refugee Board of Canada published an updated **report** on the legal and living situation of “sexual minorities” in Barbados, including social attitudes towards bisexuality (see also previous report **here**). In early-2016, during debate on the Domestic Violence Amendment Bill, the Minister of Education **declared** that the time has come for Barbadians “to stop turning a blind eye and accept the fact that gay relationships were now part of Barbadian culture”.

In May 2016, *Nation* newspaper—one of the most widely read newspapers in Barbados— **trivialised** the rape of a person who was either a gender non-conforming woman or transgender man and referred to the crime as “male medicine”. **B-GLAD**, a local LGBT civil society organisation, **condemned** the piece stating that it was a “perfect example” of the lack of value placed on LGBT lives and more specifically of the lives of masculine-expressive lesbians in Barbados. UN Women also **issued a statement** showing concern about the article. Massive public outcry forced the newspaper to **offer** an apology.

In early-2017, a **study** was published probing public views in Barbados, Guyana and Trinidad and Tobago regarding the usefulness of the anti-gay laws in: reflecting moral standards, stopping ‘the spread of homosexuality’, importance in terms of public health, and effectiveness in protecting young people from abuse.

DOMINICA

Sexual Offences Act 1998.

Section 14. Gross Indecency

[GROSS INDECENCY]

- “(1) Any person who commits an act of gross indecency with another person is guilty of an offence and liable on conviction to imprisonment for five years.
- (2) Subsection (1) does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent.
- (3) For the purposes of subsection (2)—
- an act shall be deemed not to have been committed in private if it is committed in a public place; and
 - a person shall be deemed not to consent to the commission of such an act if—
 - the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act;
 - the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person; or
 - that person is, and the other party to the act knows or has good reason to believe that the person is suffering from a mental disorder.
- (4) In this section “gross indecency” is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of genital organs for the purpose of arousing or gratifying sexual desire.”

Section 16. Buggery

[BUGGERY]

- “(1) A person who commits buggery is guilty of an offence and liable on conviction to imprisonment for—
- twenty-five years, if committed by an adult on a minor;
 - ten years, if committed by an adult on another adult; or
 - five years, if committed by a minor;
- and, if the Court thinks it fit, the Court may order that the convicted person be admitted to a psychiatric hospital for treatment.
- (2) Any person who attempts to commit the offence of buggery, or is guilty of an assault with the intent to commit the same is guilty of an offence and liable to imprisonment for four years and, if the Court thinks it fit, the Court may order that the convicted person be admitted to the psychiatric hospital for treatment.
- (3) In this section “buggery” means sexual intercourse per anum by a male person with a male person or by a male person with a female person.”

Dominica rejected all (7) the **recommendations** to repeal the above-mentioned articles that it received in its 1st cycle UPR in 2010. It also rejected a series of recommendations to address discrimination in relation to HIV, engage in sensitivity training with judiciary and security forces, and to employ the **Yogyakarta Principles** to guide such work. In its response, Dominica conceded (para.33) that the law is “discriminatory” and that there is a “certain element of discrimination in the society”. It also **stated** that its 2003 HIV/AIDS strategy was inclusive “regardless... of sexual persuasion” (para. 20).

Dominica’s 2nd cycle UPR in May 2014 generated 12 strong **recommendations** to decriminalise and strengthen anti-discrimination provisions within the country in relation to LGBT populations. The only mention of sexual orientation during the interactive dialogue was linked to HIV: a mere reiteration of the fact that its 2003 AIDS strategy did not discriminate on grounds of sexual orientation (para. 24). No other address was given to four very strong comments made about Dominica’s duties in regards to protection of human rights defenders doing SOGI-related work. Dominica’s next UPR cycle will take place in May 2019.

As a member of the General Assembly of the Organisation of American States (OAS), Dominica has joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by this body since 2008. In 2013, Dominica decided to introduce a joint footnote —together with Saint Vincent and the Grenadines and San Kitts and Nevis— stating that the delegations of these three countries were “unable to join consensus on the approval of [the] resolution” (see all **OAS-GA Resolutions** since 2008). Since 2014, Dominica has withdrawn from the list of countries inserting footnotes aiming to limit or reject the content of these resolutions.

The 2015 Inter-American Commission on Human Rights (IACHR) report on violence against LGBTI persons **states** that the so-called “gay panic” defence (defined as the attempt to justify the killing of a person by arguing that the violence was prompted by alleged same-sex sexual advances made by the victim) has been accepted by local courts in Dominica (paras. 491, 494).

In 2014, Minority Rights Dominica (MiRiDom) and the Sexual Rights Initiative, submitted a **report** for the country’s UPR examination, indicating that human rights defender groups in Dominica “are forced to operate underground because of fear that their members will be victimised”, and “those who are openly gay complain of acts of physical abuse, and are often victims of vandalism committed against their positions, as well as being ejected from house and home”. Moreover, Kaleidoscope Trust **reports** that the media climate in Dominica is not particularly hostile, probably due to a lack of knowledge about SOGI-related groups and issues. For its part, the 2015 US Dept. of State Report **indicates** that “societal and employment discrimination against persons due to their real or perceived sexual orientation or gender identity was common in the socially conservative society.” Additionally, social stigma was identified as a cause for the low levels of crime reporting among LGBTI victims.

In 2016, Senator Isaac Baptiste **spoke against** the criminalisation of buggery in Dominica. During his contribution to the Parliamentary debate on the introduction of a Bill to amend the Sexual Offences Act, Mr. Baptiste stated that “the continued criminalization of buggery as it is now provided for, to the extent that the court can subject that person to psychiatric observation and treatment, is not consistent with what is happening internationally”.

GRENADA

Criminal Code of 1987, as amended in 1993.

Article 431

[UNNATURAL CONNEXION]

“If any two persons are guilty of unnatural connexion, or if any person is guilty of an unnatural connexion with any animal, every such person shall be liable to imprisonment for ten years.”

At its 1st cycle UPR in May 2010, Grenada received five **recommendations** to decriminalise same-sex sexual relations, all of which it refused. However, it did note that the current law “could be viewed as discriminatory”, and with time “growing tolerance on the part of the people would help in addressing this issue”, which would have to be deliberated by the Cabinet. It was noted that there was no discrimination in the provision of health and other services in that regard (para. 26).

In January 2015, Grenada’s 2nd cycle UPR concluded. The State had received 16 **recommendations** that were SOGI-related, mostly concerning decriminalisation, but also non-discrimination in services and the protection of LGBT human rights defenders. Each of these were rejected (‘noted’), and in the interactive dialogue, the State explained that it had been looking at discrimination against LGBT people in the context of Constitutional provisions, but a platform of public consultations is now advised to consider legislative provisions regarding workplaces, as Constitutional ones may fail to adequately gain public support (para. 35). Grenada’s next UPR is in October 2019.

As a member of the General Assembly of the Organisation of American States (OAS), Grenada has joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by this body since 2008 (the list of all OAS-GA Resolutions since 2008, among other resources, is available [here](#)).

In October 2014 Groundation Grenada Directors **presented** at the National Consultation on Constitution Reform, proposing an expansion of the bill of rights of Grenada to include protections for LGBT People. In late-September 2015, a **three-day conference** was organised by the Organization of Eastern Caribbean States (OECS) around the possibility of using litigation to move the laws in the region. In October 2015, a **public hearing** was held at the Inter-American Commission on Human Rights (IACHR) at the request of **Groundation Grenada** and **GrenCHAP** on the subject of same-sex sexual relations and the law.

In October 2016, the Government **announced** that it would postpone the referendum for a new Constitution amid growing concerns raised about one of the bills to be voted, which was **said** to allow for recognition of gay relationships. Grenada’s Attorney General had to **clarify** that the Rights and Freedoms Bill would not introduce same sex marriage in the island.

GUYANA

Criminal Law (Offences) Act, 1983.

Section 352. Committing acts of gross indecency with male person

[GROSS INDECENCY]

“Any male person, who in public or private, commits, or is a party to the commission, or procures or attempts to procure the commission, by any male person, of an act of gross indecency with any other male person shall be guilty of misdemeanour and liable to imprisonment for two years.”

Section 353. Attempt to commit unnatural offences

[ATTEMPTED BUGGERY]

“Everyone who—

- (a) attempts to commit buggery; or
 - (b) assaults any person with the intention to commit buggery; or
 - (c) (c) being a male, indecently assaults any other male person,
- shall be guilty of felony and liable to imprisonment for ten years.”

Section 354. Buggery

[BUGGERY]

“Everyone who commits buggery, either with a human being or with any other living creature, shall be guilty of felony and liable to imprisonment for life.”

At its 1st cycle UPR in May 2010, Guyana received seven **recommendations** to decriminalise and include SOGI as a named ground for non-discrimination. In its responses the State said that no cases stemming from the law had come before the courts, and that “[c]hanges to laws required widespread consultation and a major change in attitude on the part of the

populace". The delegation also indicated that attempts to include the phrase "sexual orientation" in the anti-discrimination clause of the Constitution "had been met with widespread consternation and protest".

Guyana received 17 **recommendations** in its 2nd cycle UPR in January 2015, of which it accepted three: to strengthen protections, to ensure that hate crimes and discrimination based on sexual orientation or gender identity are vigorously investigated and appropriately prosecuted, and further review of legislative non-discrimination provisions relating to SOGI. All other recommendations had a call to decriminalise, and all 14 were rejected ('noted'). In its responses the Guyana delegation pointed out that prior to elections the Parliamentary Special Select Committee had a mandate to look at reviewing the legislation, but that process had ceased. It stressed there had been "unfettered freedom" in regards to freedom of expression for LGBT groups, and that the State did not discriminate based on sexual orientation, as provided by the Constitution.

As for UN Treaty Bodies, both the **CEDAW Committee**, in 2012 and the **CESCR** in 2015 have urged Guyana to decriminalise consensual adult same-sex relations. Both bodies have also expressed concern at the high levels of discrimination based on sexual orientation and gender identity. Additionally, in 2013, the **CRC** urged the State to ensure that its programmes address the situation of discrimination against children because of their sexual orientation and/or gender identity.

As one of the 35 Member States of the Organisation of American States (OAS) Guyana has subscribed to the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by the OAS General Assembly since 2008. However, in 2013 and 2014, Guyana requested the insertion of footnotes in an attempt to limit or reject the content of the resolutions approved in those two years respectively. In 2013 the Government **declared** it was "unable to join consensus" given the fact that several of the issues addressed in the Resolution were the subject of deliberation "by a special select Committee of the National Assembly". The exact same footnote was **inserted** in 2014. However, in 2016, Guyana withdrew from the list of countries requesting such "declarations" (see all **OAS-GA Resolutions** since 2008).

In late 2013, a **public hearing** on reports of discrimination and violence against children based on sexual orientation and gender identity in Guyana was held before the Inter-American Commission on Human Rights (IACHR). In 2015, **another public hearing** was held, focusing on access to social, economic and cultural rights (focus on the situation of LGBT people starts at minute 19.00).

Guyanese NGO Society Against Sexual Orientation Discrimination (SASOD) and the Sexual Rights Initiative (SRI) **submitted** a detailed shadow report to Guyana's 2nd cycle UPR that illustrates the main local challenges in terms of legal and societal bias and reports that "in a national survey 25% of Guyanese admitted to being homophobic while 18% approved of using violence against LGBT persons" (para. 8).

As **reported** in *76 Crimes* in January 2016, Prime Minister Granger has **said** that he is "prepared to respect the rights of any adult to indulge in any practice which is not harmful to others". Previously in 2015, he **noted** that his government would not allow religious imposition to trump the human rights of LGBT people in Guyana. A month earlier, the former Health Minister **had spoken** about Guyana showing leadership and repealing the archaic law, within the context of the United Nations Sustainable Development Goals (2015-2030).

Also in 2016, representatives of a human rights organisation **met** with the Ministry of Social Protection and recommended that the government extend workplace discrimination protection to include sexual orientation, gender identity and health status. More **recommendations** to decriminalise consensual same-sex relations came from the European Union and the British Government and from the Guyana's Country Coordinator for the **President's Emergency Plan For AIDS Relief** (PEPFAR), a United States governmental initiative to address the global HIV epidemic.

In early-2017, a **study** was published probing public views in Barbados, Guyana and Trinidad and Tobago regarding the usefulness of the anti-gay laws in: reflecting moral standards, stopping 'the spread of homosexuality', importance in terms of public health, and effectiveness in protecting young people from abuse.

**Offences Against the Person Act, 1864.****Article 76. Unnatural Crime****[BUGGERY]**

"Whosoever shall be convicted of the abominable crime of buggery committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years."

Article 77. Attempt**[ATTEMPTED BUGGERY]**

"Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour."

Article 78. Proof of Carnal Knowledge

"Whenever upon the trial of any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

Article 79. Outrages on Decency**[GROSS INDECENCY]**

"Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding 2 years, with or without hard labour."

In 2009, Jamaica introduced a new **Sexual Offences Act** which establishes the rules for the 'Sex Offender Register and Sex Offender Registry' at Sections 29 - 35, operative as of October 2011). Under this law, anyone convicted of a "specified offence" must be registered as a "sex offender" and comply with specific obligations. Articles 76, 77 and 79 of the Offences Against the Person Act (cited above) fall under the category of "specified offences" as per Article 2 of the law's First Schedule.

To provide law enforcement agencies with appropriate LGBT sensitisation training was the only **recommendation** accepted by Jamaica in its 1st cycle UPR in October 2010. All other 11 recommendations were rejected – calls for decriminalisation, non-discrimination and protection of LGBT human rights defenders. In its Final Report, the Working Group **recorded** the State's response: "Jamaica stressed that the issue of male homosexuality was one of great sensitivity in Jamaican society, in which cultural norms, values, religious and moral standards underlay a rejection of male homosexual behaviour by a large majority of Jamaicans; and that the Government was committed to ensuring that all citizens were protected from violence" (para. 32).

At its 2nd cycle UPR in May 2015, Jamaica received 18 **recommendations** from States, of which it accepted only three: all of which were to do with the investigation and prosecution of violence acts against LGBT people and those defending their rights. The rejected, or 'noted', recommendations were primarily to do with criminalisation, but also many to do with codifying non-discrimination provisions relevant to LGBT people. The State mentioned that "several initiatives had been put in place" in order to create better understanding of SOGI-related issues in Jamaica, giving the example of police sensitisation in regards to in-force education on human rights, diversity training and support to LGBT people in the reporting of crime.

The UN Treaty Bodies **HRCee** (2011, para. 8) and **CESCR** (2013, paras. 8, 9) urged Jamaica to repeal its buggery laws, to send a strong message that harassment, discrimination or violence against LGBT persons will not be tolerated, and to swiftly and effectively investigate, prosecute and sanction individuals for such acts. The **CRC** (2015) expressed concern about gaps in the overall data collection in Jamaica, in particular with respect to LGBT children (para. 16). In his **report on his mission to Jamaica** in 2010, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, touched upon the harsh living conditions of gay men deprived of their liberty.

As a member of the Organisation of American States (OAS), Jamaica is under the jurisdiction of the Inter-American Commission on Human Rights (IACHR). The IACHR has recently been monitoring the situation of human rights in Jamaica, dedicating a full chapter (chapter 6) to discrimination based on sexual orientation and gender identity in its [2012 Jamaica Country Report](#). In 2014 the Commission held two *ex officio* public hearings, one in [March](#) and another one in [October](#), to follow up on the Report. In both hearings, civil society organisations and the State submitted updated information with regard to the issues discussed in that 2012 Report.

At the General Assembly of the OAS, Jamaica joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by that body since 2008. However, since 2013, Jamaica has introduced footnotes to every resolution on the matter approved since then, in an attempt to limit or reject the content of these international instruments. The [footnote inserted in 2013](#) (fn. 3) reads: “The Government of Jamaica is unable to join the consensus on the approval of this resolution, given that the terminology of gender expression, as proposed, is ambiguous and has the potential to impose one value system over another. Furthermore, this term and other new terminologies used in the text, have not gained international acceptance nor are they defined in Jamaica’s domestic law.” The exact same footnote was [repeated in 2014](#) (fn. 6). However, in 2016 (there was no resolution in 2015), Jamaica slightly shifted the tone of its footnote and [declared](#): “The Government of Jamaica is fully committed to protecting the human rights of all its citizens including from any form of violence in accordance with the rule of law and the Jamaican Constitution. Jamaica, however expresses its reservation regarding terminologies such as gender identity and gender expression which are not defined in Jamaican law and have not gained international acceptance” (fn. 1).

Despite striking [reports](#) showing that up to 91% of Jamaicans believe lawmakers should make no attempt to repeal buggery laws, decriminalisation efforts are also being [channelled](#) through [strategic litigation](#) before local courts. The first [hearing](#) in this case was held in January 2016.

The human rights situation of LGBT people in Jamaica has been documented by several organizations: Kaleidoscope Trust (2015); Human Rights Watch (2014 and 2004); J-FLAG ([shadow report](#) for Jamaica’s 2nd UPR cycle; [shadow report](#) and [replies to LOIs](#)—together with other organisations—for the 2016 HRCee review). In 2016, J-FLAG also published a [study](#) showing how gays in Jamaica are exposed to increased levels of hate or rejection and how conversion “therapy” enjoys high levels of acceptance, especially among politicians and employers. After their [video report](#) on the “Gully Queens,” Vice [documented](#) the challenges on running a queer shelter in Jamaica. Another [report](#) focused on the experience of LGBT persons in Jamaica, how fleeing the country is a frequently considered alternative, and how these experiences jeopardise the country’s human, social and economic development. In fact, regarding the issue of asylum, [a gay Jamaican refugee](#) living in Canada is now working with [Rainbow Canada](#) to help other LGBT people flee persecution in Jamaica.

In terms of visibility, in 2016 a number of activities [were organised](#) in Kingston, in celebration of the Jamaica Pride. Other pride events also [took place](#) in the city of Montego Bay. During his visit to Jamaica, former President of the United States, Barack Obama, [openly supported](#) Angeline Jackson, a local activist fighting for LGBT equality and [against corrective rape](#) in Jamaica. In January 2017, the University of West Indies [organised](#) “Beyond Homophobia: Centring LGBT Experiences in the Caribbean,” the second conference on the subject matter.

With regard to statements by public officials, even though the Minister of Education [stated](#) that there was “no place” for school bullying based on sexual orientation in Jamaica, the head of the country’s Teachers’ Association (JTA) [said](#) he could not ask counsellors to assist LGBT students as long as same-sex sexual acts remain criminalised.

In January 2017, Jamaican cable companies [censored](#) the American docudrama series “When We Rise” (a US mini-series about rights recognition for LGBT people). Many other films and series have been banned in Jamaica, including an [advertisement](#) promoting love and respect for LGBT people. The Jamaican Court of Appeal has yet to rule on the [lawsuit](#) brought forward by Maurice Tomlison against two TV stations that refused to air the ad (see case factsheet [here](#)).

SAINT KITTS AND NEVIS

**Offences against the Person Act, 1990.**

Part XII – Unnatural Offences

Article 56. Sodomy and bestiality**[BUGGERY]**

“Any person who is convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labour.”

Article 57. Attempt to commit an infamous crime

“Any person who attempts to commit the said abominable crime, or is guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, commits a misdemeanour, and, on conviction, shall be liable to be imprisoned for a term not exceeding four years, with or without hard labour.”

Saint Kitts and Nevis did not accept any of the eight **recommendations** regarding decriminalisation and non-discrimination at its 1st cycle UPR in January 2011, the State delegation noted that it protects, not excludes, MSM in its HIV programming, and that despite the existence of the criminalising legislation, LGBT people enjoyed the same freedoms as everyone else in the “tolerant society” that is Saint Kitts and Nevis. It also asserted that LGBT persons did enjoy the same rights and privileges as everyone else, and no reports had been received about violence against LGBT people or exclusion from employment (para. 35).

At its 2nd UPR cycle in 2015, the State also received eight **recommendations** concerning the same issues: decriminalisation and non-discrimination. During the interactive dialogue, the delegation completely denied the existence of any formal or positive legal discrimination against persons based on their sexual orientation or gender identity in Saint Kitts and Nevis and reiterated that even though no laws prohibited such discrimination, the Government had received no reports of violence or discrimination on that basis (para. 16). The delegation added that the Ministry of Education had adopted the *Health and Family Life Education* (HFLE) core curriculum in schools, supported by UNICEF and that a “theme unit of that document addressed sexuality and sexual health, whereby students learned about sexuality in terms of the total expression of who they are as human beings.” Interestingly, the delegation indicated “it was envisaged that gaining an understanding about this critically important topic would prevent any discrimination against persons on the basis of their sexual orientation or sexual identity” (para. 87).

As a member of the General Assembly of the Organisation of American States (OAS), Saint Kitts and Nevis has joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by this body since 2008 (see all **OAS-GA Resolutions** since 2008). However, in 2013, Saint Kitts and Nevis joined Dominica and Saint Vincent and the Grenadines to insert a joint footnote stating that the delegations of these three countries were “unable to join consensus on the approval of this resolution” (fn. 2). It bears mentioning that Saint Kitts and Nevis withdrew from the list of countries that inserted further footnotes in 2014 and 2016 resolutions (there was no resolution in 2015).

In 2013, the Inter-American Commission on Human Rights (IACHR) **welcomed** the statement delivered by the Prime Minister of St. Kitts and Nevis, Denzil Douglas, at a press conference regarding discrimination, stigma and HIV. In fact, he **recommended** “having a very serious look” at laws that criminalise “those who are engaged in sex work for pay”, and “those who are considered to be homosexuals”. However, less optimistic press reports **indicated** that, despite giving pro-LGBT comments to international audiences, Douglas had done nothing to remove the laws while he was in office, and that he had even been caught on camera making homophobic statements.

In late-2015, a media outlet **spoke** to three gay men from St Kitts and Nevis who said that “violence and harassment against the LGBT community is common and that police do little to stop it”. The 2016, US Department of State Human Rights Report **indicates** that “negative societal attitudes towards the LGBTI community impeded the operation of LGBTI

organizations and the free association of LGBTI persons”. In fact, it has been reported that the country’s first LGBT organisation, the *St Kitts/Nevis Gay-Straight Alliance for Progress*, had its first meeting in January 2016. Moreover, the US DOS report explains that LGBT people are reluctant to report incidents of violence or abuse for fear of retribution or reprisal and an increase in threats of blackmail and fear of discrimination.

The publication *Speaking Out* offers a snapshot of some progress in the socio-political sphere through 2015 in this State, pointing out to trainings of State agents and statements by public officials (see page 37).

SAINT LUCIA



Criminal Code, No. 9 of 2004 (effective 1 January 2005).

Section 132. Gross Indecency

[GROSS INDECENCY]

“(1) Any person who commits an act of gross indecency with another person commits an offence and is liable on conviction on indictment to imprisonment for ten years or on summary conviction to five years.

(2) Subsection (1) does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent.

(3) For the purposes of subsection (2) —

(a) an act shall be deemed not to have been committed in private if it is committed in a public place; and

(b) a person shall be deemed not to consent to the commission of such an act if —

(i) the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act;

(ii) the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person; or

(iii) that person is, and the other party to the act knows or has good reason to believe that the person is suffering from a mental disorder.

(4) In this section “gross indecency” is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.”

Section 133. Buggery

[BUGGERY]

“(1) A person who commits buggery commits an offence and is liable on conviction on indictment to imprisonment for —

(a) life, if committed with force and without the consent of the other person;

(b) ten years, in any other case.

(2) Any person who attempts to commit buggery, or commits an assault with intent to commit buggery, commits an offence and is liable to imprisonment for five years.

(3) In this section “buggery” means sexual intercourse per anus by a male person with another male person.”

At its 1st cycle UPR in January 2011, St Lucia received eight recommendations. It accepted two which both concerned investigation and protection of SOGI-related human rights defenders. Having asserted that non-discrimination in the Constitution was inclusive of all St Lucians, the delegation made an interesting comment during its Interactive Dialogue: “Matters regarding how a society interacts, what principles it is governed by and how it will evolve in the future clearly reveal a need for advocacy and changes in attitude of certain sectors of society. The question remains, however, whether such advocacy should be the role of the Government, or whether it should be carried out by those who believe they are discriminated against” (para. 65).

In its 2nd cycle UPR in November 2015, the State revealed that it was “considering enacting ordinary legislation addressing discrimination on the grounds of sexual orientation”, as suggested by the Constitutional Reform Commission, referencing its 2006 Labour Code that already outlaws such discrimination (para. 18). Furthermore, the delegation indicated that “all Saint Lucians, including LGBT persons, were afforded full protection under the Constitution”, and that judicial redress was afforded to “any individual” regardless of sexual orientation (para. 19). Saint Lucia received a total of 13 SOGI-related

recommendations. All recommendations to repeal laws criminalising same-sex consensual acts or legislation that may otherwise discriminate against LGBT people were rejected. Only three recommendations (and one in part) were accepted, all of them referring to awareness-raising campaigns and “strengthening the fight” against discrimination based on sexual orientation and gender identity.

As a member of the General Assembly of the Organisation of American States (OAS), Saint Lucia has joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by this body since 2008 (see all **OAS-GA Resolutions** since 2008). However, in 2013, Saint Lucia announced it would insert a footnote to that year’s resolution (fn. 7). The following year, Saint Lucia inserted a footnote that reads as follows: “Saint Lucia is unable to join consensus on the approval of this resolution since we are of the view that the term ‘gender expression’ is one that is not thoroughly defined or accepted internationally. Moreover, not only is the expression heavily nuanced but most importantly it is currently not defined in domestic law” (fn. 12). Saint Lucia inserted no footnote in the 2016 resolution (there was no resolution in 2015).

Local human rights organisations called on political parties “to make a full position statement on the issue of LGBT discrimination”, after a video showing the Minister of Tourism using a derogatory word sparked outrage on social media. In fact, in 2015, the interplay of buggery laws and tourism had been the subject of a **special report** by Telesur.

The 2016 US Department of State Human Rights Report **explains** that there was widespread social discrimination against LGBTI persons in the deeply conservative Saint Lucian society during 2015, and that the few openly LGBTI persons faced daily verbal harassment. However, very few incidents of violence or abuse appear to have been reported, mainly due to reluctance to report for fear of retribution or reprisal. No progress had been made in the investigation of the killing of Marvin Anthony Augustin, which appears to have been a hate crime. Furthermore, in terms of economic, social and cultural rights, LGBTI persons were denied access to rental homes or were forced to leave rental homes, and were denied jobs or left jobs due to a hostile work environment.

Despite this adverse environment, several courageous activists publicly shared their stories of survival in Saint Lucia (see among others, **Jessica St Rose** and **Donavan Monerville**).

SAINT VINCENT AND THE GRENADINES



Criminal Code, 1990 Edition.

Section 146

[BUGGERY]

“Any person who —

- (a) commits buggery with any other person;
- (b) commits buggery with an animal; or
- (c) permits any person to commit buggery with him or her;

is guilty of an offence and liable to imprisonment for ten years.”

Section 148

[GROSS INDECENCY]

“Any person, who in public or private, commits an act of gross indecency with another person of the same sex, or procures or attempts to procure another person of the same sex to commit an act of gross indecency with him or her, is guilty of an offence and liable to imprisonment for five years.”

At its 1st cycle UPR in May 2011, the State rejected 11 **recommendations** to lift discriminatory laws and practices, including the repeal of Section 146 (in line with the **Human Rights Committee** Concluding Observations in 2008). In response, the State said that its current legislation was supported by society and there was no call to repeal it, “[in] the context of the moral, societal and cultural make-up of the State”. In this vein, Saint Vincent and the Grenadines compared its own legal situation to that of the United Kingdom arguing that it had taken “hundreds of years” for the UK to repeal similar legislation, and “the harsh nature of the sentences imposed under British law,” comparing them to the “relatively short

period of time that Saint Vincent and the Grenadines has been an independent state, and the less punitive sanctions involved” (para. 29).

In its 2nd cycle UPR, Saint Vincent and the Grenadines once again rejected all SOGI-related **recommendations**. During the interactive dialogue, the delegation indicated that criminalising provisions “had existed for a long time and that the precepts underlying them had overwhelming public support in the country’s Christian society espousing Judaeo-Christian values in the Caribbean context”. However, changes in those values were acknowledged as “occurring, particularly among sections of young people”. The delegation went on to stress that “there had been no imprisonments” based on the criminalising provisions, but at the same time, as it did in its 1st cycle, insisted on the fact that there was “no public or legislative appetite to revise any of [these] laws” (para. 44).

In 2015, the CEDAW Committee **noted** that women in same-sex relationships are not covered by the 2015 Domestic Violence Act, and recommended this exclusion be rectified.

As a member of the General Assembly of the Organisation of American States (OAS), Saint Vincent and the Grenadines has joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by this body since 2008 (see all **OAS-GA Resolutions** since 2008). In 2013, Saint Vincent and the Grenadines, along with Dominica and San Kitts and Nevis, inserted a footnote stating that the delegations of these three countries were “unable to join consensus on the approval of this resolution” (fn. 2). The Government further stated that “the term ‘gender expression’ is one that is not thoroughly defined internationally or that has international acceptance” and suggested that the discourse at the OAS “should be confined only to language which has been recognized or approved by the United Nations”. In 2016, Saint Vincent and the Grenadines withdrew from the list of countries inserting footnotes. Further, at the OAS General Assembly in June 2016, Minister of Economic Planning and Sustainable Development of Saint Vincent and the Grenadines, Camillo Gonsalves, **described** the Orlando shooting as a “tragic and heinous event” and said that his country offered its “support in ridding the world of hate and the tools of hate”.

In 2015, opposition Senator Vynnette Frederick **stated** that Saint Vincent needed to discuss the issues of same-sex relationships and that she was well positioned to lead the discussion because of her perceived sexuality. In 2010, Prime Minister Ralph Gonsalves, made disparaging comments about her, suggesting she was a lesbian. Based on those remarks, Senator Vynnette Frederick brought a claim against the Prime Minister and stated that those comments had negatively impacted her performance at the elections. The 2015 Kaleidoscope Trust’s report **illustrates** a socio-political environment that appears to be improving incrementally, as discussions about what impedes full citizenship in a discriminatory environment take place.

The 2016 US Department of State Human Rights Report **indicates** that anecdotal evidence suggested there was social discrimination against LGBTI persons, although local observers believed such attitudes of intolerance were slowly improving. Still, members of professional and business classes were more inclined to conceal their LGBTI sexual orientation.

TRINIDAD AND TOBAGO



Sexual Offences Act 1986, as amended by the **Sexual Offences (Amendment) Act (No. 31 of 2000)**.

Section 13.

[BUGGERY]

“(1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment—

- (a) if committed by an adult on a minor, for life;
- (b) if committed by an adult on another adult, for twenty-five years;
- (c) if committed by a minor, for five years.

(2) In this section "buggery" means sexual intercourse per anum by a male person with a male person or by a male person with a female person."

Section 16.

[SERIOUS INDECENCY]

"(1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment—

(a) if committed on or towards a minor under sixteen years of age for ten years for a first offence and to imprisonment for fifteen years for a subsequent offence;

(b) if committed on or towards a person sixteen years of age or more for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—

(a) a husband and his wife; or

(b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire."

In October 2011, Trinidad and Tobago commenced its 1st UPR sessions. The State had received six **recommendations**, and had accepted two of these: to undertake policies to promote the rights of LGBT people, and to institute policy to prevent and prosecute crimes based on SOGI. Three of the remaining four recommendations that were 'noted' (rejected) concerned repeal of the criminalising law, and the fourth rejection called for wide-ranging legislative and political reforms to address discrimination, including public awareness campaigns, based on "sexual preference".

In its 2nd cycle UPR, the State received 14 SOGI-related **recommendations**, all of which were rejected. Ten of these recommendations referred to decriminalisation. During the interactive dialogue, the delegation did not answer any of the comments made by other countries on SOGI issues. Trinidad and Tobago's next UPR is in May 2021.

As a member of the General Assembly of the Organisation of American States (OAS), Trinidad and Tobago has joined the resolutions on Human Rights, Sexual Orientation, and Gender Identity and Expression adopted by this body since 2008 (see all **OAS-GA Resolutions** since 2008).. However, in 2013, Trinidad and Tobago announced, along with Saint Lucia and Honduras, it would insert a footnote to that year's resolution (fn. 7). The following year, Trinidad and Tobago did so stating it was unable to support the resolution and recalled that "the act of sodomy whether between same sex partners or heterosexual partners is illegal" (fn. 10). In the 2016 resolution (there was no resolution in 2015), the State slightly shifted the tone of its footnote stating that Trinidad and Tobago was unable to join the consensus "as some areas are contrary to the laws of the Republic", but that it remained "firmly committed to the promotion and preservation of the rule of law; the protection of human rights and fundamental freedoms of all people as enshrined in the Constitution of Trinidad and Tobago".

In June 2016, Prime Minister, Keith Rowley, **stressed** that there were no plans to change the buggery law. However, he stated that the police should protect every citizen "regardless of who they sleep with, they don't sleep with or how they do it". Moreover, the Caribbean Court of Justice delivered its **judgment** in a case brought forward by Maurice Tomlinson seeking to invalidate immigration laws which prohibit the entry of "homosexuals" into Belize and into Trinidad & Tobago. Although the decision safeguarded the right of CARICOM gay nationals to enter those two countries, it **failed to declare these laws invalid**. The decision has been analysed by **Andre Badoo** and **Colin Robinson**.

Although the Equal Opportunities Commission **urged** the inclusion of sexual orientation in the State's non-discrimination provision, no legislative developments have been enacted to protect the rights of LGBT people in Trinidad and Tobago. In fact, the Coalition Advocating for Inclusion of Sexual Orientation (CAISO) along with other organisations, submitted a detailed **shadow report** for the State's 2nd cycle UPR which follows up on the recommendations made to Trinidad and Tobago in 2011.

In early 2017, Jason Jones, a Trinidad-born **gay human rights activist**, brought a **claim** before local courts seeking to repeal the buggery laws. After filing his brief, Jones **reported receiving** dozens of death threats.

AFGHANISTAN



Penal Code, 1976.

Chapter Eight: Adultery, Pederasty, and Violations of Honour

Article 427:

[INTERCOURSE BETWEEN MALES]

- “(1) A person who commits adultery or pederasty shall be sentenced to long imprisonment.
 (2) In one of the following cases commitment of the acts, specified above, is considered to be aggravating conditions:
 a) In the case where the person against whom the crime has been committed is not yet eighteen years old.”

Although the Afghan Penal Code does not contain any explicit provisions on the criminality of consensual same-sex sexual acts. Article 130 of the Constitution does allow recourse to be made to Sharia law, which prohibits same-sex sexual activity in general, and indeed any sexual contact outside marriage. Afghanistan’s Sharia law criminalises same-sex sexual acts with a maximum of the death penalty. A BBC article of late-2016 **confirms** that LGBT people live in constant fear of this or other severe persecutory penalties and they are forced to hide their identities. A high-profile scholar is quoted “there was broad consensus amongst scholars that execution was the appropriate punishment if homosexual acts could be proven”, and this is consistent with a **history** of such repression in Afghanistan.

In Afghan legal terminology “pederasty” appears to refer to intercourse between males regardless of age. The fact that paedophilia - or sexual relations with persons under the age of consent - falls under subsection 2(a) of article 427 indicates that this is the case. Terming sexual acts between adult men “pederasty” has previously not been uncommon; this occurred for example in the translations of the Criminal Codes of Albania (1977) and Latvia (1933), and in the old Russian legal tradition a “pederast” usually referred to a male who had anal intercourse with another male, regardless of age. Further, the traditional practice of keeping Bacha Bazi (teenage boys typically aged 14-18) for sexual use and as symbols of status amongst older men is **reported** to be currently widespread.

In its 2nd cycle UPR in January 2014, the only recommendation regarding SOGI that Afghanistan received was **not accepted** (‘noted’), Norway called for the “repeal the provisions of the penal code that criminalise sexual relations between consenting adults of the same sex”. No mention was made of the death penalty in relation to same-sex behaviour directly, although ten recommendations calling for the abolition of the death penalty in line with civil and political rights were made: under international human rights law these necessarily include SOGI in their scope. A Joint Submission (SRI, IFPP, and AFGA) made a **reference** to men who have sex with men (MSM), and this appears to be the only mention of SOGI-related material through Afghanistan’s entire 2nd cycle UPR process. Its next review is October 2018.

Although a senior member of Afghanistan Independent Human Rights Commission **attended** the Workshop on the Role of NHRIs in Promoting and Protecting the Rights and Health of LGBTI in Asia and the Pacific, February 2015, but to date there has been **no mention** of sexual orientation or SOGI in the work of that Commission.

BANGLADESH



Penal Code, 1860 (Act XLV of 1860).

Section 377. “Unnatural Offences”

[AGAINST THE ORDER OF NATURE]

“Whoever voluntary has carnal intercourse against the order of nature with man, woman, or animal, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.
Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

While referencing family values at its 2nd cycle UPR in April 2013, the Bangladeshi Minister for Foreign Affairs **concurred** with the newly-found position of the National Human Rights Commission that LGBT people should be protected from violence and discrimination in law. However, throughout 2016 the levels of violence and threat from religious radicals that LGBT people have been exposed to have exponentially risen, and the State has not offered protection. As such, many have been forced to leave their homes and flee the country for fear of their lives.

There are no SOGI-based NGOs in Bangladesh, although there are some long-standing CSOs, such as Boys of Bangladesh and the Bhandu Social Welfare Society, and online communities such as Roopbaan, Shambhab (a lesbian network) and Vivid Rainbow. It is unlikely that these groups can register as NGOs as it is understood that Section 377 **extends** to membership of a SOGI-based organisation, a view **endorsed** (at p.8) by one of Bangladesh's only barristers concerned with SOGI issues, Sara Hossain.

Bangladesh **accepted** a recommendation to carry out sensitisation training with public officials regarding SOGI discrimination at its 1st UPR, but this issue was not picked up at its 2nd cycle review, nor is there evidence that such sensitisation has significantly occurred. The **capacities** of seven South Asian National Human Rights Institutions (NHRIs) to respond to LGBTI concerns were assessed in 2013, amongst them that of Bangladesh. Bangladesh's 3rd cycle UPR will be in January 2018.

On 15 November 2013, Bangladesh legally **recognised** the Hijras population as being a 'third sex' for purposes of voting, travel, identification and other core civil rights.

In January 2013, Bangladesh's first ever LGBTI magazine, *Roopbaan* was published and it has expanded its **initiatives** (at p.40) into organising awareness and advocacy, including two public events - 'Rainbow rally' - to promote friendship and diversity in Dhaka in 2014 and 2015. However, in April 2016 organisers had to **cancel** the rally because of threats and opposition from Islamists, and four arrests were reported. On 25 April 2016, the editor of *Roopbaan*, Xulhaz Mannan, and fellow activist Mahbub Tonoy, were **gruesomely executed** in an apartment in Dhaka.

In February 2015 Avijit Roy, the author of Bangladesh's first scientific book (2010) on same-sex sexual identity, was **savagely murdered** on the streets of Dhaka, seemingly by religious fundamentalists.

BHUTAN



Penal Code 2004.

Chapter 14: Sexual Offences

Unnatural sex

[AGAINST THE ORDER OF NATURE]

Section 213. "A defendant shall be guilty of the offence of unnatural sex, if the defendant engages in sodomy or any other sexual conduct that is against the order of nature."

Grading of unnatural sex

Section 214. "The offence of unnatural sex shall be a petty misdemeanor."

Chapter 2: Classes of crime

Section 3. "For the purpose of this Penal Code, the classes of crimes shall be as follows:

(c) A crime shall be petty misdemeanor, if it is so designated in this Penal Code or other laws and provides for a maximum term of imprisonment of less than one year and a minimum term of one month for the convicted defendant."

In its 1st cycle UPR in late-2009, the representative of Bhutan had **claimed**, “[h]owever, I wish to share that the provisions concerning unnatural acts in the Penal Code of Bhutan have never since its enactment been evoked for acts between two consenting adults of the same sex. The provisions can be revised when there is felt need and desire from our people”.

There appears to have been no reference to this or related matters in its 2nd cycle UPR in 2014.

Bhutan did **not accept** any of the four recommendations to decriminalise same-sex sexual behaviour in its 2nd cycle UPR in April 2014. Bhutan’s next review is in January 2019.

BRUNEI DARUSSALAM



Penal Code, Chapter 22, revised edition 2001.

Unnatural offences

[AGAINST THE ORDER OF NATURE]

Section 377. “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine. [S 12/97]

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

Brunei Darussalam rejected (‘noted’) the five recommendations made in its 2nd cycle Universal Periodic Review in April 2014. Unlike its 1st UPR cycle **rejections** in 2009 (mostly on non-discrimination), the major concerns of the 2nd cycle were decriminalisation (France, Canada, Spain and Czech Republic), and the revised Penal Code (Cap 22) that reintroduces the death penalty for same-sex sexual behaviour (Spain and Czech Republic). Bangladesh, counter-intuitively to human rights, used the UPR process to **encourage** (at p.10) Brunei Darussalam to uphold its social policies in line with ‘traditional family values’.

In 2014, IGLHRC (now OutRight) submitted a **Shadow Report** to the Convention on the Elimination of Discrimination Against Women (CEDAW) Committee describing in detail how “the enforcement of SPC Order 2013 is likely to result in even tighter family control and increased violence to force Bruneian lesbians, tomboys, masculine-looking women, bisexual women and transgender women to conform to social norms (and now criminal law) on sexuality and gender”. In para. 13(a) of its Concluding Observations, the CEDAW committee **urged** the State to, “immediately review the new Sharia Penal Code Order 2013 with a view to repealing its direct and indirect discriminatory provisions affecting women”.

Since 2014, Brunei Darussalam has been phasing in its **Syariah Penal Code Order** (SPC Order 2013), despite learned **critiques** of its human rights deficits. The second and third phases of it were due to be in place in 2015 and 2016 (at which point the death penalty for consensual same-sex sexual behaviour was due to apply – for both men and women). To date, it appears that Brunei has not produced its procedural code, without which it cannot proceed to the second and third phases. It is also the case that the last execution by the State in Brunei was in 1957. However, Human Rights Watch **warn** that the current Sultan is particularly ardent.

In its **Concluding Observations** on Brunei Darussalam in February 2016, the Committee on the Rights of the Child) recommends that, repeating earlier recommendations to the State, efforts are stepped up to address, *inter alia*, discrimination based on SOGI, and it recommended improving awareness-raising on such issues.

GAZA – OCCUPIED PALESTINIAN TERRITORY



The British Mandate Criminal Code Ordinance, No. 74 of 1936 is in force in Gaza.

Section 152(2) of the Code criminalises sexual acts between men with a penalty of up to 10 years. *[SEXUAL ACTS BETWEEN MEN]*

“(2) Any person who:—

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature,

is guilty of a felony, and is liable to imprisonment for ten years.”

This Code was in force also in Jordan until 1951 and in Israel until 1977, before they adopted their own Penal Codes. Note that in the West Bank (including East Jerusalem) the Jordanian Penal Code of 1951 (modified in 1960) is in force, having no prohibition on sexual acts between persons of the same sex.

Since the 2007 governance of Gaza by Hamas, the Gazan legislative body has attempted to amend or replace the British Mandatory Penal Code. The proposal from 2013 purported to be “Islamic based”, and included flogging for adultery and cutting off an offender’s right hand for theft. While a complete draft of the proposal was never published, it is highly likely its treatment of same-sex acts would have been far more severe than even the current law. The code failed to pass the Gazan legislature.

INDIA



Penal Code, 1860. Section 377.

Unnatural offences

[AGAINST THE ORDER OF NATURE]

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description or a term which may extend to ten years and shall also be to fine.

Explanation: Penetration is sufficient to candidate the carnal intercourse necessary to the offence described in this section.”

Although the law is technically only applicable to men, women in India are in fact **subject** to it (at p. 12), and are subject to its significant ‘chill factor’, and resultant stigmatisation. In 2009, Section 377 of the Indian Penal Code was given a more limited interpretation by the Delhi High Court, **lifting** the ban on same-sex sexual activity among consenting adult men in private (see **comment**). However, on 11 December 2013, in *Koushal v. Naz Foundation*, a two-judge bench of the Supreme Court of India **upheld** Section 377 as constitutional. Therefore, private consensual sexual activity between two men is still a crime in India. The judgment also said that the legislature should decide on this issue, not the courts, yet attempts at **introducing** such a Bill before parliament have not been unsuccessful.

In terms of India’s recent performance regarding international human rights law at the UN, its 2nd cycle UPR **responses** (May 2012) suggest the country’s current regard to its obligations: India accepted a level 3 (i.e. ‘to consider’) recommendation to “[s]tudy the possibility of eliminating any criminalisation of same-sex relations”, despite the **concerns** that the Criminal Law (Amendment) Bill 2012 that was approved by the Cabinet retained Section 377 of the India Penal Code. In the same UPR session, India rejected a general recommendation for non-discrimination, particularly in employment, based on sexual orientation. India’s 3rd UPR cycle commences in May 2017.

In *Naz Foundation* (2009), the Ministry of Home Affairs justified retention of Section 377 on the grounds of protection of health and morals, but the High Court of New Delhi **found** (at p. 11) that public morality is not a legitimate State interest and held that, although protection of public health was a legitimate State interest, the law at issue was not rationally connected to this legislative end. In this case, the High Court relied on the practice of regional and international human rights mechanisms, via *Dudgeon* and *Toonen*, to derive this important principle.

The Supreme Court has issued two contrasting judgments. The Section 377 judgment in 2013 refused to apply fundamental constitutional rights to decriminalise same-sex sexual conduct, stating that decriminalisation is a question for parliament, not the courts. On the other hand, a Supreme Court judgment in *National Legal Services Authority v. Union of India and others* a few months later **found** that transgender people do enjoy constitutional rights and the Supreme Court required the government to implement measures in recognition of these rights. On April 15, 2014, in this case, the Supreme Court of India upheld the constitutional rights of transgender persons under Articles 14, 15, 19 and 21, which guarantee the right to equality, the right against discrimination, freedom of speech and expression, and the right to life with dignity respectively.

The UN Rapporteur on Human Rights Defenders has twice noted problems in relation to SOGI in India, in 2009 and 2012. In 2014, the Committee for the Elimination of all forms of Discrimination Against Women (CEDAW) **urged** India “[t]o make efforts to eliminate any criminalization of same-sex relations by studying the possibility, as accepted by the State party during its [U]niversal [P]eriodic [R]eview [...], and to take note of the ruling of the Supreme Court (*Suresh Kumar Koushal and another v. NAZ Foundation*, 2013) in this regard”. In April 2016, the International Commission of Jurists (ICJ) released a **Briefing Paper** on the Section 377 Curative Petition laying out the validity of the Supreme Court reversing its earlier decision.

It was **reported** that nearly 1500 people were arrested under Section 377 in 2015. However, it appears that over 800 of these were assaults on minors, and a further number were arrests of under-age persons.

INDONESIA (TWO PROVINCES ONLY)



Same-sex sexual relations between consenting adults are not prohibited according to the 1982 Indonesian **Penal Code** (which finds root in the Netherlands Indies Penal Code). However, at the national level there are stigmatising Regulations that apply nationwide: for example, Government Regulation 61/2014 on Reproductive Health stipulates that; a “Healthy sexual life ... b) free from sexual orientation dysfunction or deviance,, ... and e) in accordance with ethics and morals”. Reports throughout 2016 and early 2017 indicate a heightened threat from both State and non-State actors to LGBTI human rights defenders and their work.

At the provincial level (between two bordering provinces Ache and Sumatra), there are **areas** and municipalities that penalise same sex sexual relations through local Ordinances amongst which:

- **Provincial Ordinance on the Eradication of Immoral Behavior (No. 13/2002) in South Sumatra:** classifies and penalises same sex relations as “immoral behavior”.
- **Local Regulation [City Ordinance] Batam City No. 6/2002 about Social Ordinance, Social Order Article 9:** forbids the setting up of LGBT associations (explicitly mentioned).
- **Local Regulation [City Ordinance] Palembang City No. 2/2014 about the Abomination of Prostitution, Chapter V. Prohibition Provisions, Article 8:** outlaws “homosexual” “prostitution”.
- **Local Regulation [City Ordinance] about Prevention, Eradiction and Action toward Social Ills (No. 9/2010) in Padang Panjang, West Sumatera:** its definition includes same sex relationships within its scope (paid, or not paid for).
- **District Ordinance on Social Order (No. 10/2007) in Banjar, South Kalimantan Province:** mentions “abnormal” homosexual and heterosexual acts (in addition to “normal” ones) in its definition of “prostitute”. No explanation is given for “normal” or “abnormal” acts. It also prohibits the formation of organisations “...leading to immoral acts”, that are “...unacceptable to the culture of [local] society”. These are later **explained** by giving examples of lesbian and gay organisations “and the like”.

- **City Ordinance on the Development of a Value System in Social Life Based on the Teachings of Islam and Local Social Norms (No. 12/2009) in Tasikmalaya, West Java:** prohibits adultery and prostitution, both heterosexual and homosexual.
- **Aceh Regulation No. 6/2014** [Provincial Ordinance] on criminal offenses under Syariah law, passed in 2014, came into effect on 23 October 2015. The law **stipulates** a punishment of 100 lashes and/or up to approximately eight years in prison. The regulation applies to local residents and to foreigners in the province for the crime of Liwat (male penetration) and Musahaqah (female same-sex sexual activity) in article 63 and 64.

In 2002, the national parliament gave the province of Aceh the right to adopt Islamic Sharia laws. Such laws apply to Muslims only. In the city of Palembang in South Sumatra one can **receive** jail time and hefty fines for same-sex relations. In recent years, there has been no abatement in the anti-SOGI demands of Muslim clerics as **reported** by Human Rights Watch in March 2016.

At its most recent UPR, 2nd cycle in May 2012, Indonesia was specifically **asked** (at para. 6.5) to address violence against SOGI human rights defenders against whom threats were on the increase. Indonesia responded to Spain's call to "eliminate the legislation" that criminalises and discriminates against same-sex people, particularly in the Aceh province by **saying**, "[t]he recommendations do not reflect the actual situation in the Provinces they refer to". Here, the State representatives may have been referring to the fact that Qanun Jinayah Aceh (Syariah Law) is legal guidance on regulations about forbidden acts or wrongdoings according to the teaching of Islam (Syariah), from which interpretations flows, rather than a book of rigid statutes of black letter law that overtly outlaw same-sex sexual relations, *per se*.

Among its principle concerns, the United Nations Committee on Economic, Social and Cultural Rights "... notes with concern that laws and by-laws which discriminate against women and marginalized individuals and groups such as sex workers, and lesbian, gay, bisexual and transgender persons are in force in provinces, districts and autonomous regions, in spite of the review mechanism in place in the State party (art. 2.1)", and made **recommendations** on how to rectify these Convention violations.

On 3 March 2016, Indonesia's Parliamentary Commission for Defense, Foreign Affairs and Information (known as Commission I) **recommended** "measures for the [Indonesian Broadcasting Commission, or KPI] to tighten controls over broadcasting LGBT-related content, as well as sanctioning strict punishment for violation of LGBT content delivery" – representing another repressive **legal vehicle** targeting LGBT people. HRW and other **reports** in 2016 and 2017 document a worsening socio-political environment for LGBT advocacy and development, a situation that also has **economic** consequences for the State.

IRAN

Islamic Penal Code of Iran, 2013

Article 147- The age of maturity for girls and boys are, respectively, a full nine and fifteen lunar years.

Article 172 clarifies that in the cases of *zina*, *livat*, *tafkhez*, and *musaheqeh*, confessions must be made four times, and Article 200 specifies that regarding testimony in cases of *zina* or *livat*, the witness must have personally seen the act, otherwise cases of *zina* (adultery) or *livat* shall be considered as *qazf* (accusation) and responded to by a *hadd* (divine) punishment.

Article 232- Where a man or woman confesses to *zina* less than four times, s/he shall be sentenced to thirty-one to seventy-four lashes of ta'zir punishment of the sixth grade. The same punishment mentioned in this article shall be applicable in the cases of *livat*, *tafkhez*, and *musaheqeh*.

Book Two – Hudud (divine punishments)**Part Two- Offenses punishable by Hadd (particular punishment)****Chapter Two- Livat, Tafkhiz, and MUSAHEQEH****[HOMOSEXUAL AND LESBIAN ACTS]**

Article 233- *Livat* is defined as penetration of a man's sex organ (penis), up to the point of circumcision, into another male person's anus.

Article 234- The *hadd* punishment for *livat* shall be the death penalty for the insertive/active party if he has committed *livat* by using force, coercion, or in cases where he meets the conditions for *ihsan*; otherwise, he shall be sentenced to one hundred lashes. The *hadd* punishment for the receptive/passive party, in any case (whether or not he meets the conditions for *ihsan*) shall be the death penalty.

Note 1- If the insertive/active party is a non-Muslim and the receptive/passive party is a Muslim, the *hadd* punishment for the insertive/active party shall be the death penalty.

Note 2- *Ihsan* is defined as a status that a man is married to a permanent and pubescent wife and whilst he has been sane and pubescent has had a vaginal intercourse with the same wife while she was pubescent, and he can have an intercourse with her in the same way [vaginal] whenever he so wishes.

Article 235- *Tafkhiz* is defined as putting a man's sex organ (penis) between the thighs or buttocks of another male person.

Note- A penetration [of a penis into another male person's anus] that does not reach the point of circumcision shall be regarded as *tafkhiz*.

Article 236- In the case of *tafkhiz*, the *hadd* punishment for the active and passive party shall be one hundred lashes and it shall make no difference whether or not the offender meets the conditions of *ihsan* [mentioned in note 2 of article 234], or whether or not [the offender] has resorted to coercion.

Note- If the active party is a non-Muslim and the passive party is a Muslim, the *hadd* punishment for the active party shall be the death penalty.

Article 237- Homosexual acts of a male person in cases other than *livat* and *tafkhiz*, such as kissing or touching as a result of lust, shall be punishable by thirty-one to seventy-four lashes of ta'zir punishment of the sixth grade.

Note 1- This article shall be equally applicable in the case of a female person.

Note 2- This article shall not be applicable in the cases punishable by a *hadd* punishment under Shari'a rules.

Article 238- *Musaheqeh* is defined as where a female person puts her sex organ on the sex organ of another person of the same sex.

Article 239- The *hadd* punishment for *musaheqeh* shall be one hundred lashes.

Article 240- Regarding the *hadd* punishment for *musaheqeh*, there is no difference between the active or passive parties or between Muslims and non-Muslims, or between a person that meets the conditions for *ihsan* and a person who does not, and also whether or not [the offender] has resorted to coercion.

Article 241- In the cases of indecent offenses, in the absence of admissible legal evidence and with denial of the accused, any type of investigation and interrogation in order to discover hidden affairs and things concealed from the public eye shall be prohibited. In cases with the possibility of commission of an offense with force, coercion, assault, abduction, or deception, or cases which are considered as commission [of an offense] with resorting to force, this rule shall not be applicable.

The Press Law (1986)**[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]**

There are a number of articles within the Press Law that directly impede freedom of expression to do with sexual orientation, gender identity and sex characteristics.

While reviewing a periodic report of the Islamic Republic of Iran in 2013, the Committee on Economic, Social and Cultural Rights (at para. 7) expressed concern over the criminalisation of consensual same-sex sexual activity and the possibility that convicted male persons may be subject to the death penalty.

At its 1st cycle UPR in February 2010, Iran received three recommendations regarding decriminalisation and discrimination based on SOGI, while at its 2nd cycle review in October 2014, there were 14 SOGI recommendations. These mostly centered on decriminalisation, persecution and discrimination. At its Interactive Dialogue session the delegation of Iran justified his country's position on 'homosexuality', by saying it was not so long ago that same-sex sexual relations had been "subject

to prosecution in most Western countries in the not too distant past". Iran will be before the UPR again in April 2019 for its 3rd cycle sessions.

The situation for LGBTI in Iran people is well illustrated in a 2014 [interview](#) recorded on the website *76 Crimes*. Outright Action International have produced a series of reports on the situations of sexual and gender minorities in Iran, and keep an up to date [archive](#) of relevant information from the country.

However, on 4 April 2014, Iran's [Supreme Leader](#) described "homosexuality" as "moral bankruptcy" and "[libidinous behaviour](#)". On 24 September 2014, the Iranian Speaker of Parliament [described](#) "homosexuality" as "modern Western barbarism". The Supreme Council of National Security (SCNS) censored official journalists, forbidding them from [covering certain topics](#) including SOGIESC-related rights, in the name of ensuring national security.

The Committee on the Rights of the Child [addressed](#) Iran in February 2016. In line with civil society [submissions](#), it spoke of being concerned with on-going discrimination of LGBTI children, and punishments of same-sex sexual behaviour of adolescents who are above the age of criminal responsibility "ranging from flogging to death penalty" [para. 31]. It also expressed concern that young people have no information on LGBTI issues, and trans people are forced into surgery [para.71], and urges reversal of such policies [para.72].

These, and other, concerns were more fully elaborated in the [Joint Submission](#) at the Interactive Dialogue with the Special Rapporteur on the situation of human rights in Iran, delivered by ARC-International in March 2016.

IRAQ



After the American invasion in 2003 the [Penal Code](#) of 1969 was reinstated in Iraq. This code does not prohibit same-sex relations.

Article 404

[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]

"Any person who himself or through some mechanical means sings or broadcasts in a public place obscene or indecent songs or statements is punishable by a period of detention not exceeding 1 year or by a fine not exceeding 100 dinars."

Non-State actors in Iraq including Sharia judges, are known to order executions of men and women for same-sex sexual behaviour, despite the fact that Iraq's civil code is silent on same-sex sexual behaviour, and the country's legal system does not defer to the Sharia court. It is also known that both police and militias have frequently kidnapped, threatened and killed LGBT people, as [documented](#) by OutRight since 2014, and charted on their [Timeline](#).

The Daesh (or ISIS / ISIL) held areas of northern Iraq and northern Syria, are known to target men and women on account of their gender expression, gender identity and their sexual orientation. The *Nusr* [*'Victory'* in Arabic] [website](#), which claims to be the website of the Islamic Caliphate, has a section on Legal Jurisprudence (evidence-based rules and the Penal Code). One of the pages under this section is dedicated to "Punishment for Sodomy", which states: "The religiously-sanctioned penalty for sodomy is death, whether it is consensual or not. Those who are proven to have committed sodomy, whether sodomiser or sodomised, should be killed...".

Iraq accepted [the only](#) recommendation given to it (from France) with SOGI content in 2nd UPR in October 2014: "Guarantee equality of civil and political rights. Avoid all forms of discrimination based on ethnicity, religion, gender or sexual orientation": this remained unaddressed in the delegation's formal response.

In 2015, the United Nation Human Rights Committee that oversees the International Covenant on Civil and Political Rights (ICCPR) issued its Concluding Observations to Iraq. These included (at paras. 11 and 12) **concerns** on the stigmatisation and social exclusion of people on the basis of SOGI, and their inability to publicly demonstrate peacefully. The Committee acknowledged, "... diversity of morality and cultures must [...] always be subject to the principles of universality of human rights and non-discrimination". The State should, therefore, "vigorously" combat stereotypes, ensure enjoyment of Covenant rights to all, investigate, prosecute perpetrators and compensate victims, collect data on SOGI-related crime, and create anti-discrimination legislation that lists SOGI as a ground for protection".

Earlier in 2015, the United Nations Committee Against Torture - in relation to reliable reports before it – at para. 25 **expressed** concern that these attacks occur regularly and with impunity, at times leading to death. As such, Iraq should "take effective measures to prevent violence based on real or perceived sexual orientation and gender identity and ensure that all acts of violence are investigated and prosecuted promptly, effectively and impartially, perpetrators brought to justice and victims provided redress".

KUWAIT



Penal Code, Law No.16 of 2 June 1960, as amended in 1976.

Article 193

[CONSENSUAL INTERCOURSE BETWEEN MEN]

"Consensual intercourse between men of full age (from the age of 21) shall be punishable with a term of imprisonment of up to seven years." Such relations with a man under 21 years of age are criminalised by article 192.

Article 198

[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]

"Whoever makes a lewd signal or act in a public place or such that one may see it or hear it from public place, or appears like the opposite sex in any way, shall be punished for a period not exceeding one year and a fine not exceeding 1000 Dinar or one either of these punishments".

Kuwait 'noted' (rejected) a recommendation from Brazil to decriminalise same-sex relations between consenting adults at its **1st cycle UPR** in 2010. At its **2nd UPR** in January 2015, Uruguay and Iceland recommended Kuwait decriminalise same-sex sexual relations, and the Netherlands also iterated this and a call for non-discrimination in the country's law. This call for non-discrimination was echoed by Argentina and Chile. **Without alluding** to SOGI, at para. 29 of the State's formal acceptance of the report of the Working Group, the delegation justified that looking after public morals does not contravene Article 21 of the ICCPR (peaceful assembly).

In May 2014, it was **reported** that vice police raided a "sex party" and arrested 32 people, both men and women ("tomboys").

In August 2016 in its **Concluding Observations** to Kuwait the Human Rights Committee that oversees the ICCPR stated that: "13. The State party should take the measures necessary to decriminalize sexual relations between consenting adults of the same sex and repeal the offence of imitating members of the opposite sex, in order to bring its legislation into line with the Covenant. It should also take measures to put an end to the social stigmatization of homosexuality and the harassment, discrimination and violence perpetrated against persons based on their real or perceived sexual orientation or gender identity".

LEBANON

Penal Code of 1943.

Article 534

[SEXUAL INTERCOURSE AGAINST NATURE]

"Any sexual intercourse against nature is punished with up to one year of imprisonment".

Article 209

[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION - BREACH OF MODESTY]

"The making or possession, importing or attempts to import for trade, distribution, for payment, copying, exhibition or display or attempts to display to the public, or for selling or attempts to sell, or distribution or engaged in the distribution of each publication, an editor or a drawing or a declaration or pictures or paintings or photographs, or the origin of the image or its template or produced anything in breach of modesty shall be punished with imprisonment from imprisonment from one month to one year and a fine from 20,000 Lira to 100,000 Lira".

Article 532 of 1943

"The exposing of public morals by any of the ways mentioned in paragraphs 2 or 3 of Article 209 shall be punished with imprisonment from one month to one year and a fine from 20,000 Lira to 100,000 Lira".

In 2010, at Lebanon's 1st cycle UPR, Norway recommended they decriminalise and "ensure non-discrimination on the basis of sexual orientation and gender identity", the response to which was 'noted' (refused). The organisation Helem offer an [analysis](#) of the criminalising law. However, it is [reported](#) that in March 2014, a court [read down](#) Article 534 by ruling in favour of a transgender woman and her male partner. In contrast, in August 2014, it is [reported](#) that 27 men were arrested at a Hammam allegedly for same-sex sexual behaviour.

At the Interactive Dialogue session in Lebanon's 2nd cycle UPR in November 2015, the delegation, in response to the six strong recommendations that the State received [said](#): "As for sexual orientation, although article 534 of the Penal Code stated that sexual intercourse contrary to nature was punishable, two court decisions had indicated that article 534 did not apply to homosexuals [referring to the above]. The judiciary had played an important role in preventing and opposing acts of violence or discrimination against lesbian, gay, bisexual and transgender persons". Public attitudes to LGBT people in Lebanon are caught in an [excellent report](#) produced in 2015, and an October 2016 [short animated video](#) advises on the rights a person who is arrested can assert.

In its [Concluding Observations](#) on Lebanon in October 2016, the Committee on Economic, Social and Cultural Rights (CESCR) addresses issues of discrimination based on SOGI, recommending the State adopts a legal framework for combatting discrimination, enshrines the principle in the Constitution, conducts campaigns to combat prejudices and stigmatisation and establishes mechanisms to ensure victims can seek effective remedies.

In reference to the 2014 case mentioned above, in January 2017 the Court of Cassation (the highest court in Lebanon) looked at the reasoning of the lower court and [found](#) in favour of it. The question of what comprises 'natural' in human sexuality was central to the issue.

MALAYSIA

Penal Code (Consolidated version 1998).

Unnatural Offences

[AGAINST THE ORDER OF NATURE]

Section 377A. Carnal intercourse against the order of nature.

"Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

Explanation: Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section."

Section 377B. Punishment for committing carnal intercourse against the order of nature

"Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping."

Section 377D. Outrages on decency

[GROSS INDECENCY]

"Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years."

Several states in Malaysia have **instated** Islamic Sharia laws, applying to male and female Muslims, criminalising male/male and female/female sexual acts with up to three years imprisonment and whipping. The Sharia Penal law in the Malaysian state of Pulau Pinang **confers** penalties for sodomy [*Liwat*] and lesbian relations [*Musahaqat*] with fines of RM5,000.00, three years imprisonment and 6 lashes of the whip. All these penalties can be combined.

Having received seven recommendations from States to decriminalise in its **2nd cycle UPR** in October 2013, the Government **stated** (at para. 9) that matters involving lesbian, gay, bisexual, and transgender persons and adherents of other schools of Islamic thought would be handled carefully and consistent with cultural traditions, religious doctrine and societal norms, and domestic laws and regulations.

In February 2015, leading opposition leader, and former Deputy Prime Minister Anwar Ibrahim was jailed for five years after losing his appeal against his conviction on sodomy charges – charges widely **understood** to be politically motivated. Reflecting the tone of much public utterance, on 11 September 2015, the Malaysian tourism minister, Datuk Seri Nazri Aziz, **said** that lesbian, gay, bisexual or transgender Malaysians would never have equal rights : see, **Human Dignity Trust**.

MALDIVES



Penal Code, Law No. 6/2014

Section 410 – Offences against the family

[SAME SEX MARRIAGE]

"Unlawful Marriage. A person commits an offense if:[...] (8) two persons of the same sex enter into a marriage; The offenses in this Section are Class 1 misdemeanors which carry a jail term of 1 year or less but more than 6 months."

Section 411

[UNLAWFUL SEXUAL INTERCOURSE]

"(2) he engages in sexual intercourse with a person of the same sex.

Definitions: (2) "Same- sex intercourse means";

(A) Insertion by a man his sexual organ or any object into the anus of another man for sexual gratification. Or the insertion into another mans mouth the penis of a man or

(B) Insertion of a woman's organ or any object into the vagina or anus of another woman for sexual gratification.

The offenses in this Section range from Class 1 misdemeanors to Class 3 felonies that carry a jail term of between 6 months and 8 years (when same-sex involving incest or adultery)."

Section 412

[INDECENT ACTS]

"(a) Unlawful Intercourse. A person commits an offense if:

(5) if the person married or unmarried has sexual contact with a person prohibited for marriage by virtue of being a close relative, or being breast fed by the same mother, or due to marriage. The offense is a Class 5 felony.

(b) Offense Defined. A person engaging in sexual contact with a person of the same is committing an offense. [sic]

(c) Prohibition. "prohibited sexual contact" means indecent acts other than the offenses prescribed under Section 411 (a) of this Code, with a person of same sex, or with a person of the opposite sex other than with a person to whom he is married, or with an animal, for obtaining sexual gratification.

The offenses in this Section range from Class 1 misdemeanors to Class 3 felonies that carry a jail term of between 6 months and 8 years (when same-sex involving incest or adultery).”

Until a new Penal Code came into force in July 2015, consensual same-sex sexual conduct went unregulated in the Maldives under the civil law. But the existing Sharia code has been transposed into the civil code by this 2014 law, and it criminalises same-sex sexual acts for both men and women. For men, the punishment is banishment for nine months to one year or a whipping of 10 to 30 strokes, while the punishment for women is house arrest for nine months to one year.

In its conception, Law No. 6/2014 sets out its range of offences and defences according to a Sharia scheme. This scheme then embraces the entire population and not just those of the Muslim faith. Less than two months after the new Penal Code came into force, arrests of gay men have been **reported**. Testimony in Kaleidoscope Trust’s publication (p.43) **portrays** the Maldives as highly hostile to LGBTI persons.

At its 1st cycle UPR in November 2010, recommendations to Maldives were to decriminalise, protect against violence and remove discrimination based on sexual orientation and gender identity in national laws. Maldives **rejected** all of five these recommendations.

In a **Briefing Paper** (at p.2) submitted to Maldives’ 2nd cycle UPR in May 2015, the International Service for Human Rights (ISHR) says, “[u]ncodified Muslim Sharia Law criminalises homosexual conduct, thus making the Maldives a very insecure place to advocate for the rights of persons who identify themselves as LGBTI.”

A panel of refugee appeals officers in the Immigration New Zealand Agency **recognised** that individuals continue to be forced to flee persecution based on their sexual orientation throughout Maldives.

In finalising its 2nd UPR process in September 2015, the Maldives **rejected** (‘noted’) two recommendations made to it – concerning discrimination and decriminalisation (Chile and Argentina).

In April 2016, **Concluding Observations** of the Committee on the Rights of the Child recommended the State to “amend its legislation in order to eliminate any discrimination against girls, children born out of wedlock or following out-of-court marriages, and lesbian, gay, bisexual, transgender or intersex children”, and “to use legislative, policy and educational measures, including sensitization and awareness-raising, to end stigmatization” of such children.

MYANMAR



Penal Code, Act 45/1860, Revised Edition.

Section 377

[AGAINST THE ORDER OF NATURE]

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Sexual orientation and gender identity was not mentioned in Myanmar’s 1st cycle UPR in November 2010. However, the National Human Rights Commission was established in 2011 and given force in 2014. One commissioner **attended** the UN Asia-Pacific conference on Human Rights, Sexual Orientation and Gender Identity in 2015, although state-sponsored homophobia **continues** to the present time.

In its 2nd cycle UPR in November 2015, two recommendations were made to repeal Section 377 by Australia and Spain. It appears that the delegation **offered** no response to these, other than ‘noting’ (rejecting) them.

OMAN

**Omani Penal Code of 1974.****Article 33****[DISGRACING CRIMES]**

"The following are deemed as disgracing crimes:

I. All felonies punishable by a coercive sentence.

II. All misdemeanours stated hereafter:

1. Bribery; 2. Embezzlement; 3. False testimony; 4. Perjury; 5. Forgery and use, with knowledge, of forged items; 6. Incitement to prostitution; 7. Homosexual and lesbian intercourses; 8. Drug trafficking; 9. Theft; 10. Rape and assault; 11. Fraud; 12. Flash Cheque; 13. Breach of trust; 14. Counterfeit; 15. Trespass."

Homosexual and Lesbian Intercourses**Article 223.****[HOMOSEXUAL AND LESBIAN EROTIC ACTS]**

"Anyone who commits erotic acts with a person of the same sex shall be sentenced to imprisonment from six months to three years. The suspects of homosexual or lesbian intercourse shall be prosecuted without a prior complaint, if the act results in a public scandal. The suspects of lesbian intercourse among ascendants, descendants or sisters shall only be prosecuted upon a complaint from a relative or a relative by marriage forth-degree removed."

At its 1st cycle UPR, Sweden made two recommendations that Oman 'noted' (i.e. rejected) – one to decriminalise same-sex sexual relations, and the other to abolish discrimination based on SOGI.

Although there are no morality laws that specify SOGI in regard to limits on the freedom of expression in Oman, in September 2013 the English-language newspaper *The Week* was shut down for one week after printing an article about the country's LGBT community. The content was deemed to fall under "public discord", which carries a three-year prison sentence. The article's author and the paper's editor were charged with violating the highly restrictive 1984 Press and Publications Law. Under pressure from the government, the newspaper removed the article from its website, though the print issue continued to circulate.

Oman's 2nd cycle UPR was in November 2015. Only one civil society submission mentioned decriminalising "homosexuality", and both Mexico and Brazil made recommendations for Oman to repeal its legislation (or at least not apply it [Brazil]). The State 'noted' (rejected) these recommendations.

PAKISTAN

**Penal Code (Act XLV of 1860).****Section 377. 'Unnatural offences'****[AGAINST THE ORDER OF NATURE]**

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to a fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Section 294. 'Obscene Acts and Songs'**[OBSCENE ACTS]**

"Whoever to the annoyance of others---a) does any obscene act in any public place, or b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

Section 12 (Ordinance No. VII of 1979)**[UNNATURAL LUST]**

This provision was amended in 1980 by an ordinance that raised the minimum punishment to ten years and a fine. Under Section 12 of the Hudood Ordinances, "Whoever kidnaps or abducts any person in order that such person may be subjected [...] to [...] unnatural lust [...] shall be punished with death or [...] imprisonment for a term which may extend to twenty-five years, and shall also be liable to a fine [...]"

There were no direct mentions of SOGI in either of Pakistan's UPR outcome documents in **May 2008** and **October 2012**. Only in 2008 were there civil society submissions (ILGA and ILGHRC) on the issue (it appears that of the 38 civil society submissions made in 2012, none had a SOGI context). However, there were recommendations concerning the protection of human rights defenders and the training of public employees (judges, police, etc) in international human rights standards in their 2nd cycle UPR. Pakistan's 3rd cycle UPR will be in November 2017.

Pakistan has been particularly vocal at the Human Rights Council and at various UN fora in its refusal to embrace SOGI within the scope of the various human rights Treaty Bodies, and in its promotion of the 'traditional values of humankind' resolutions at the Human Rights Council. Most recently, throughout 2016, Pakistan took the lead in opposing the appointment of a United Nations SOGI mandate holder, Vitit Muntabhorn. In June 2012, at the 19th session of the HRC, at the reading of a report mandated by the first SOGI resolution (A/HRC/19/42) of September 2011, Pakistan led a **walkout** by member States of the Organisation of Islamic Cooperation, which was unprecedented behaviour in that forum. They were objecting to "attempts to create" "new standards" regarding SOGI that "seriously jeopardise the entire international human rights framework". Pakistan continues to object to the application of international human rights standards to SOGI in UN forums.

According to Kaleidoscope Trust, in April 2014, a serial killer confessed to killing three gay men because of their sexual orientation, yet Pakistani media depicted the serial killer as "the epitome of righteousness". Section 294 is reportedly often deployed to target male and trans sex workers.

QATAR

Qatar's 1971 Penal Code (Law Number 14 in 1971 at Art.201) penalised consensual same-sex relations with up to 5 years in prison. The Qatari criminal law was changed in 2004, and according to **Law No. 11** in 2004, sodomy itself is no longer a crime.

However, under the 2004 **Penal Code's Article 296**, 'pimping' same-sex acts is punishable by 1--5 years in jail, and **Article 298** specifies that same-sex sex work is punishable by up to 10 years. This means that as of 2004, there is no civil law criminalising consensual same-sex sexual activity, although the terms "... leading, instigating..." in the statute could potentially be applied to the dissemination of information on SOGI issues.

Article 296 of 2004**[MORALITY CODE LIMITING SOGI PUBLIC EXPRESSION]**

"One is convicted to no less than a year and no more than three years in prison in case of [*inter alia*] 3 - Leading, instigating or seducing a male anyhow for sodomy or immorality. 4 - Inducing or seducing a male or a female anyhow to commit illegal or immoral actions."

Qatar also runs Sharia courts, where technically it is possible that Muslim men could be put to death for same-sex sexual behaviours, but there appears to be no evidence that has been applied to date. The 'chill factor' of these provisions, are covered by UNHCR guidance of 2002 that explains (at paras. 57 and 59) norms that do not confirm with international human rights law can be seen to be persecutory "*per se*". The offence of "Zina" renders any sexual act by a married person outside of marriage punishable by death, while sexual acts by non-married persons are punishable by flogging – both are offences, no matter if they were same-sex or different-sex.

In its 1st UPR in February 2010, only Sweden made a recommendation regarding SOGI to Qatar (which was 'noted'): "To ensure that LGBT persons are not discriminated against and, as an immediate step, to amend the provisions of the penal code criminalizing consensual sexual activity among persons of the same sex and to ensure that no one is punished for such activity under Sharia law". This recommendation was repeated at the Interactive Dialogue session, but the State gave **no response** to either. At its 2nd cycle UPR in mid-2014, only one mention of LGBT workers was made in relation to the upcoming World Cup, to which it appears the State made **no response** at all.

SAUDI ARABIA



There is no codified Penal Law in Saudi-Arabia.

Instead, the country applies strict Islamic Sharia law. According to the interpretation, *Sura 7:80/81*, describes sexual intercourse between men as a misdemeanour, but does not specify a punishment. However, just as all sexual relations outside of marriage are illegal, the penalty for a married man is generally understood to be death by stoning. The penalty to be imposed for same sex sexual acts is a matter of dispute. According to a **report** to the German parliament "some call for whipping, and others believe they are quoting the Prophet that "both men to be killed". However, same-sex sexual behaviour is not listed in the Sharia as one of the crimes deserving of death – as are murder, adultery, apostasy, or highway robbery".

In its 1st cycle UPR in February 2009, there were four **brief mentions** of sexual orientation-related content in civil society submissions, yet no recommendations to Saudi Arabia from other States or any other mentions of SOGI. However, in Saudi Arabia's October 2013 **review** (2nd cycle UPR), there were no civil society inputs on SOGI, no recommendations and no mentions by the State on SOGI-related issues. At the United Nations, Saudi Arabia has continually **refused** to accept that the human rights framework includes SOGI issues.

Although Saudi Arabia does not have a codified criminal code, there is a morality law enforcement **agency** called the 'Committee for the Propagation of Virtue and the Prevention of Vice', that arrests and detains people who violate the traditional teachings of Wahhabism, including same-sex sexual behaviour and diverse gender expression. They operate in-person and online, and are known to be particularly **vicious** regarding LGBT people.

There are no LGBT groups or organisations operating in Saudi Arabia that are known in the region, and opportunities for people to meet have been severely restricted. According to the Council of Ministers **Resolution** in 2001, "[a]ll internet users in the Kingdom of Saudi Arabia shall refrain from publishing or accessing data containing some of the following: 1. Anything contravening a fundamental principle or legislation, or infringing the sanctity of Islam and its benevolent Shari'ah, or breaching public decency".

Authorities in Saudi Arabia **arrested** several people on "suspicion of homosexuality" in raids on two parties in the city of Jeddah in June 2015. In March 2016, it is **reported** that a doctor in Jeddah was arrested by the Committee for Promotion of Virtue and the Prevention of Vice for flying the rainbow flag, although he had been unaware of its meaning. Also in March 2016, from Jeddah, **ominous attention** has been brought to online communications amongst sexual and gender minorities. However, in May 2016, regarding the death penalty for same sex sexual relations, a leading cleric **noted**, "[b]y condemning homosexuals to death they are committing a graver sin than homosexuality itself".

In October 2016, the **Concluding Observations** of the Committee on the Rights of the Child observed a worry that, *inter alia*, LGBT children are subject to persistent discrimination in Saudi Arabia. As such it was recommended that the State adopt "a proactive and comprehensive strategy to eliminate *de jure* and *de facto* discrimination".

The Saudi authorities **raided** a resort south of Saudi capital, Riyadh in February 2017, and detained 35 Pakistani citizens, describing them as “faggots”, and releasing photographs of some of the individuals who were cross-dressing. Corroboration of the event has not been obtained, but it is **reported** that two members of the group were brutally **killed** by the authorities, a claim that the State **denies**.

SINGAPORE



Penal Code (Chapter 22), 1872, Revised Edition 2008.

Outrages on decency

Section 377A

[GROSS INDECENCY]

“Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.”

Section 377 criminalising “carnal knowledge against the order of nature” has been already repealed by the **Penal Code (Amendment) Act 2007, No. 51**, which came into force on 1 February 2008.

Section 294

[OBSCENE ACT]

“Whoever, to the annoyance of others —

- (a) does any obscene act in any public place; or
- (b) sings, recites or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.”

Section 354

[OUTRAGE MODESTY]

“Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any two of such punishments.”

In October 2014, Singapore’s highest court, the Court of Appeal, **found** that Section 377A infringed the rights of individuals of diverse sexual orientation, and felt that the legislature should **address** the issue, and law should not be made by the Court. Reportedly, an internet blogger **commenting** that one of the judges acted with bias (his text is available in this article), was sentenced with a fine of approximately €6,000, upheld at his appeal in December 2015. Kaleidoscope Trust **reports** (at 46) that section 377A is rarely used now to prosecute LGB people, but sections 354 and 294 are deployed more frequently

In June 2015, the Pink Dot rally **attracted** more than 28,000 participants in Hong Lim Park.. Similar number of attendees populated the June 2016 rally, but it is notable that there was a particular **emphasis** by the State on ensuring ‘foreign entities’ are not funding this agenda (2016 saw significant new funding partners for this event).

In January 2016, at its 2nd cycle UPR, Singapore **received** 12 recommendations, 11 of which called for repeal of Section 377A, and one of which focused on bias in media representation of LGBTI persons and issue, and another which called for general non-discrimination. Singapore “noted” (effectively rejected) all 12 recommendations.

SRI LANKA

Penal Code 1885 (as amended by the Penal Code (Amendment) Act, No. 22 of 1995).

Article 365. Unnatural offences

[AGAINST THE ORDER OF NATURE]

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment of either description for a term which may extend to ten years [...]

Explanation – penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

Article 365A. Acts of gross indecency between persons

[GROSS INDECENCY]

“Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of any act of gross indecency with another person, shall be guilty of an offence and shall be punished with imprisonment of either description for a term which may extend to two years or with a fine, or with both and where the offence is committed by a person over eighteen (18) years of age in respect of any person under sixteen (16) years of age shall be punished with rigorous imprisonment for a term not less than 10 years and not exceeding 20 years and with a fine and shall also be ordered to pay compensation of amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such a person.”

At Sri Lanka’s 2nd cycle UPR in November 2012, only two States (Argentina and Canada) made specific recommendations regarding decriminalisation in the Penal Code. Sri Lanka ‘noted’ them. The State’s next review will be in November 2017.

Although the 1995 amendments broadened the scope of the law to be gender-neutral, according to Kaleidoscope Trust (at p. 47), the law is essentially seen to be a dead law (unenforced although legally valid). However, it is important to note that the presence of the law creates a significant ‘chill factor’ on LGBT people who continue to be subject to extortion and violence. This organisation also reports that at its appearance at the Human Rights Committee, the State acknowledged constitutional protection regarding discrimination in relation to SOGI, amidst a somewhat softening tone regarding SOGI. However, Sri Lanka voted against the creation of a SOGI mandate holder at the UN in late-2016.

Also, in a January 2017 interview the Minister for Justice, basing his argument on the religious nature of Sri Lankan society has said regarding 365 and 365A, “under no circumstance are we going to change that law”. Elsewhere he called “homosexuality” a “mental disorder”, a comment that initiated public outcry. There are pressing concerns, that despite earlier consultations, there appears to be moves to remove references to sexual orientation and gender identity from the nation’s National Human Rights Action Plan for 2017-2021.

SYRIA

Penal Code of 1949.

Article 520

[UNNATURAL SEXUAL INTERCOURSE]

“Any unnatural sexual intercourse shall be punished with a term of imprisonment of up to three years.”

Article 517

“Punish crimes against public decency in any of the ways mentioned in paragraph 1 of Article 208 [any act carried out in a public or open area where one could possibly see, intentionally or accidentally, the act] with imprisonment of three months to three years.”

Despite the provisions of the black letter law, since 2011 Syria has become one of the most dangerous places on earth for sexual and gender minorities, with frequently complex responses to same sex sexual activity. Of the relatively few

testimonies that have emerged out of the war-ravaged country, scenes of torture, persecution, summary execution carried out by State and non-State actors, and often extended family members are **reported**.

In its 1st cycle UPR, in 2011, Amnesty International was the **only NGO** that made a submission about the repeal of Article 520. No States made recommendations on this issue, and there is **no reference** to SOGI in the concluding documents from the first cycle.

Only two civil society submissions were made to Syria's 2nd UPR in November 2016, including this **observation** by MADRE (para 11): "Women and girls can be killed because of mere suspicion of an affair or romantic liaison, a false accusation, or for being raped or sexually assaulted. Victims of "honor" killings also include LGBT individuals".

AWASUR (Joint Submission 12) **state**: "LGBT identified individuals are persecuted and stigmatized socially and legally, where they are denied equal opportunities to education and work through the denial of employment in public services and sometimes in private establishments. They are also persecuted by the law through security trailing and detention, where many men have been beaten, tortured, and raped – individually and in groups – at checkpoints due to their sexual orientation".

In its preliminary Interactive Dialogue to date (March 2017), the Syrian delegation has made **no mention** of the multiple societal and official attacks and persecution of sexual or gender minorities in its responses.

TURKMENISTAN



Criminal Code of 1997 (effective 1 January 1998).

Chapter 18: Crimes against morality

Section 135: Homosexual acts

[HOMOSEXUAL ACTS]

"(1) Homosexual acts, i.e. sexual intercourse between men, shall be punished with a term of imprisonment of up to two years.

(2) Homosexual acts involving physical force, the threat of force and the exploitation of the victim's need for assistance shall be punished with a term of imprisonment of between three and six years.

(3) The offence that is specified in subsection (2) of this Section, where:

- (a) it is committed more than once;
- (b) it is committed by three or more persons without collusion or by several persons in collusion;
- (c) it is committed consciously against a minor;
- (d) it has infected the victim with a sexual disease;

shall be punished with a term of imprisonment of between five and ten years.

(4) The offence that is specified in subsections (2) and (3) of this Section, where:

- (a) it has been committed consciously against a person who has not yet reached the age of 14;
- (b) it has, due to negligence, caused the death of the victim, caused severe damage to their health or infected them with AIDS;

shall be punished with a term of imprisonment of between ten and 20 years."

Section 137. Coercion to engage in sexual relations

[COERCION]

"The coercion of a person to engage in sexual relations, homosexual acts or other acts of a sexual nature by means of blackmail, threats to destroy assets or the exploitation of a material or other dependency shall be punished with a term of correctional labour of up to two years or a term of imprisonment of up to two years."

"Homosexuality" is considered a **mental disorder** in the country, and as such, punishment for same-sex sexual acts between men or perceived 'homosexual' behaviour can also include placement in psychiatric institutions to be 'cured' of their sexual preferences. The law criminalising same-sex sexual acts between males is enforced selectively, and while there are reports of arrests, individuals are rarely prosecuted under this law. The Criminal Code does not mention female same-sex sexual acts.

In its 1st cycle UPR in December 2008, Turkmenistan **rejected** two recommendations (Sweden and Czech Republic) to decriminalise, without offering any rationale for that refusal. Again at its April 2013 review, it rejected Slovenia's recommendation, which referred to other international human rights mechanisms: "Decriminalize sexual relations between consenting adults of the same sex, as recommended by the Human Rights Committee".

In its Concluding Observations on Turkmenistan in 2012, the Human Rights Committee **said** that, "[t]he State party should decriminalize sexual relations between consenting adults of the same sex in order to bring its legislation in line with the Covenant. The State party should also take the necessary steps to put an end to the social stigmatisation of homosexuality and send a clear message that it does not tolerate any form of discrimination against persons based on their sexual orientation or gender identity".

UNITED ARAB EMIRATES



All sexual acts outside of heterosexual marriage are banned in the United Arab Emirates. No article in **Federal Law No (3) of 1987** on Issuance of the Penal Code specifically discusses consensual same-sex relations, although various scholars translate this article otherwise.

It is through the Sharia code that the death penalty theoretically can apply to same-sex sexual relations through the offence of Zina (Article 356) which applies to sexual relations outside of marriage of any sort. However, **research** by leading human rights organisations concludes that although in some cases courts have gone beyond codified laws and imposed harsher sentences of stoning and flogging for Zina crimes, it **appears** that the law is used in rape cases only.

Different Emirates within the UAE have anti-sodomy laws: Article 80 of the Criminal Code in Abu Dhabi (the Emirate that is the seat of the UAE), criminalises "[unnatural sex with another person]", punishable up to 14 years in jail. (This law was passed in 1970, before Abu Dhabi was an independent entity). Article 177 of the Emirate of Dubai (also passed in 1970) imposes 10 years of imprisonment for [sodomy].

The UAE received two State recommendations regarding SOGI in its 2013 2nd cycle UPR: "Protect the human rights of all individuals, including LGBT individuals, and take appropriate steps to help ensure that protection is provided to the victim and perpetrators are identified and prosecuted" (USA), and "Repeal the criminalization of sexual relations between persons of the same sex" (Argentina). It 'noted' both and appears to have made **no comment** at any session on these issues.

UZBEKISTAN



Criminal Code of 1994.

Article 120

[HOMOSEXUAL ACTS - MALE]

"Homosexual acts, which are defined as the gratification of a man's sexual drive with another man without the use of force, shall be punishable with a term of imprisonment of up to three years."

At its 2nd cycle UPR in late-April 2013, Uzbekistan '**noted**' (rejected) two calls to decriminalise same-sex sexual relations (Netherlands and Uruguay), and two others to enact non-discrimination legislation (Spain and Argentina). The State's **response** to these calls was unambiguous: "On questions regarding the decriminalization of homosexuality, the Criminal Code forbids consensual sexual relations between men, but this does not apply to women. There are no plans in the near

future to repeal this law which reflects traditions that have developed over more than 1,000 years. Uzbekistan in this respect shares the position of the Muslim countries expressed during the discussions of this issue within the Human Rights Council” [para 88]. Uzbekistan’s next UPR will be in January 2018.

In August 2015, the Human Rights Committee issued its Concluding Observations on Uzbekistan. At paras. 6 and 7, it **noted** that for the State to align with Convention obligations, its legal framework needs to ensure, *inter alia*, full protection from discrimination in all spheres, inclusive of SOGI and it provides for effective remedies in cases of violations. It also reiterated a previous recommendation concerning “any form of social stigmatization, hate speech, discrimination or violence” based on SOGI, ensuring “the investigation, prosecution and punishment of such violent acts”, and the repeal of Article 120.

YEMEN



Penal Code 1994.

Article 264

[HOMOSEXUALITY – MEN]

“Homosexuality between men is defined as penetration into the anus. Unmarried men shall be punished with 100 lashes of the whip or a maximum of one year of imprisonment, married men with death by stoning.”

Article 268

[HOMOSEXUALITY – WOMEN]

“Homosexuality between women is defined as sexual stimulation by rubbing. The penalty for premeditated commission shall be up to three years of imprisonment; where the offence has been committed under duress, the perpetrator shall be punishable with up to seven years detention.”

Following the unification of north and south Yemen, the 1994 Yemeni Penal Code (the Republic’s Rule number 12) requires stoning to death for consensual same-sex relations for men (Art. 264) and three to seven years imprisonment for women (Art. 268).

The situation in Yemen has become progressively worse for sexual and gender minorities since the takeover of much of the country by the Houthi militia in 2013. An **article** from August 2015 goes into some detail on the environment for LGBT people in Yemen. Murders of gay men **continue** to be reported.

In its 2nd cycle UPR in January 2014, there were no recommendations made by States to Yemen in regards to SOGI. In fact, it appears that there was only one passing **mention** of SOGI in the 18 civil society and other submissions. Unlike at its 1st cycle UPR in May 2009 where there was **one**, there were no oral statements made at the close of Yemen’s 2nd cycle UPR. Yemen’s next UPR will be in October 2018.

COOK ISLANDS (NEW ZEALAND ASSOCIATE)



Crimes Act 1969.

Section 154. Indecency between males

[INDECENT ACT]

“(1) Everyone is liable to imprisonment for a term not exceeding five years who, bring a male,—

- (a) Indecently assaults any other male; or
- (b) Does any indecent act with or upon any other male; or
- (c) Induces or permits any other male to do any indecent act with or upon him.

(2) No boy under the age of fifteen years shall be charged with committing or being a party to an offence against paragraph (b) or paragraph (c) of subsection (1) of this section, unless the other male was under the age of twenty-one years.

(3) It is not defence to a charge under this section that the other party consented.”

Section 155. Sodomy

[SODOMY]

“(1) Everyone who commits sodomy is liable—

- (a) Where the act of sodomy is committed on a female, to imprisonment for a term not exceeding fourteen years;
- (b) Where the act of sodomy is committed on a male, and at the time of the act that male is under the age of fifteen years and the offender is of over the age of twenty-one years, to imprisonment for a term not exceeding fourteen years;
- (c) In any other case, to imprisonment for a term not exceeding seven years.

(2) This offence is complete upon penetration.

(3) Where sodomy is committed on any person under the age of fifteen years he shall not be charged with being a party to that offence, but he may be charged with being a party to an offence against section 154 of this Act in any case to which that section is applicable.

(4) It is no defence to a charge under this section that the other party consented.”

The Cook Islands is a New Zealand associate, and as such, the laws in the Cook Islands are only applicable to the islands, and not to New Zealand. The LGBT organisation, the *Te Tiare Association*, is pushing for decriminalisation in light of developments at the international (UN) level. Even though representatives of the local traditional royal family have spoken against criminalisation of same-sex intimacy, it is reported that the political establishment are not as yet entirely on board.

KIRIBATI



Penal Code [Cap 67] Revised Edition 1977.

Section 153. Unnatural Offences

[BUGGERY]

“Any person who—

- (a) commits buggery with another person or with an animal; or
 - (b) permits a male person to commit buggery with him or her,
- shall be guilty of a felony, and shall be liable to imprisonment for 14 years.”

Section 154. Attempts to commit unnatural offences and indecent assaults

[ATTEMPTED BUGGERY]

“Any person who attempts to commit any of the offences it specified in the last preceding section, or who is guilty of any assault with intent to commit the same, or any indecent assault upon any male person shall be guilty of a felony, and shall be liable to imprisonment for 7 years.”

Section 155. Indecent practices between males

[GROSS INDECENCY]

“Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony, and shall be liable to imprisonment for 5 years.”

Kiribati 'noted' (rejected) two **recommendations** to decriminalise, and four to include SOGI into its Constitutional provisions for non-discrimination in its 1st cycle UPR in May 2010. However, the State did attempt to explain its position: "Concerning the issue of sexual orientation, the delegation appreciated the existence of homosexuality and the need to include it as a prohibited discriminatory ground in the Constitution. However, the delegation reiterated the high threshold required in order to adopt an amendment to the Bill of Rights. The same would apply to the issue of discrimination against women" (para. 61). Local organisations **reported** that a Private Member's Bill calling for such Constitutional inclusion was then rejected in the Parliament in 2014.

In its 2nd cycle UPR in January 2015, Kiribati received **recommendations** from France, Slovenia, Chile, Canada and Uruguay to decriminalise same-sex sexual relations, and to ensure SOGI is a ground that is protected in anti-discrimination legislation. In the final Working Group **report** for Kiribati, there is no mention of the State's reasons for rejecting ('noted') all SOGI-related recommendations. It is notable that the State created a Gender Equality and Women's Development Policy in light of the problem it identified in its 2010 UPR (quoted above).

Finally, Boutokaan, Inaomataia ao Mauriia Binabinaine Association (BIMBA), the first Kiribati LGBT NGO, was founded in September 2016. The establishment of **BIMBA** is likely to lead to increased effort towards decriminalising same-sex sexual conduct and broader law reform in the country.

PAPUA NEW GUINEA



Criminal Code 1974, as amended in 2002.

Section 210. Unnatural Offences

[AGAINST THE ORDER OF NATURE]

"(1) A person who—

- (a) sexually penetrates any person against the order of nature; or
- (b) sexually penetrates an animal; or
- (c) permits a male person to sexually penetrate him or her against the order of nature, is guilty of a crime.

Penalty: Imprisonment for a term not exceeding 14 years.

(2) A person who attempts to commit an offence against Subsection (1) is guilty of a crime.

Penalty: imprisonment for a term not exceeding seven years."

Section 212. Indecent Practices between Males

[GROSS INDECENCY]

"(1) (1) A male person who, whether in public or private—

- (a) commits an act of gross indecency with another male person; or
- (b) procures another male person to commit an act of gross indecency with him; or
- (c) attempts to procure the commission of any such act by a male person with himself or with another male person, is guilty of a misdemeanour.

Penalty: Imprisonment for a term not exceeding three years."

In its 1st cycle UPR in June 2011, Papua New Guinea rejected two **recommendations** to decriminalise sexual relations between consenting adults of the same sex, and one to include "sexual orientation and gender" in non-discrimination legislation.

In its 2nd cycle UPR in July 2016, Papua New Guinea did not accept five SOGI related **recommendations**, four of which referred to the decriminalisation of same-sex sexual activity, and included a **footnote** explicitly stating that "LGBT [sic] is currently not a priority of the Government" (see fn. 53). During the interactive dialogue, the delegation **stated** that the rights of lesbian, gay, bisexual, transgender and intersex persons, "needed to be understood by the population" and that a "national consultation process was required in order to address the issue in a comprehensive way".

Kapul Champions, the first local registered gay, bisexual and transgender human rights NGO in the country came into being in 2013 and, in 2015, it submitted its own report for the UPR. The organisation indicated that former Member of Parliament, Dame Carol Kidu, described gay Papua New Guineans as being forced to live lives of secrecy, calling —unsuccessfully— on the government to decriminalise 'homosexuality'. The report also shows that Prime Minister Peter O'Neill stated that there were 'strong feelings' against 'homosexuality' in the country, which was "yet to accept such sexual openness". Other civil society organisations submitted information on SOGI issues, namely *Kaleidoscope Trust and the Sexual Rights Initiative*, focusing on criminalisation, discrimination, access to justice, health services and employment regarding LGBTI people, and *Human Right Watch*, with regard to the plight of gay asylum seekers in Papua New Guinea.

Regarding actual enforcement of laws criminalising same-sex sexual relations, Kaleidoscope Trust reported that in March 2015, Malalaua district resident Mr Joe Sevese was prosecuted and pleaded guilty to indecent acts between males (see *State v. Sevese* at 2). In that matter, the sentencing judge found that "homosexual acts or this type of behaviour is quite prevalent in society" despite the lack of reported cases, and sentenced the accused to a suspended sentence, mandatory counselling and community work.

SAMOA

Crimes Act 2013

Section 67. Sodomy

[SODOMY]

"(1) A person who commits sodomy is liable:

- (a) where the act of sodomy is committed on a female, to imprisonment for a term not exceeding 7 years; or
- (b) where the act of sodomy is committed on a male, and at the time of the act that male is under the age of 16 years and the offender is of or over the age of 21 years, to imprisonment for a term not exceeding 7 years; or
- (c) in any other case, to imprisonment for a term not exceeding 5 years.

(2) Sodomy is complete upon penetration.

(3) It is no defence to a charge under this section that the other party consented."

Section 68. Attempts to commit sodomy

[ATTEMPTED SODOMY]

"A person is liable to imprisonment for a term not exceeding 5 years who:

- (a) attempts to commit sodomy; or
- (b) assaults any person with intent to commit sodomy."

Section 71. Keeping place of resort for homosexual acts

[FACILITATES INDECENT ACTS]

"A person is liable to imprisonment for a term not exceeding 7 years who:

- (a) keeps or manages, or knowingly acts or assists in the management of, any premises used as a place of resort for the commission of indecent acts between males; or
- (b) being the tenant, lessee or occupier of any premises, knowingly permits the premises or any part thereof to be used as a place of resort for the commission of indecent acts between males; or
- (c) being the lessor or landlord of any premises, or the agent of the lessor or landlord, lets the premises or any part of the premises with the knowledge that the premises are to be used as a place of resort for the commission of indecent acts between males, or that some part of the premises is to be so used, or is willfully a party to the continued use of the premises or any part thereof as a place of resort for the commission of the indecent acts."

At its 1st cycle UPR in May 2011, Samoa rejected three Level 5 (act immediately) recommendations to decriminalise same-sex sexual activity from Canada, France and Norway, but it did accept a Level 2 ("continue its reconsideration") soft recommendation from the United States. However, Samoa's rejection is worthy of note: Paragraph 22 of the report of the Working Group reads: "Samoa noted the gaps and weaknesses in its legislative framework on upholding equality and non-discrimination based on sexual orientation, and that relevant legislation was being reviewed by the Samoa Law

Reform Commission. Samoa indicated that *Faafafine*, gays and lesbians were integral members of Samoan society and were heirs to family chiefly titles and lands through extended family consensus, as done for all men and women of its society. However, sexual orientation was a sensitive issue in Samoa given the religious and cultural beliefs of mainstream society. Nonetheless, Samoa was confident that education, awareness and sensitisation would pave the way for societal acceptance and prevention of discrimination that might arise out of sexual orientation”.

In its 2nd cycle UPR, Samoa received seven SOGI-related **recommendations**, six of which were rejected and only one accepted (to reduce violence against women and girls and violence based on sexual orientation and gender identity). During the interactive dialogue the delegation touched upon “discriminatory practices on sexual matters”, stating that Samoa had worked to increase awareness among the population, stressing that issues like this one are especially difficult to face, as they involve “cultural and religious sensitivities”.

In 2013, Samoa voted in favour of the **Asian and Pacific Ministerial Declaration on Population and Development**, which included several references to SOGI-related issues, such as violence and discrimination against LGBT people, and included policy directions on the matter. Furthermore, the **Labour & Employment Relations Act of 2013** banned discrimination against employees or applicants for employment based on sexual orientation (among other grounds). Also in 2013, Samoa enacted the **Crimes Act 2013**, amending Section 58D of the **Crimes Ordinance 1961**, which decriminalised ‘indecent acts’ between males.

However, this progress is eclipsed by the fact that sodomy provisions survived the 2013 amendment. Criminalisation of same-sex consensual act between adults was kept on the books despite the **recommendation to decriminalise** made by the Samoa Law Reform Commission (Recommendation 12). As organisations **point out**, the existence of the law means that Samoa’s criminal provisions can still be used to target gay and bisexual men, and potentially transgender and intersex persons.

SOLOMON ISLANDS



Penal Code (Revised Edition 1996).

Section 160. Unnatural offences

[BUGGERY]

“Any person who—

- (a) commits buggery with another person or with an animal; or
- (b) permits a male person to commit buggery with him or her, shall be guilty of a felony, and shall be liable to imprisonment for fourteen years.”

Section 161. Attempts to commit unnatural offences

[ATTEMPTED BUGGERY]

“Any person who attempts to commit any of the offences specified in the last preceding section, or who is guilty of any assault with intent to commit the same, or any indecent assault indecent assaults upon any male person shall be guilty of a felony, and shall be liable to imprisonment for seven years.”

Section 162. Indecent practices between persons of the same sex (*Inserted by Act 9 of 1990, s. 2*)

[GROSS INDECENCY]

“Any person who, whether in public or private—

- (a) commits any act of gross indecency with another of the same sex;
- (b) procures another of the same sex to commit any act of gross indecency; or
- (c) attempts to procure the commission of any act of gross indecency by persons of the same sex, shall be guilty of a felony and be liable to imprisonment for five years.”

Although the Solomon Islands accepted Norway’s recommendation to decriminalise same-sex sexual activity between consenting adults in its 1st cycle UPR in May 2011, in the same session it ‘noted’ (rejected) three other **recommendations** that advised exactly the same thing (from Slovenia, France and Spain). The Working Group report states: “The delegation

reported that the cultural context of society did not condone same-sex relationships. Any commitment to removing Penal Code provisions criminalising sexual relations between consenting adults of the same sex must be subject to consultations. However, there had not been any submissions to the Law Reform Commission in their review of the Penal Code to repeal those sections.”

In its 2nd cycle UPR, the Solomon Islands’ rejected six **recommendations** regarding decriminalisation and anti-discrimination legislation inclusive of SOGI. In a cursory response, the delegation responded that much still remained to be achieved with regard to sexual orientation and gender identity, but this would take time, resources and commitment.

In 2016, the Equal Rights Trust published a **report** on discrimination and inequality in the Solomon Islands that includes a section on sexual orientation discrimination (p. 104 onwards). The oppressive environment in which LGB people live in the islands is reflected in testimonies gathered in focus groups. Participants spoke of verbal, physical and sexual abuse in public places and lack of protection from police officers.

TONGA

Criminal Offences Act [Cap 18] 1988 Edition.

Section 136. Sodomy and bestiality

[SODOMY]

“Whoever shall be convicted of the crime of sodomy with another person or bestiality with any animal shall be liable at the discretion of the Court to be imprisoned for any period not exceeding ten years and such animal shall be killed by a public officer (Substituted by Act 9 of 1987).”

Section 139. Attempted sodomy, indecent assault upon a male

[ATTEMPTED SODOMY]

“Whoever shall attempt to commit the said abominable crime of sodomy or shall be guilty of an assault with intent to commit the same or of any indecent assault upon any male person shall be liable at the direction of the Court to imprisonment for any term not exceeding 10 years.”

Section 140. Evidence

“On the trial of any person upon a charge of sodomy or carnal knowledge it shall not be necessary to prove the actual emission of seed but the offence shall be deemed complete on proof of penetration only.”

Section 142. Whipping for certain offences

“Whenever any male person shall be convicted of any offence against sections 106, 107, 115, 118, 121, 122, 125, 132, 136 and 139 of this Act the Court may, in its discretion in lieu of or in addition to any sentence of imprisonment authorised under this Act order the person so convicted to be whipped in accordance with the provisions of section 31 of this Act.” (Substituted by Act 9 of 1987).

Interestingly, in its 1st cycle UPR in May 2008, having received three other States’ **recommendations** to decriminalise same-sex sexual relations (all of which were ‘noted’), Bangladesh used the opportunity of the UPR to recommend that Tonga *retain* its criminalising law—a recommendation that is anathema to international human rights standards - but Tonga also rejected this advice. The delegation noted “[o]n the issue of the right to privacy... [she] indicated that Tonga is an inclusive society with tolerant Christian values that require respect across differences”.

In January 2013, at its 2nd cycle UPR Tonga accepted a **Level 3** (“to consider”) **recommendation** regarding, “strengthening measures to eliminate all discriminatory treatment” based on SOGI from Argentina. However, it then went on to reject a further five recommendations to decriminalise same-sex sexual relations between consenting adults. The delegation did not address the six SOGI recommendations directly in its response to the UPR, but in a response to its ratification of Convention on the Elimination of Discrimination Against Women (CEDAW) mentioned that one of its reservations may be about same-sex marriage. Tonga’s next UPR will be in October 2017.

In 2013, Tonga voted in favour of the [Asian and Pacific Ministerial Declaration on Population and Development](#), which included several references to SOGI-related issues, such as violence and discrimination against LGBT people, and included policy directions on the matter. In May 2015, the Pacific Sexual Diversity Network (PSDN) held its first conference (“*Our Voices, Our Communities, Our Rights!*”) in Tonga, with the support of the State and the Tongan royal family. [Ninety-six delegates](#) (73 of whom work for LGBT CSOs or individual activists from 12 Pacific Islands) attended. Despite [vitriolic rhetoric](#) by religious groups, the local LGBT organisation *Tonga Leitis Association* (TLA) has been active on the ground [urging](#) the government to repeal sodomy laws still in force.

TUVALU

**Penal Code [Cap 8] Revised Edition 1978****Section 153. Unnatural offences****[BUGGERY]**

“Any person who—

(a) commits buggery with another person or with an animal; or

(b) permits a male person to commit buggery with him or her,

shall be guilty of a felony, and shall be liable to imprisonment for 14 years.”

Section 154. Attempts to commit unnatural offences and indecent assault**[ATTEMPTED BUGGERY]**

“Any person who attempts to commit any of the offences specified in the last proceeding section [sic], or who is guilty of any assault with intent to commit the same, or any indecent assault upon any male person shall be guilty of a felony, and shall be liable to imprisonment for 7 years.”

Section 155. Indecent practices between males**[GROSS INDECENCY]**

“Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony, and shall be liable to imprisonment for 5 years.”

Despite the Czech Republic’s 1st cycle UPR [recommendation](#) to Tuvalu to decriminalise, as an act that would foster tolerance and assist with dealing with HIV, the delegation made reference to the difficulties of Constitutional change which, “... will need to be carefully considered”, rather than the legislative amendments that were being sought (para. 14).

Again, at its 2nd cycle UPR in June 2013, Tuvalu repeated the phrase “carefully considered” in relation to legislative repeal. It rejected [recommendations](#) from the United States and the United Kingdom to decriminalise consensual same-sex sexual activity, and responded by saying that, “... people with different sexual orientation did not suffer social discrimination but the question of legal protection in the law was controversial and would need to be carefully considered. Tuvalu was open to discussion”.

In 2013, Tuvalu voted in favour of the [Asian and Pacific Ministerial Declaration on Population and Development](#), which included several references to SOGI-related issues, such as violence and discrimination against LGBT people, and included policy directions on the matter. In fact, in its oral statement, Tuvalu’s delegation stressed that the country turned a new page in its efforts to address key population issues and that it was addressing human issues that are inclusive in nature, upholding the human rights of every individual in this region. However, the 2016 US Department of State Report on Human Rights still [indicates](#) that social stigma or intimidation may prevent reporting of incidents of discrimination or violence based on sexual orientation.



ilga

GLOBAL PERSPECTIVES

CRIMINALISATION																	
Country	Legal	Age of consent		Illegal		Penalising text					Expression		Max Sentences (M)onths and (Y)ears				
	All genders	Equal	Unequal	Male	Female	Sexual act	Sodomy	Against nature	Buggery	Indecency/ other	Promotion law	Morality code	1 M - 2 Y	3 Y - 7 Y	8 Y - 14 Y	15-Y - Life	Death
Algeria																	
Angola																	
Benin																	
Botswana																	
Burkina Faso																	
Burundi																	
Cameroon																	
Cape Verde																	
Central African Republic																	
Chad																	
Comoros																	
Congo																	
Côte d'Ivoire																	
Dem. Rep. of Congo																	
Djibouti																	
Egypt																	
Equatorial Guinea																	
Eritrea																	
Ethiopia																	
Gabon																	
Gambia																	
Ghana																	
Guinea																	
Guinea-Bissau																	
Kenya																	
Lesotho																	
Liberia																	
Libya																	
Madagascar																	
Malawi																	
Mali																	
Mauritania																	X
Mauritius																	
Morocco																	
Mozambique																	
Namibia																	
Niger																	
Nigeria																	
Rwanda																	
São Tomé & Príncipe																	
Senegal																	
Seychelles																	
Sierra Leone																	
Somalia																	
South Africa																	
South Sudan																	
Sudan																	
Swaziland																	
Tanzania																	
Togo																	
Tunisia																	
Uganda																	
Zambia																	
Zimbabwe																	

		PROTECTION										RECOGNITION						
Arrests in past three (3) years	NGO Ban	NRHI - inclusive of sexual orientation?				Discrimination protection					CT BAN	Relationship recognition				Country		
		Yes	No	Unclear	None	Constitution	Employment.	Other	Hate Crime	Incitem.		Yes	Marriage	Civil recognition	Joint adoption		2nd parent adoption	
																		Algeria
																		Angola
																		Benin
																		Botswana
																		Burkina Faso
																		Burundi
																		Cameroon
																		Cape Verde
																		Central African Republic
																		Chad
																		Comoros
																		Congo
																		Côte d'Ivoire
																		Democratic Republic of Congo
																		Djibouti
																		Egypt
																		Equatorial Guinea
																		Eritrea
																		Ethiopia
																		Gabon
																		Gambia
																		Ghana
																		Guinea
																		Guinea-Bissau
																		Kenya
																		Lesotho
																		Liberia
																		Libya
																		Madagascar
																		Malawi
																		Mali
																		Mauritania
																		Mauritius
																		Morocco
																		Mozambique
																		Namibia
																		Niger
																		Nigeria
																		Rwanda
																		São Tomé & Príncipe
																		Senegal
																		Seychelles
																		Sierra Leone
																		Somalia
																		South Africa
																		South Sudan
																		Sudan
																		Swaziland
																		Tanzania
																		Togo
																		Tunisia
																		Uganda
																		Zambia
																		Zimbabwe

LGBT VISIBILITY: A DOUBLE-EDGED SWORD

ANTHONY OLUOCH AND MONICA TABENGWA

Anthony Oluoch is a Kenyan lawyer and in 2017 became Program Manager for Pan Africa ILGA (PAI), and Monica Tabengwa, a barrister from Botswana, is PAI's Executive Director.

The African lesbian, gay, bisexual, and transgender (LGBT) movement has grown exponentially over the last decade. Many organisations fighting for the rights of sexual and gender minorities have been formed and are developing. Numerous brave individuals across the continent have come out and stood up to the violence, stigma and discrimination faced by those of diverse sexual orientation or gender identity. Their voices for equality, and what its absence looks like, have become stronger and clearer. Concurrently, opposition to the existence of such African voices and the ideas they speak has become more strategic and frequently more violent.

The cultural, religious and political barriers to the achievement of LGBT equality and non-discrimination have been made visible in many African countries time and time again. The visibility of our issues and our bodies presents a double-edged sword: on the one hand that visibility serves the necessary purpose of de-mystifying LGBT persons and their human rights concerns. On the other hand it creates a backlash towards many of those bodies who put themselves out in the open.

Our visibility frequently serves to create an enabling environment for State and non-State actors to stigmatise, violate and discriminate against people due to their sexual orientation or gender identity. This persecution can be so severe that the individuals involved have no choice but to seek safety elsewhere. It is, therefore, to this issue that we focus our attention in looking at Africa over the past year, discussing the possible causes of so many African LGBT persons' displacement and migration.

The United Nation's 1948 Universal Declaration of Human Rights (UDHR) was declared as a common standard of achievement for all peoples and all nations. For the first time in global history, an agreement was reached setting out fundamental human rights as worthy of universal protection. In terms of international standards and guidance on asylum, Article 14 of the UDHR states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution". The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees are multilateral treaties defining who a refugee is, and setting out the rights of individuals who are granted asylum. They also set out the responsibilities of nations that grant asylum, but these treaties are not legally binding, although they have been ratified by a majority of the United Nations (UN) member states. Guidance on how to interpret these standards in regards to sexual orientation and gender identity are set out in UNHCR guidelines 2008 and 2012.

While these international instruments set out guidelines for dealing with refugees and asylum seekers, most States have set out their own regulations on the issue. For instance, France became the first country to recognise the constitutional right to asylum under Article 120 of the Constitution of 1793 and the Netherlands admits people who would be in danger if they were to return to their own country. The principle of *non-refoulement* – not sending people back to where they would be in danger of

persecution - underpins international treaties dealing with asylum, and is implicit in Article 3 of the European Convention on Human Rights (ECHR): “[n] No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

Although the asylum granting process in the United States has been characterised as being a game of ‘refugee roulette’ due to the outcome depending largely on the personality of the adjudicator, the country does recognise the right of asylum, and has admitted a significantly large number of refugees including those belonging to sexual and gender minorities. Likewise, many other countries recognise the right of asylum and have admitted individuals on various grounds including persecution on the grounds of actual or perceived sexual orientation or gender identity.

At the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights (the African Commission) in Luanda, Angola, in 2014, a ‘*Resolution on Protection against Violence and Other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*’ (Resolution 275) was adopted. Resolution 275 condemned “the increasing incidences of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their real or imputed sexual orientation or gender identity”. It specifically condemned the situation of systematic attacks by State and non-State actors against person on said basis. It called on all States Party to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities. It also strongly urged States to end all acts of violence and abuse, whether committed by State or non-State actors including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence, including those targeting persons on the basis of their sexual orientation or gender identities.

Three years after the adoption of the Resolution 275, cases of violence, stigma and discrimination towards individuals based on their real or imputed sexual orientation or gender identity persist across the African continent. States continue to deny basic fundamental rights and freedoms to individuals. Some African States have gone ahead to further criminalise same-sex conduct and limit civil society spaces, thereby increasing instances of discrimination, and impeding the development and functioning of SOGI human rights defenders work. Lesbian, gay, bisexual and transgender individuals continue to be arbitrarily arrested, detained and subjected to cruel and inhuman treatment by State and non-State actors alike: crimes that are very rarely punished and render LGBT people highly vulnerable.

In Tanzania, there has been an ongoing witch-hunt for LGBT persons since July 2016. The Deputy Minister for Health threatened to publish known LGBT people in the country in early-2017. On 15 August 2016, he oversaw a raid on the offices of Community Health Education Services and Advocacy (CHESA), confiscating a number of sensitive documents and compelling some staff members to report to the police for interrogation. The Deputy Minister also announced that the country will ban HIV/AIDS outreach projects aimed at gay men especially the supply of lubricant, a move which forced the temporary closure of US funded programs that provide testing, condoms and medical care to gay men. Noting that about 30% of gay men in Tanzania are HIV-positive, this move will put many lives at the risk of HIV-related health problems, and deeper social stigmatisation.

In 2016, it became widespread knowledge that **police** in Egypt use online **dating applications** (including Grindr) to arrest and detain LGBT people. While consensual same sex sexual activity in private is not illegal in Egypt, authorities have arrested and detained LGBT individuals under the '**debauchery law**', whose vague provisions allow for these arrests to happen. As **reported** in April 2016, 11 individuals were sentenced to a total of 101 years in prison under this law.

The Egyptian 1964 **Law on Private Associations and Foundations** is another regressive law used to police and restrict the work of NGOs, and it was a 'blueprint' legislation adopted by other North African States. It decrees that the practice of activities that result in destabilising the national unity, national security, public law and order and public morals are criminal. A 2016 amendment added provisions including requiring government permission to accept foreign funding or expertise or consulting with a foreign organisation, to conduct surveys or publish reports, and at the same time, increasing penalties for violation. These provisions make it **increasingly difficult** for human rights defenders to operate in these countries.

In east Africa, the police **raided** a gay pride event in Kampala, Uganda in August 2016. This raid led to the arrest of about 20 LGBT-identified individuals. The group was released more than two hours later without being charged although some of the detainees alleged to have been mistreated by the police officers while in custody. This raid and others forms of **intimidation and persecution** of LGBT people in the country was made possible by the enactment of the 2014 **Anti-Homosexuality Act**, that further criminalised same-sex conduct proposing life sentences for persons found guilty. While this law was later **repealed** on a technicality, the extant Section 145 of the Penal Code contains overly-harsh penalties (up to life imprisonment) for same-sex conduct, and there are **many recorded** cases of human rights violations based on sexual orientation and gender identity in Uganda. The enactment of the law saw an increase in these violations causing many LGBT Ugandans to **flee the country** for fear of persecution.

In December 2015, four men in Tunisia were **forced** to undergo anal examinations the results of which were used to convict them of same-sex sexual conduct. While these tests have been invalidated by experts in the medical profession and are **considered** a form of torture, cruel, inhuman and degrading treatment, they have been used and continue to be used as a source of evidence in cases of same-sex conduct in **countries including** Cameroon, Egypt, Uganda, Zambia and Kenya. Unfortunately, the High Court in Kenya in 2016 denied a **petition** seeking to find these tests to violate the rights to privacy and dignity. Instead the court ruled that the tests are a legal means of acquiring evidence to prove same-sex conduct.

The denial of the freedom of association and expression is not only limited to countries that criminalise same-sex conduct. Mozambique decriminalised same-sex conduct in 2015, however it remains difficult for the LGBT organisation, LAMBDA, to obtain legal recognition as a NGO. The organisation has been **endeavouring** for more than eight years for official recognition to no avail. This situation is unfortunately more common than not for many organisations in Africa, as new legal vehicles that act to narrow the civic space are being considered or introduced (via amendments to existing laws) in States including Nigeria, Uganda and Kenya (see NGO section in the Legislation Overview of this edition).

In the midst of all these hardships, the Botswana Court of Appeal in 2016 issued a landmark ruling

in *Attorney General v Thuto Rammoge & Others*, ordering the Botswana government to register the organisation LEGABIBO (Lesbians, Gays and Bisexuals of Botswana). The court reaffirmed the Court of First Instance's ruling that the refusal to register the organisation was both irrational and in violation of the right to freedom of association.

The formal and informal persecution of LGBT persons remains unchallenged in most African countries, and in those States community organising is severely limited, oppressed and unattainable. For example, Sudan **applies** the death penalty for consensual same-sex sexual activity, and as such, it is virtually impossible for any organisation working on sexual orientation or gender identity to **develop**, although there has been **some activity**. In terms of organising, a rigorous registration process is mandated in Section 8(1) of the *Voluntary and Humanitarian Work (Organization) Act, 2006*, and other sections impose restrictions on the work of NGOs operating in Sudan. The laws in the country grant discretionary regulatory powers to the government over the operations of these organisations. The few individuals who, in spite of the laws in place, attempt to provide services directed towards LGBT people in the country were forced to flee the country due to the threats that were directed at them (source: authors' personal interviews). The death penalty is also applied for same-sex conduct in parts of Somalia and 12 States in northern Nigeria. Although not applied, the presence of the death penalty in Mauritania emits a strong chill factor for LGBT people in that country.

In August 2016, the President of Humanity First Cameroon, a Yaoundé-based advocacy group was a **victim** of two burglaries where the perpetrators left threatening homophobic notes. The same cost him a large sum of money and valuable property. Humanity First Cameroon released a **statement** stating that the attacks were focused and intended to harm the victim. This is just one of many cases of LGBT people being attacked in their homes, much like that of **Eric Lembembe** in 2012. There have been **reported cases** of individuals evicted from their places of dwelling due to their actual or imputed sexual orientation or gender identities in many African countries.

It is because of these and various other reasons that a significant number of African individuals have fled persecution their home countries and sought asylum elsewhere. Asylum-seeking processes differ by country, yet all are bound by the 1951 Geneva Convention Relating to the Status of Refugees. Asylum-seekers must show that they have a well-founded fear of persecution due to their race, religion, political opinion or membership of a particular social group, and that they are unable or unwilling to seek protection from authorities in their own country. It is possible for a person to apply to remain in some European countries if removing them would be in breach of their rights laid down in the 1950 European Convention on Human Rights. This claim is a "human rights claim".

Following the enactment of the defunct 2014 law in Uganda, discussed above, many LGBT individuals fled to Kenya, a country that also criminalises same-sex conduct, but is considered relatively friendly. However, while in Kenya the individuals have been persecuted and **mistreated** by, among others, their fellow asylum-seekers because they are LGBT. According to a UNHCR **study**, asylum-seekers and refugees with a diverse sexual orientation or gender identity face distinct vulnerabilities. In addition to severe discrimination and violence in their countries of origin - including sexual abuse, lack of police protection, exclusion from access to basic services, arbitrary detention and social and familial ostracism and execution - LGBT asylum-seekers are frequently **subject** to continued harm while in forced displacement.

The situation is not very different in countries like the United Kingdom where an asylum seeker has to prove their claim to sexual or gender diversity. Individuals are often detained in detention centres where they are **forced** to live alongside other homophobic refugees for long periods of time. To test the claim about an asylum seeker's sexual orientation, officials are **known** to ask a series of invasive questions that degrade the individual's dignity. Although the Court of Justice of the European Union (ECJ) **ruled** that authorities, when verifying the sexual orientation of an asylum seeker, should always **comply** with the EU's Charter of Fundamental Rights, invasive, traumatising behaviours are still played out on asylum seekers. The ECJ ruled that while declarations by the applicant are the starting point of the assessment, they may require confirmation. However, in verifying the sexual orientation of the applicant, human dignity and the right for private and family life should be respected.

In spite of the harsh conditions for LGBT people in the African states described here, the countries in which these individuals seek sanctuary continue to deport them sending them back to their home countries where they face threats of violence, stigma, as tragically seen with the **death** of Jackie Nanyonjo,. While there have been some positive developments in African countries regarding the rights of sexual and gender minorities, there are still cases that force those involved to flee and seek safer spaces. Seeking asylum is usually a **last resort** for many.

So many of the problems that this short article points to are a result of the backlash, or pushback, to the increasing visibility of LGBT issues and bodies both in Africa and globally. Increasingly, African activists are actively engaging the existing human rights mechanisms at the UN and the African Commission. SOGI recommendations to African States from the UPR, the Treaty Bodies and Special Procedures, largely resulting from civil society reporting are impacting on States. The utterances from these human rights bodies supply LGBT civil societies with valuable tools to hold their countries accountable for violations of their fundamental rights and freedoms. African human rights advocacy networks must continue facilitating this engagement, and particularly work on further strengthening the skills and capacities of LGBT people to remain strong and visible. The opposition is growing strong and bold, but the knowledge that the support of the international and regional human rights bodies must strengthen the resistance, and inspire more strategic planning and engagement.

Country	CRIMINALISATION																
	Legal	Age of consent		Illegal		Penalising text					Expression		Max Sentences (M)onths and (Y)ears				
	All genders	Equal	Unequal	Male	Female	Sexual act	Sodomy	Against nature	Buggery	Indecency/ other	Promotion law	Morality code	1 M - 2 Y	3 Y - 7 Y	8 Y - 14 Y	15-Y - Life	Death
Antigua and Barbuda																	
Argentina																	
Bahamas																	
Barbados																	
Belize																	
Bolivia																	
Brazil																	
Canada																	
Costa Rica																	
Chile																	
Colombia																	
Cuba																	
Dominica																	
Dominican Republic																	
Ecuador																	
El Salvador																	
Grenada																	
Guatemala																	
Guyana																	
Haiti																	
Honduras																	
Jamaica																	
Mexico																	
Nicaragua																	
Panama																	
Paraguay																	
Peru																	
St Kitts & Nevis																	
St Lucia																	
St Vincent & the Grenadines																	
Suriname																	
Trinidad and Tobago																	
United States																	
Uruguay																	
Venezuela																	

		PROTECTION										RECOGNITION					
Arrests in past three (3) years	NGO Ban	NRHI - inclusive of sexual orientation?				Discrimination protection					CT BAN	Relationship recognition				Country	
		Yes	No	Unclear	None	Constitution	Employ.	Other	Hate Crime	Incitem.		Yes	Marriage	Civil recognition	Joint adoption		2nd parent adoption
																	Antigua and Barbuda
																	Argentina
																	Bahamas
																	Barbados
																	Belize
																	Bolivia
																	Brazil
																	Canada
																	Costa Rica
																	Chile
																	Colombia
																	Cuba
																	Dominica
																	Dominican Republic
																	Ecuador
																	El Salvador
																	Grenada
																	Guatemala
																	Guyana
																	Haiti
																	Honduras
																	Jamaica
																	Mexico
																	Nicaragua
																	Panama
																	Paraguay
																	Peru
																	St Kitts & Nevis
																	St Lucia
																	St Vincent & the Grenadines
																	Suriname
																	Trinidad and Tobago
																	United States
																	Uruguay
																	Venezuela

THE AMERICAS IN 2016: A YEAR MARKED BY SIGNIFICANT ADVANCES, VIOLENCE AND ANTI-RIGHTS STAKEHOLDERS

FANNY GOMEZ-LUGO AND VÍCTOR MADRIGAL-BORLOZ

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Particular thanks to Mariel Ortega de los Santos for her contribution to this article, and to the human rights defenders in the region with whom the authors conferred.

There have been a number of developments in various countries in the Americas related to the human rights of lesbian, gay, bisexual, trans and intersex (LGBTI) people in 2016. This article will only address the rights of lesbian, gay and bisexual populations. In effect, significant advances in the continent were consolidated of which this article focuses on measures of recognition and protection against discrimination. More extensive analysis would reveal progress in other areas such as health, asylum, and employment such as [guidance for health professionals](#) in Uruguay, asylum-granting policies in Canada and Uruguay, and employment [public policy actions](#) in El Salvador. Despite these gains, there was an increase in the existing gap among the region States' level of recognition of LGB people's rights. Even in the States where there were significant advances, anti-rights sectors or leaders generate regression risks.

ADVANCES: REGIONAL LEVEL

OAS AND OTHER MULTI-STATE INITIATIVES

At the Organisation of American States (OAS), in the omnibus resolution adopted by the 46th General Assembly ([AG/RES. 2887 XLVI-O/16](#)), commitments on sexual orientation, identity and gender expression were inserted. In particular, the section of this Resolution on torture and other cruel, inhuman or degrading treatment or punishment included SOGI-related language. In turn, the Permanent Council of the organisation commemorated the International Day against Homophobia, Transphobia and Biphobia in its [May calendar](#). Argentina, Brazil, Canada, Chile, Colombia, the United States of America, Mexico and Uruguay [founded the OAS LGBTI Core Group](#), which held several activities in 2016, including an event on [LGBT people and human trafficking](#).

A large number of States in the Americas, as well as regional, multilateral and civil society organisations and the private sector took part in establishing the [Equal Rights Coalition](#) to promote human rights of LGBTI people at the international level. The leadership and perseverance of several OAS Member States was also instrumental in the creation of the [Independent Expert mandate](#) on protection against violence and discrimination based on sexual orientation or gender identity issues at the United Nations, defending the initiative from attempts made by other groups of States aimed at debilitating the

mandate. In turn, over the course of 2016, the World Bank **adopted measures** to further the work done involving LGBTI people.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (IACHR)

On 11 June 2016, a friendly settlement agreement was signed in the **Peralta Wetzel case** by which Chile admitted responsibility in denying access to civil marriage to three same-sex couples and to legally recognise marriages entered into in other countries. In the agreement, Chile took up significant responsibilities, such as promoting the equal marriage initiative as a matter of legitimate interest in a democratic and inclusive society and the revision of several articles of the Criminal Code.

On 3 July 2016, the IACHR requested the adoption of precautionary measures for **Juana Mora Cedeño and Mario José Delgado González**, based on their complaints reporting the harassment they had suffered as a result of defending LGBT people's human rights in Cuba.

In December 2016, the IACHR held a **public hearing** on case 12,982 (*Luis Alberto Rojas Marín vs. Peru*) regarding the alleged sexual violence and torture of Rojas Marín due to his sexual orientation and related situations involving discrimination and impunity. In this case, there is a discussion of State obligations regarding prevention, investigation and reparation of torture originated in sexual orientation perceptions.

Through the work of its LGBTI Rapporteurship, the IACHR continued to promote the Report on Violence against LGBTI People in the region, issued 23 press releases, sent four (4) letters requesting confidential information to countries in the region, held five (5) **thematic hearings**, gave training on the Inter-American System and protection standards related to the rights of LGBTI people in several countries in the region addressed to different stakeholders. In addition, it included the perspective of human rights of LGBT people in several **thematic** and **country reports** approved or published in 2016.

INTER-AMERICAN COURT OF HUMAN RIGHTS (COURT)

In 2016, the Court issued two sentences related to sexual orientation. In the **Duque case** (in Spanish only), the Court found Colombia responsible for the violation of the right to equality and non-discrimination by not allowing Mr. Duque to equally benefit from a survivor's pension after the death of his partner. In the **Flor Freire case** (in Spanish only), the first case on discrimination due to perceived sexual orientation, the Court found Ecuador responsible for applying an administrative sanction based on military disciplinary regulations sanctioning "homosexual acts" with more severity than sexual acts between a woman and a man. Finally, Costa Rica requested the Court to issue an **advisory opinion** on the interpretation of the Convention in relation to SOGI-related rights, including on the equity benefits for same-sex couples.

ADVANCES: NATIONAL LEVELS

FAMILIES AND INTER-PERSONAL RELATIONS

Although in the Caribbean the threat of criminalisation is still being faced, in August 2016 the Supreme Court of Justice of Belize **declared** Article 53 of the Criminal Code unconstitutional. This article criminalises “carnal access against the order of nature” and imposes a penalty of up to ten (10) years of prison. The Supreme Court ruled that the provision violated the right to human dignity, intimacy, freedom of expression, non-discrimination and equality, and excluded consensual sexual acts between adults taking place in private from its scope. In addition, the Supreme Court stated that the definition of “sex” contemplated in article 16.3 of the Constitution of Belize includes “sexual orientation”, in agreement with the international obligations taken up by the country.

The Belizean case is a good example of how jurisdictional actions seem to catalyse other processes of social change. In conversation with the authors, Caleb Orozco, the activist behind the case, points out that the words showing support to this decision by the Prime Minister’s wife and the Presidency of the National Commission on AIDS have caused “oceanic changes” in political thought. Similar observations can be made about other countries in the continent: in **Antigua and Barbuda**, the Social Transformation Minister spoke in favour of the decriminalisation of sodomy, in **Canada** and the **United States of America**, measures were implemented to commemorate and apologise for historical violations, and in **Mexico**, the participation of the President at the commemoration of the International Day against Homophobia is considered a historical event by some civil society sectors. In conversation with the authors, Josefina Valencia, a Mexican activist, indicates that at different levels of public policy, this event accelerated and triggered the work done by government agencies to guarantee the rights of LGBTI populations.

There were advances in the whole continent regarding the recognition of same-sex couples’ rights: in **Aruba**, the Parliament passed a law that extended civil union; in **Colombia**, the Constitutional Court endorsed same-sex marriage and the Office of the Registrar in Bogota **authorised** the minor daughter of a same-sex couple to be registered; in **Costa Rica**, in June 2016, the Social Security Governmental Agency (Caja Costarricense del Seguro Social, “CCSS”) agreed to grant survivor pensions to same-sex couples; in Ecuador, *de facto* partnerships were recognised as “civil status” and same-sex couples were included in the Organic Act of Management of Identity and Civil Data; in the United States, a Wisconsin judge **recognised** the right of two lesbian women to be registered as mothers in their son’s birth certificate, and in Arizona, presumption of maternity was **recognised** for both mothers; in Mexico, same-sex marriage was approved in the states of **Michoacán**, **Campeche** and **Jalisco**; and in Peru, the 7° Constitutional Court **ordered** the National Registry of Identification and Civil Status (RENIEC, as per its Spanish acronym) to register the marriage of a same-sex couple that had been entered into abroad.

EDUCATION

In the United States, California approved that country’s first **regulatory framework** addressed at public schools for the inclusion of the contributions of American LGBT people and people with disabilities in **History and Social Sciences classes**; and in Peru, the Education Ministry adopted a **new national syllabus** for lower education aimed at boosting **gender equality** and respect for people regardless of their sexual orientation and/or gender identity, guaranteeing the same duties, rights and opportunities for all people.

OTHER MEASURES TO PREVENT DISCRIMINATION AND PATHOLOGISATION

In several States of the continent, significant measures were adopted in this regard: in Chile, the Health Ministry **took an official stand** against the so-called reparative therapies; in Costa Rica, **circular No. 003-2016** issued by the Ministry of Justice ordered the modification of regulatory instruments that may incur in discrimination as well as the creation of a protocol to assist sexually diverse people deprived of freedom; in Colombia, the National Penitentiary Institute adopted a pioneer **regulation** in the region which contemplates direct protection measures for LGBTI people deprived of freedom; and in the United States, a federal judge in Mississippi **blocked** the implementation of a law that would allow for discrimination based on moral or religious convictions, and in **Miami** and **Seattle** measures were adopted against the so-called “conversion therapies”.

CHALLENGES

VIOLENCE

In 2016, at least two massacres in gay bars were recorded: in the city of Orlando, in the United States, **49 LGB people** lost their lives and in Mexico, **five LGB people** were murdered at a bar in the city of Xalapa.

The absence of comprehensive statistical information on the violence indexes that affected LGB people in the region continues to be one of the most significant challenges. Even in this lacking context, the figures that are recorded—particularly by civil society organisations—are reason of great concern. For instance, the following murders have been recorded: 340 LGBT people in **Brazil**, 11 LGBT people in **El Salvador** and seven LGBT people and human rights advocates in Honduras (see IACH Press Releases **27/16** and **78/16**). In other countries, the following murders of LGB people were recorded: two LG victims in Chile (see reports by MOVILH **1** and **2**), three LG people—one of them a human rights defender—in Colombia (see reports by Caribe Afirmativo **1** y **2**), and two gay men in **Jamaica**.

On the other hand, one of the paradigmatic advances in terms of systematic violence against LGBT people took place in Colombia with the inclusion of LGBT victims in Peace Agreements signed by the State and FARC-EP guerrilla groups. In communication with the authors, Marcela Sánchez, a Colombian defender, explained:

[f]or the first time in the world, some peace agreements include a gender perspective, place victims at the core of the debate and recognize a differential approach in their texts. In particular, agreements include a clause implying that in the regulatory development of the peace agreements nobody could be discriminated against for their sexual orientation.

DOORS CLOSED AND ATTACKS BY GROUPS AND PEOPLE AGAINST LGB PEOPLE'S HUMAN RIGHTS

Even in the countries showing significant advances, there were concerning regression tendencies and/or attempts to block the recognition of LGBT people's rights in **Brazil**, **Colombia**, **Mexico**, **Guatemala**, **Peru**, **Belize** and **Bolivia**.

For instance, with respect to the meeting between the President of Mexico and LGBT activists in May 2016, Josefina Valencia pointed out to the authors that “conservative groups organised large demonstrations and used a vast number of resources to block the advances of LGBTI people and women rights”. Also in communication with the authors, Gloria Careaga added that “the articulation between local conservative forces and international networks has been very strong. Local business groups are also involved and have established a strong position from which to stop any advance”. The National Congress decision not to support the presidential initiative to formally recognise equal marriage in the whole country was probably the result, among other things, of the opposition by conservative groups that demonstrated openly and massively.

Marcela Sánchez adds that in Colombia, the year 2016 was contradictory, since despite the advances regarding equal marriage and the inclusion in the Peace Agreements, this very same year and perhaps due to the advances that have been taking place throughout the country in the last decade, the existence of an unprecedented anti-rights movement led by evangelical groups wishing to generate regression in education, children rights and peace building in Colombia became evident.

In Argentina, the new administration did not openly oppose LGBTI people’s rights but, Marcelo Ferreyra, an Argentine activist, brought to the attention of the authors the fact that the government “is not willing to make the necessary investments required by public policies”. Even more, it appears to be ready to “tolerate a dissident policy, what has led police repression to worsen, limitations in terms of access to justice or discriminatory prosecutions”.

In a reflection on the importance of coalitions and joining forces, Caleb Orozco from Belize states that

while right-wing forces are everywhere, a social transformation process is going on in which families are not ashamed of supporting and loving their family members... LGBT coalitions in Latin American and Caribbean countries are everywhere and the thematic platform helps... demonstrations are taking place and repressive environments, violence and fear are no longer stopping us from voicing our thoughts... They may kill us, but they won’t stop us!

FINAL WORD

In 2016, there was significant progress in the recognition of lesbian, gay and bisexual people’s human rights in the Americas. However, violence due to bias against people with diverse sexual orientation continues to be the norm. Focus should be placed on the progress made, managing the great tension generated by regressive forces and processes, and making new breakthroughs.

AMERICA'S UNPROMISING START TO 2017

(NOTED BY AUTHORS OF THIS EDITION)

Throughout the 2016 election in the United States, American LGBT **organisations** and some **media outlets** expressed growing concern about the implications that Donald Trump's electoral victory would have in the quest for LGBT equality. Then-candidate Trump had given confusing, even contradictory, statements on his stance on this issue. In his acceptance speech at the 2016 Republican National Convention, he **pledged** to defend "LGBTQ [American] citizens from the violence and oppression of the hateful foreign ideology". However, in the days following the election, **hundreds of violent incidents**, many of them targeting LGBTQ people, were widely **reported**.

A few days later, GLAAD launched the **Trump Accountability Project** (TAP), an exceptional initiative which closely follows the Trump administration on issues affecting LGBTQ people and catalogues the anti-LGBTQ statements and actions of President Donald Trump and those in his circle.

As reported by TAP, one of the very first official SOGI-related actions took place minutes after Trump took office, when all references to the **work of the presidency** towards LGBTQ equality were **deleted** from the White House website. However, within the first three months of the new administration, several less symbolic and more substantive regressive measures ensued.

Among the most concerning is the **removal** of the federal guidelines **which protected transgender students** by providing schools different useful resources, such as best practices and practical advice on complying with case law under the Title IX sex discrimination law (see also, IACHR **statement**). President Trump's **appointment** of Judge Neil Gorsuch to the Supreme Court was also a major cause for concern. As **explained** by the Williams Institute, Judge Gorsuch is a conservative justice in the tradition of late Justice Scalia and he is likely to reach decisions that negatively impact the LGBT community. Moreover, "sexual orientation" and "gender identity" were **removed** as proposed subjects for possible inclusion on the Decennial Census and/or American Community Survey in the future.

Further initiatives and proposals have raised growing concern among LGBTQ activists and scholars. The Williams Institute **reported** that if the proposed changes to the Affordable Care Act are eventually enacted, almost a million LGBT adults may lose health insurance by 2026. It has also been **reported** that the proposed budget for the U.S. Congress would reduce funding for the **research** and the **worldwide initiative to help people with HIV and AIDS**, known as PEPFAR.

In this unpromising context, most organisations on the ground have launched campaigns and programs to resist both federal and state anti-LGBTQ initiatives.

CRIMINALISATION																		
Country	Legal		Age of consent		Illegal		Penalising text					Expression		Max Sentences (M)onths and (Y)ears				
	All genders	Equal	Unequal	Male	Female	Sexual act	Sodomy	Against nature	Buggery	Indecency/ other	Promotion law	Morality code	1 M - 2 Y	3 Y - 7 Y	8 Y - 14 Y	15-Y - Life	Death	
Afghanistan																	X	
Bahrain																		
Bangladesh																		
Bhutan																		
Brunei Darussalam																		
Cambodia																		
China																		
East Timor																		
Gaza (OPT)																		
India																		
Indonesia (most)																		
Sumatra/Aceh																		
Iraq																		
Iran																		
Israel																		
Japan																		
Jordan																		
Kazakhstan																		
Kuwait																		
Kyrgyzstan																		
Laos																		
Lebanon																		
Malaysia																		
Maldives																		
Mongolia																		
Myanmar																		
Nepal																		
North Korea																		
Oman																		
Pakistan																	X	
Philippines																		
Qatar																	X	
Saudi Arabia																		
Singapore																		
South Korea																		
Sri Lanka																		
Syria																		
Taiwan																		
Tajikistan																		
Thailand																		
Turkmenistan																		
Vietnam																		
United Arab Emirates																	X	
Uzbekistan																		
West Bank(OPT)																		
Yemen																		

		PROTECTION										RECOGNITION									
Arrests in past three (3) years	NGO Ban	NRHI - inclusive of sexual orientation?				Discrimination protection					CT BAN	Relationship recognition				Country					
		Yes	No	Unclear	None	Constitution	Employ.	Other	Hate Crime	Incitem.		Yes	Marriage	Civil recognition	Joint adoption		2nd parent adoption				
Yes	Yes																				
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																					Bangladesh
																					Bhutan
																					Brunei Darussalam
																					Cambodia
																					China
																					East Timor
																					Gaza (OPT)
																					India
																					Indonesia (most)
																					Sumatra/Aceh
																					Iraq
																					Iran
																					Israel
																					Japan
																					Jordan
																					Kazakhstan
																					Kuwait
																					Kyrgyzstan
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ASIA THESE DAYS – THREE PARTS: EAST & SOUTH EAST ASIA, SOUTH ASIA AND MIDDLE EAST

EAST AND SOUTH-EAST ASIA

ANNA ARAFIN, JEAN CHONG, JACK LEE, MINGKE LIU, DANIELE PALETTA, YULI RUSTINAWATI, MINHEE RYU, DOUGLAS SANDERS (MAIN AUTHOR), AZUSA YAMASHITA, AND BIN XU.

Some changes. Some progress. Firstly, this section looks at separate developments in Indonesia, China and Taiwan and also progress at the Asia Pacific Forum (APF). It then turns to record some overarching issues such as discrimination, freedom of expression and other themes of relevance to East and South-east Asian States over the past year.

DEVELOPMENTS IN INDONESIA, CHINA, TAIWAN AND AT THE APF

INDONESIA

The outbreak of elite homophobia, **noted** in last year's 'Asia These Days' essay, continued in much of 2016. The demands by various political, educational, medical and religious figures for criminal laws and compulsory treatment were not, in fact, implemented in new legislation. Restrictions aimed at public media were reinforced. The president and vice-president did not condemn the blatant homophobia of cabinet ministers and other elites, only saying there should be no violence or discrimination. The flood of anti-LGBT statements only eased off when other issues came to dominate public discussion (reassessing the mass killings in 1965-6, and the campaign against the Chinese Christian candidate for governor of Jakarta).

The **Family Love Alliance** appealed to the constitutional court to expand the existing criminal law prohibitions of sexual activity to cover all acts outside of heterosexual marriage, as a way, it seems, to criminalize homosexual same sex sexual acts. The court allowed the challenge to proceed, and has heard numerous 'expert' witnesses. One witness, a noted psychiatrist, Dadang Hawari, **said** "homosexuals" could be 'cured' by psychiatric treatment. Indonesian Child Protection Commission (KPAI) chairman Asrorun Ni'am Sholeh, former law and human rights minister Yusril Ihza Mahendra and a commissioner from the National Commission on Human Rights have **testified** for the Alliance. The constitutional court hearing concluded in February, 2017.

CHINA

Two quite liberal Chinese based media sources, *Global Times* and *Sixth Tone* (launched to enhance China's 'soft power' capacity) give ongoing coverage in English of developments for international audiences, and the English language version of *China Daily* has been largely positive about LGBT issues in recent years. Will these apparently liberalizing patterns continue – when media stories in early 2017 repeatedly tell of crackdowns on human rights lawyers?

The last year has confirmed the unexpected pattern of court cases in China. Observers were surprised that the cases could be heard. Did the courts actually have some independence on sexuality issues? The issues did not seem to threaten any strategic governmental concerns (and there was no conservative religious lobby with any influence). There was support from a loose **group** of 'Rainbow Lawyers', volunteering legal services. Made up of around 60 lawyers and legal workers, the group was set up in 2014. It runs a national hotline. Subjects of leading court cases include:

Conversion therapy: In a landmark decision in December, 2014, a District Court **ruled** that a medical clinic in Chongqing, that had administered electroshock therapy and hypnosis to 'cure' an individual of 'homosexuality', was liable to pay damages. It ruled that homosexuality was not an illness and the treatment was abusive. China had removed homosexuality from the list of mental disorders in 2001, following international patterns. The clinic was ordered to apologize and pay compensation of 3,500 yuan (\$536). Despite the verdict, clinics continue to offer electroshock therapy, as undercover activists proved in a 2015 **documentary** by Britain's Channel 4. A new conversion therapy case **began** in May 2016 against a hospital in Henan province for administering unwanted treatment to an individual to 'cure' his homosexuality. The hospital had accepted an involuntary committal of the man by his family, including his wife, from whom he was separated. The hospital refused access to the individual, until police became involved, and secured his release. The lawsuit asks for an apology and compensation.

Website censorship: Fan Popo **sued** the government in 2015 after his film *Mama Rainbow*, on mothers of LGBT children, was removed from online sites. He won a ruling that the state agency had issued no ban.

Same-sex marriage: In late-June 2015, two gay men were **denied** marriage registration in the city of Changsha. Both the trial court and the appeals court rejected their case.

Textbooks: Qiu Bai found that many of the medical texts in her university library called homosexuality a psychological disorder. But China had declassified homosexuality as a disorder in 2001. Qiu Bai and classmates wrote to relevant government agencies. Getting no satisfaction, she **sued** the Ministry of Education. On November 24th, 2015, a judicial hearing took place. In lieu of a trial, Chen was given a two hour meeting with education officials, presided over by a judge. That did not resolve the issues, and a court hearing **began** in September, 2016. Meanwhile Beijing Normal University **issued** a new set of textbooks for primary grades that described same-sex attraction as "a completely normal phenomenon" and said there should be no discrimination.

Employment discrimination: Mr C identifies as male, though his national identity card indicates he is female. He reported to work at a Health Checkup Centre in the city of Guiyang dressed as a man. He was fired after a one-week probation period. After attending a seminar held by Wider Pro Bono Legal Center in Shenzhen, he began a lawsuit with the center's support. Article 12 of China's **Labor Law** contains an anti-discrimination clause that includes ethnicity, religion, and sex, but not sexual orientation or gender identity. The employer denied acting on bias. A lawyer from the 'Rainbow Lawyers' network **took** the case, and Professor Liu Xiaonan from the Law School at China University of Political Science and Law in Beijing appeared as an expert witness to discuss issues of workplace discrimination. The initial decision in May 2016, simply ordered payment for the probation period. An appeal decision in December 2016, **ordered** additional compensation, saying the firing had been

unlawful, but did not find discrimination on grounds of transgender identity. A re-hearing is scheduled for late-April 2017. The case received extensive publicity in China and internationally.

TAIWAN

Taiwan has been the leading jurisdiction in Asia on LGBT rights. It has a prohibition of discrimination on grounds of sexual orientation and gender identity in employment and education. It has the best transgender recognition **law** in Asia. It has been debating opening marriage, off and on, for twenty years. Activists have long speculated as to where marriage would be opened first in Asia – would it be Nepal, Thailand or Taiwan? It looks like Taiwan, and it looks like 2017.

The first draft of a Bill to open marriage by amending the civil code was **passed** by a committee in Taiwan's parliament in December 2016. This opened a period of debate and negotiations. Some legislators want a separate registration law for same-sex couples, not the opening of marriage. Taiwan's president, Tsai Ing-wen **supports** marriage equality.

There is also a judicial challenge. Fourteen grand justices of the Taiwan constitutional court **heard** the case on 24 March, 2017. The call for opening marriage was brought by long-time activist **Chi Chia-wei**, whose litigation has been before the courts for a decade. He was supported by the Taipei city government, which already has a registry where couples can have their relationships formally recognized (with very limited legal or administrative consequences).

Taiwan activists **hosted** the 2015 ILGA Asia conference. In spite of the contested international status of Taiwan, there was an enthusiastic contingent in Taipei from Mainland China.

NATIONAL HUMAN RIGHTS INSTITUTIONS

National Human Rights Commissions exist in eight countries in East and Southeast Asia: Indonesia, South Korea, Malaysia, Mongolia, Myanmar, Philippines, Thailand and Timor-Leste. Some of these bodies have played valuable and active roles on SOGIE issues, and all have addressed SOGIE issues at some point. The **Asia Pacific Forum** of National Institutions for the Promotion and Protection of Human Rights (APF) is an umbrella organization linking 24 national bodies in the Asia-Pacific region. In June 2016, it published a major **report**: *Promoting and Protecting Human Rights: Sexual Orientation, Gender Identity and Sexual Characteristics: A Manual for National Human Rights Institutions*. It contains a comprehensive analysis of LGBTI issues, international human rights law and the role that national commissions can play. The APF organized a regional conference to mark the 10th anniversary of the **Yogyakarta Principles** in Bangkok in late-April, 2017. Featured at the conference was Thai Professor Vitit Muntarbhorn, the first UN **Independent Expert** on SOGIE issues. He had long served on the Advisory Committee of Jurists of the APF.

DEVELOPMENTS ON OVERARCHING ISSUES IN ASIA

CRIMINAL PROHIBITIONS

British colonial era prohibitions of male-male sexual acts continued in force in Brunei, Malaysia, Myanmar and Singapore. In Malaysia the offence had been extended to female-female acts, and that continued in force.

Anwar Ibrahim, who heads an opposition political party in Malaysia, **continues** serving his prison sentence for alleged consensual same-sex sexual acts. It seems that no one else is in jail under the provision in the country.

A prohibition against male-male sexual acts for military personnel in South Korea was **upheld** by the Constitutional Court in July, 2016, for the third time. The court divided, with four of the nine judges willing to strike down the law.

Three prisons in Thailand have **arranged** separate zones to house self-identified LGBT prisoners.

SHARIA LAW

The first of three phases of a new Syariah penal code in the Malay Muslim Sultanate of Brunei, on the north coast of Borneo, came into force in May 2014. A procedural code needs to be enacted next for the following two phases to commence, but a text for that has yet to surface. When such a text emerges, and after a break of one year, phase two of the code can come into force, followed by phase three a year later. Phase three includes the death penalty for male-male sexual acts. There has been no explanation for the **long delay** in moving forward with the law (and the Sultan has criticized the impasse). The Brunei Syariah provisions of concern apply to Muslims and non-Muslims.

Aceh, the autonomous Indonesian province at the northern tip of the island of Sumatra, has unique authority in Indonesia to enact Shariah law. It has a prohibition of male-male homosexual acts (though the Indonesian national criminal code has no ban). The punishment includes a public caning – one hundred strokes. The first **prosecution** of gay men for having sex in Aceh occurred in April 2017, as a result of suspicious neighbors breaking into a room where the two men were living, and filming them together in the nude. The couple admitted they were partners, so the high evidentiary standards required by sharia law were easily met.

The decision in Malaysia limiting a state level Shariah prohibition of cross-dressing was **overturned** on procedural grounds by the highest court. No new challenge to these state-level Shariah laws has been launched.

DISCRIMINATION

Laws against discrimination on SOGIE grounds exist in Taiwan (employment and education) and Macau (employment). Such laws exist in eight or more cities or provinces in the Philippines.

The 2015 *Gender Equality Act* in Thailand prohibits discrimination on the basis of being male or female, or on the basis having a different appearance from the person's sex at birth (Section 3). The law is primarily designed to implement the constitutional prohibition of discrimination on the basis of 'sex'. It clearly covers transwomen and transmen as well. A 2016 government booklet, explaining the law, suggests it could apply to a person harassed by a boss for being 'gay'. Maybe. Maybe not.

As *noted* in last year's 'Asia These Days' essay, two studies on SOGIE discrimination were available in Hong Kong in early 2016. The 2017 'Policy Agenda' of the Hong Kong SAR government avoided promising a SOGIE non-discrimination law, *promising* instead special training of personnel and the drafting of "a charter on non-discrimination of sexual minorities for voluntary adoption by relevant organizations and individuals".(at p. 198). The document acknowledged the *support* of the government's Equal Opportunities Commission for the *development* of a SOGIE-inclusive anti-discrimination law.

A study on discrimination on SOGIE grounds in China was commissioned by the United Nations Development Programme (UNDP), and *released* in May 2016. The report shows that it is "within the family where the deepest forms of rejection and abuse reside, followed by schools and the workplace." With almost 30,000 responses, the survey was the largest to date on the topic in China.

The China University of Political Science and Law in Beijing has drafted an Employment Non-Discrimination Law, including SOGIE grounds, but its *not yet clear* which department may be in charge of promoting the draft law. There was some support for such a law in the 2015 sessions of the National People's Congress and the Chinese People's Political Consultative Conference. In 2016, the Ministry of Human Resources and Social Security consulted the draft.

A set of criminal law amendments, which *included* a prohibition of acts limiting the rights and freedoms of individuals on grounds of sexual orientation and gender identity, was enacted by the national parliament in Mongolia in December 2015. The whole package of amendments was to come into force in September 2016. However, the June 2016 national election threw out the governing coalition government, and gave the more conservative Mongolian Peoples' Party a commanding majority. A result has been a further delay for the criminal law reform package. Opposition is not focused on the SOGIE provisions, but on corporate liability (corruption) issues. There has been no discussion or publicity about the SOGIE reforms, which would die if the reform package is dropped.

SCHOOLS

In 2016 the Chinese Ministry of Education and eight other state departments issued the "Guiding Opinion of Prevention and Control of Bullying and Violence of Students of Primary and Secondary School". There was no mention of SOGIE, a common factor in bullying. The new national sex education curriculum in South Korea also avoids any mention of sexual orientation, gender identity and expression.

Japan's updated **Basic Policy for the Prevention of Bullying** of March 2017, for the first time, expressly **protects** sexual and gender minority students. This follows from a 2015 directive on transgender students and a 2016 guidebook for teachers about LGBT students. Japan chaired the 2016 UNESCO **conference** on LGBT bullying.

In the fall of 2016, the second volume of *Human Rights in Southeast Asia* was **published**, including a chapter 'Sex and Gender Diversity', produced by **SEAHRN** (the Southeast Asian Human Rights and Peace Studies Network). The goal was to bring together regionally produced materials for the teaching of human rights in post-secondary programs in Southeast Asia.

EXPRESSION AND MEDIA

In June 2016, the South Korean erotic psychological thriller, **The Handmaiden**, was released that tells a complex story of seduction and betrayal in Japanese occupied Korea in the 1930s. It features lesbian sex scenes and throughout portrays lesbians positively.

In early-2017, the Japanese film **Close-Knit** was released, telling of a girl who is abandoned by her alcoholic mother, but cared for by an uncle who lives with a transwoman named Rinko. A widely popular male actor, Toma Ikuta, plays Rinko.

In March 2017, the moments in which the Disney film **Beauty and the Beast** portrays an unambiguously gay character singing and dancing with another man were cut by the Malaysian censor. Malaysia had an existing rule that 'homosexual' characters could only be depicted if they repented or died. As widely reported, after Disney said it would not release the film in Malaysia with the cut, Malaysia relented, and the film was released intact.

The 2016 Taiwanese documentary feature film, **Small Talk** explores the life of Anu, a lesbian Taoist priestess, in a film made by her estranged daughter. There are interviews with Anu's past and present lovers, and her siblings. The film has garnered much praise.

Seek McCartney, China's first gay-themed movie to get commercial release was approved by the country's regulators and will appear in theaters in late-2017. The film **follows** the relationship between two gay men, one Chinese and one French, travelling through Tibet.

It seems somewhat difficult to know what content will be banned from online sites in China. In 2016, the hit show **Addicted** – an online series featuring a gay romance – amassed over 10 million views within the first 24 hours of launch, but was taken down four weeks later by state censors. Another drama, **Go Princess Go**, in which a male time-travels to the past and changes into a woman, was also banned. Industry associations and individual sites have tried to formulate policies. LeTV **issued** guidelines that prohibited "wrong views on love and marriage ... such as gay, or having extramarital affairs". After **protests**, LeTV dropped the reference to banning gay content. LeTV itself was still giving access to the famous Chinese film **Farewell My Concubine**, with its central gay characters. Xiaogang Wei of the media production house **Queer Comrades** noted "there is so much **more** LGBT content **online** than ever before." A few famous gay-themed films, such as **Lan Yu** and **Brokeback Mountain**, can be seen on Chinese streaming websites, but never played in cinemas. A government official **said** that gay topics are not forbidden, but assessed as to whether they "promote, advocate or beautify..."

FREEDOM OF ORGANISATION AND ASSOCIATION

There are public pride parades in Hong Kong, Japan, Korea, Taiwan and Thailand. Vietnam has long had a rainbow bicycle rally and a rainbow walk (no permits required). The most repressive situation would be **Laos**: for a couple of years an event was held within the compound of the US Embassy, but it seems that has not been repeated. Singapore refuses to grant legal recognition to LGBTI organizations, but some function (always with no overseas funding).

The eighth annual *Pink Dot* celebration in Singapore was held at the start of June 2016, at the designated 'speakers corner' in an urban park. It is the only place where public free speech is allowed (other than on race or religion). It was never expected that the government's designation of the 'speakers corner' would lead to a mass event, focused on LGBTI people and issues. In 2015, there were 28,000 participants. Participation or sponsorship by foreigners is **prohibited** without a special permit. At time of writing, around fifty 'local corporate sponsors' have signed up for the 2017 event.

The new Law on the Management of the Activities of Overseas NGOs within China came into effect in January 2017. Local NGOs face potential legal risk if they accept foreign funding under the **new law**. Public fundraising is now allowed only by registered charities, certified by a government department.

RECOGNITION OF RELATIONSHIPS

As **noted** a year ago, a small number of local jurisdictions in Japan and Taiwan have established registries in which same-sex couples can be listed. This may assist them in certain situations, such as rentals, benefits or hospital visitation. No registration systems with clear legal effects exist yet in Asia. Some immigration recognition occurs, in practice, for partners of individuals who have working or residential visas (embassy staff, academics, employees of international businesses). The same-sex partner gains residency, but no right to work.

In Korea the high profile marriage **case** of the famous Korean film director Kim Jho Gwang-soo was rejected on appeal. The judgment in May 2016, said that the "raising of the next generation" was a factor in understanding the meaning of 'marriage'. The judgment notes the exclusion of same-sex partners from laws on inheritance, division of property, the giving of consent for medical emergencies, family care leave, survivor pension rights and family oriented tax provisions. The judge said that these exclusions mean that, "it is true that the situation they are in is regrettable", but any change was up to the legislature.

We wait for news from Taiwan.

SOUTH ASIA

JOYJAYANTI CHATTERJEE, NAMRATA MUKHERJEE, NITIKA KHAITAN, NIVEDITA SAKSENA, SHOHINI SENGUPTA AND SHRUTI AMBAST

An enduring colonial legacy has meant that lesbian, gay, bisexual and transgender (LGBT) communities continue to live under the shadow of oppressive criminal laws, even if they may not face actual prosecution by the State. A resurgence of right-wing conservatism and religious extremism has also led to an increase in incidence of violence against LGBT persons in several Asian countries. However, communities of LGBT persons and human rights groups have ensured that the conversation around the rights of persons belonging to minority sexualities is sustained. Accompanied by advocacy and the strategic use of the court system, these may potentially lead to incremental changes in the rights of LGBT communities.

BANGLADESH

The LGBT community in Bangladesh continues to be criminalised through section 377 of the Penal Code which prohibits 'carnal intercourse against the order of nature'. The last year in Bangladesh has been marked by threats of homophobic violence against LGBT persons. The most prominent was the **murders** of Xulhaz Mannan and Mahbub Tonoy (leading LGBT activists) in April 2016. In response to this act of violence, an 'Islamist militant' was **arrested**, and the extremist group Ansar Al Islam was **banned**. However, LGBT persons have been **afraid to approach** the State for protection, even when they are receiving death threats on the basis of their sexual orientation.

In March 2017, the United Nations Human Rights Committee, in its report assessing Bangladesh's compliance with the International Covenant on Civil and Political Rights, **expressed** concern at the stigmatisation, harassment and violence faced by the LGBT community. It recommended that Bangladesh should "[d]ecriminalize consensual sexual acts between same sex couples, provide protection to lesbian, gay, bisexual and transgender (LGBT) persons from violence and harassment by ensuring that all cases are promptly investigated, prosecuted, and punished with appropriate sanctions, and eliminate barriers to employment and violations to the dignity of "hijras".

At the United Nations (UN), Bangladesh has generally voted against motions promoting the rights of LGBT persons. This includes **voting** in favor of a **motion** excluding LGBT communities from the UN's 'New Urban Agenda', which sought to recognise LGBT persons and acknowledge homophobia. It also voted **against** a motion to set up an independent expert on LGBT rights, and **supported** a resolution drafted by Russia opposing benefits for same sex partners of UN staff.

BHUTAN

Same-sex sexual activity is still illegal in Bhutan under sections 213 and 214 of the Penal Code of Bhutan, 2004. These sections criminalise 'unnatural sex' as a petty offence inviting imprisonment for a period between one month to one year. Last year it was **reported** that the National Assembly's committee for women, children and youth had recommended that these sections be removed. However, there appear

to have been no further developments on this front. Anecdotally, it has been **suggested** that this law is never used to prosecute anyone.

In 2015, it was **estimated** that there are close to 9000 LGBT persons in Bhutan. There are no protections in place for discrimination against LGBT persons in housing or employment. A health report found that health care workers are uncomfortable talking about sexuality, which may deter LGBT persons from seeking medical help. In 2016, a group of LGBT individuals in Bhutan gathered to mark the International Day Against Homophobia, Biphobia and Transphobia. They **reported** that their community still faces discrimination and stigmatisation.

INDIA

In February 2016, the Supreme Court heard a batch of 8 petitions asking it to **revisit** a 2014 judgement which re-criminalised same-sex sexual relations. Recognising that this was a matter of constitutional importance, it referred it to a five-judge constitutional bench. When the matter will be heard again is contingent on the constitutional bench.

In its executive decisions, however, India continues take a regressive stand on rights of sexual minorities. In March 2016, India **voted** in the United Nations General Assembly against extending marriage benefits to same sex couples working for the UN. Similarly, in September 2016, India abstained from **voting** on a United Nations Human Rights Council resolution to set up an office of an Independent Expert to end discrimination against LGBT persons. The Ministry for External Affairs clarified that this decision was taken in light of the fact that the matter on de-criminalisation is yet to be decided by the Supreme Court.

MALDIVES

Currently in the Maldives, same-sex sexual relations between men or between women are illegal: -for men triggering banishment for up to one year or whipping, and such acts between women invite house arrest for up to one year. With the **adoption of the Penal Code** in 2014, Sharia law prohibitions against same-sex sexual relations have been extended to the national sphere, which means that the law can be applied to non-Muslims and to visitors to the country. There are **no protections and rights** extended to same-sex marriages, housing, employment, adoption and the right to legal gender recognition. Societal stigma has forced members of the LGBTI community to **seek refuge** in Sri Lanka. Maldives also voted against the **Resolution** adopted by the Human Rights Council on the 'Protection against violence and discrimination based on sexual orientation and gender identity'.

NEPAL

The treatment of sexual minority populations in Nepal strikes several contradictory notes. Broadly worded laws, such as the *Public Offences Act of 1970* are routinely **(mis)used** to harass and intimidate these groups. The proposed overhaul of the 1963 **Muluki Ain** (the General Code) has taken a regressive stand when it comes to **LGBT issues**. This is especially worrisome as same-sex relations are not considered a criminal offence at present. The proposed new law, which is in the final stages of being endorsed by the Parliament, does not recognize same-sex marriages and opens up the possibility of vague terms like "unnatural sex" being used to harass persons belonging to sexual minorities. This goes contrary to the spirit of **inclusiveness** in the landmark decision of the Supreme Court in *Sunil Babu*

Pant and others v. Nepal Government and others which set the ball rolling for recognition of same-sex marriages and provided protections for sexual minorities. Nepal has also enshrined various protections on the basis of sexual orientation and gender identity in its **new Constitution** (Articles 12, 18 and 42). The Nepalese Constitution is one of the **few in the world** to provide explicit protection against discrimination to LGBT persons and expressly recognize their rights.

PAKISTAN

Same-sex relations are criminalised through Section 377 of the Pakistan Penal Code (adopted from the colonial 1860 Indian Penal Code), though its implications for same-sex female relations are unclear.

According to 2014 **reports** by the United States State Department, and the Immigration and Refugee Board of Canada, the law is 'rarely enforced in practice [in cases other than those involving children]'. The latter mentioned that the Neengar Society, an organisation working on religious and sexual minority rights in Pakistan, knew of ten cases under Section 377 in Punjab in 2011. Of these, two resulted in 10-year prison sentences, which were later commuted. However, its President cited how section 377 was frequently "used to threaten and blackmail people," including police extortion.

No nationwide empirical data is available on discrimination against persons in same-sex relations, though Malaysian lawyer Shafi'i Abdul Azeez Bello has earlier **summarised** the situation, stating that rights for LGB persons are "close to non-existent." Pakistan has opposed SOGI in international human rights fora.

SRI LANKA

Same-sex sexual relations are illegal in Sri Lanka as per Article 365 of the **Penal Code**. While there have been no known prosecutions under this provision for close to half a century (often considered to be dead law), the retention of language which stigmatizes diverse sexual orientation is problematic.

In January 2017, the Sri Lankan Government **rejected** a proposal in the National Human Rights **Action Plan** recommending decriminalisation of same-sex sexual relations, labelling the issue as cultural, rather than pertaining to human rights. This Action Plan was developed through an inter-ministerial process, with the leading role played by the Foreign Affairs Ministry. The conservative Buddhist clergy of this island nation is strongly opposed to repealing Article 365. The Health Minister **noted** that the Government is opposed to same-sex sexual activity, but will not prosecute anyone for practicing it. Perhaps, echoing this sentiment, an addendum has been included, in the draft Plan, banning discrimination against any person based on his or her sexual orientation. The members of the LGBT community have met this move with skepticism, and are fearful that they won't stop facing abuse so long as the law of the land continues to treat any non-heteronormative sexual relations as wrong.

THE MIDDLE EAST

AUTHORS REMAIN ANONYMOUS

Currently in early-2017, across most of the Middle East region political and media discourse on sexual and gender diversity is severely limited and negative. Various interpretations of Shari'a are encoded into legal practices across the region, some resulting in death for same-sex sexual activity, others in brutal prison sentences, whipping and fines for even expressing positive opinions (see [Kuwait](#)) or advocating on such issues. However, [scholarship](#) points out that same-sex sexual relations have been culturally and historically rooted within the Islamic traditions amongst both men and [women](#). Despite this, there are cities where gay and lesbian community life can operate, albeit [underground](#). As a general rule in society, there is deep family shame when a person comes out, or is outed, in their sexual or gender diversity. This, by extension, translates as social stigma, discrimination, targeting and violence against LGBTI people.

Add to this, the very terminology used to refer to this [diversity](#) in international human rights advocacy (SOGI, LGBT, etc) does not fit easily with concepts of identity and cultural expression in much of the Middle East region. Such discourse frequently [triggers](#) ideological battles in the political sphere, fuelled by religious interpretation, geo-political interest and cultural history.

Currently, Iraq's humanitarian [crisis](#) has over 11 million people in need and three million internally displaced, while in Syria it is [estimated](#) that over 13 million people need humanitarian assistance and over five million are refugees. In Yemen in March 2017, [two-thirds](#) of the population - 18.8 million people - need aid and there are an [estimated](#) three million refugees. By the most conservative estimate, amongst these populations there are huge numbers of people whose romantic or sexual attraction resides with persons of the same sex, and/or who dress, act or express as a different gender to that which they were born, and/or who were born with a body that is not typically male or female, either at birth or puberty (LGBT and intersex).

Not only are these people [persecuted](#) in their home societies, but as asylum-seekers they face [particular](#) violence in countries of [temporary] refuge. In Iraq and northern Syria, there are a series of concurrent challenges contributing to the country's, and region's, uncertainty: war continues throughout these countries, numerous territories are under Daesh (ISIS/ISIL) [control](#) who [persecute](#) and kill LGBT people (a "[moral cleansing](#)" (see para. 30), and government is [being run](#) by brutal sectarian militias. Further, and crucially, in Iraq the judicial system remains critically [flawed](#) and [corrupt](#), producing a deep sense of fear amongst populations across the country, offering no respite to the [immense](#) discrimination and [persecution](#) happening at the community and family [level](#). For those who make it to IDP (Internally Displaced Persons) camps, the security screening centers are known to be sites of serious abuse and exposure to vulnerable LGBT people.

An [effect](#) of the political changes that the Middle East region has recently gone with the rise, influence and control of Islamic movements is increased pressure on sexual and gender minorities. This was evident in [Libya](#), [Egypt](#), [Turkey](#), [Morocco](#), and [Tunisia](#) in 2016, as well as in the historically Islamic

regimes of [Iran](#) and [Saudi Arabia](#), and others. In these States, online and in-person expression of sexual and gender diversity can be very dangerous.

However, despite what function as relatively hostile environments, there are a number of States with relatively relaxed attitudes, once individuals are not too “expressive”, and thereby breaking modesty laws in the public space (see Criminalisation, Promotion and morality laws, and Barriers to NGOs in this edition for details). Lebanon provides an example of a Middle-Eastern where jurisprudence is [developing](#) positively, but arrests under the 1943 Penal Code still take place. Further and first in the Arab countries, two major Lebanese health organisations [declassified](#) homosexuality as a mental disorder. Jordan, which is the only country within the region that does not penalise same-sex relations, does set restrictions on free expression (under modesty provisions) under [Article 320](#) of its 1960 Penal Code.

In the southern part of the Middle East, the death penalty is an ever-present issue facing sexual minorities particularly in [Saudi Arabia](#) and [Yemen](#). Although the death penalty is on the statute in Qatar and the UAE, it has not been implemented in recent years. In the UAE, persons in same-sex relationships can be sentenced to ten years in prison, and may be subjected to hormonal and other chemical “treatments”. In Qatar, under the revised 2004 [Penal Code](#), Article 296 speaks of “leading, instigating or seducing” to sodomy incurs a prison sentence.

Organisations such as [Helem](#) (Dream) in Lebanon, [Shams](#) (Sun) in Tunisia, and [Iraqueer](#) in Iraq represent a hope that change regarding sexual and gender minorities will come about in time. It is notable that some Middle Eastern media (TV and social networks) have altered their tone in recent times – from unreservedly damning to neutral-negative (allowing conversation). This may help forge a path towards equality for those people who have been persecuted, utilised or forgotten in the midst of the noise of war and political agendas.

CRIMINALISATION																		
Country	Legal		Age of consent		Illegal		Penalising text					Expression		Max Sentences (M)onths and (Y)ears				
	All genders	Equal	Unequal	Male	Female	Sexual act	Sodomy	Against nature	Buggery	Indecency/ other	Promotion law	Morality code	1 M - 2 Y	3 Y - 7 Y	8 Y - 14 Y	15-Y - Life	Death	
Albania																		
Andorra																		
Armenia																		
Austria																		
Azerbaijan																		
Belarus																		
Belgium																		
Bosnia and Herzegovina																		
Bulgaria																		
Croatia																		
Cyprus																		
Czech Republic																		
Denmark																		
Estonia																		
Finland																		
France																		
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Greece																		
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Iceland																		
Ireland																		
Italy																		
Kosovo																		
Latvia																		
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Lithuania																		
Luxembourg																		
Macedonia (FYROM)																		
Malta																		
Moldova																		
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Montenegro																		
Netherlands																		
Norway																		
Poland																		
Portugal																		
Romania																		
Russia																		
San Marino																		
Serbia																		
Slovakia																		
Slovenia																		
Spain																		
Sweden																		
Switzerland																		
Turkey																		
Ukraine																		
United Kingdom (and associates)																		

		PROTECTION										RECOGNITION						
Arrests in past three (3) years	NGO Ban	NRHI - inclusive of sexual orientation?				Discrimination protection					CT BAN	Relationship recognition				Country		
		Yes	No	Unclear	None	Constitution	Employment	Other	Hate Crime	Incitem.		Yes	Marriage	Civil recognition	Joint adoption		2nd parent adoption	
																		Albania
																		Andorra
																		Armenia
																		Austria
																		Azerbaijan
																		Belarus
																		Belgium
																		Bosnia and Herzegovina
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Yes	Yes																	Russia
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																		Ukraine
																		United Kingdom (and associates)

EUROPE – TIME TO IMPLEMENT PROTECTIONS

WRITTEN BY THE ILGA-EUROPE TEAM

Throughout 2016, the LGBTI movement in Europe witnessed just how much their own work at national level was inextricably linked with wider global events. No matter what the issue in the media headlines was, there was an element of LGBTI equality woven into it. Some were bluntly apparent; the impact of the horrific attack on the Latinx night at the Pulse club in Orlando in Florida reopened conversations in Europe about hate crime and whether governments and institutions are doing enough to keep LGBTI people safe.

Other headlines may not have been LGBTI-specific at first glance, but the experiences of LGBTI people in those scenarios cannot be overlooked. Behind discussions on asylum, immigration and the procedural issues associated with these processes were the stories of the very complex situations faced by LGBTI asylum-seekers. The news of the UK's decision to leave the European Union was followed by growing reports of rise in hate crimes, including homophobic and transphobic violence, in various parts of the UK. The spread of "populist" political discourse across Europe and beyond raises serious questions for the LGBTI community, as politicians either use the community as a scapegoat or directly appeal for their votes in an attempt to prove their 'human rights credentials'. Attacks on democratic institutions such as media and courts directly affect LGBTI activism too, as it limits activists' options for visibility and accessing justice.

When zooming in on the specific LGBTI landscape in Europe, it is clear that we have entered into a period where legislative processes are slowing down. Now is the time where the implementation of laws and policies on LGBTI equality gained over the past 15 years becomes vital. Not only is it a priority to ensure that the legal wins translate into real change in the lived experience of LGBTI people, but also to ensure that there is no 'rolling back' or erosion of those gains.

Although not the focus of this publication that focuses on sexual orientation-related law but is inextricably related, legal gender recognition is an area where legal progress is still moving forward at pace. In June 2016, Norway's parliament voted in favour of legislation based on the principle of self-determination, joining Denmark, Malta and Ireland. Various progressive developments relating to trans-related law are being enacted into law in France, Greece, Belgium, Luxembourg, Malta, the UK, Ukraine, Sweden and Portugal, and the European Court of Justice (see ILGA-Europe's [Annual Review 2017](#)). Jurisprudence is establishing clear principles to guide policymakers regarding implementation of core principles of dignity and equality to sexual orientation and gender identity.

Likewise, the visibility of the human rights of intersex people (a proportion of whom identify as LGB), has much increased in 2016: more institutions and governments explicitly included intersex issues in their work, for example Bosnia and Herzegovina added sex characteristics to its anti-discrimination law, and Belgium, Greece and the Netherlands initiated political discussions towards adopting more inclusive legislation.

Milestones continued to be marked in the area of family law in several European countries. Same-sex couples celebrated in [Greece](#) and [Cyprus](#) as the first partnerships were signed in both countries in early-2016. Italian lawmakers [passed](#) a historic civil unions law, after months of intense and divisive debate. Slovenia's long-awaited Bill to extend the rights and protections for couples in registered partnerships also became [effective](#) in early-2017. Even in the absence of all implementing legislation, [Estonia's](#) Registered Partnership Act became enforceable in 2016. Marriage equality came into force in [Finland](#), [Gibraltar](#), [Greenland](#) and the [Isle of Man](#). Joint and second parent adoption became an option for same-sex couples in [Portugal](#), and the same country also opened access to medically assisted reproduction to all women (ensuring automatic parental recognition for same-sex couples). Reforms to existing adoption law that will extend step-parent adoption to registered partners were also finalised during 2016 in [Switzerland](#).

The European courts also issued significant rulings in the area of family, as the European Court of Human Rights delivered verdicts in [Pajić v Croatia](#) (the first ruling by the Court on family reunification of same-sex couples) and [Taddeucci and McCall v Italy](#) (Italy's refusal to grant one partner in a same-sex couple a residence permit violated their rights). It is also noteworthy that in a few countries, deliberations around full recognition of all forms of rainbow families flourished. The Netherlands and Denmark are both currently discussing the possibility of inclusive laws to recognise families with more than two parents and different kinds of parenting roles, such as legal parents with parental rights and social parents who are recognised as part of the family. In [other countries](#), activists undertook awareness-raising around the very existence of rainbow families, as the first TV ad to feature a same-sex couple and their children was broadcast in Albania.

This good news sits in stark contrast to the ongoing discussions on restricting the definition of family life or marriage by referendum – in [Georgia](#), [Romania](#) and [Lithuania](#). Romania's very public referendum debate was also accompanied by an equally visible court case taken by a same-sex [couple](#) who wish to be recognised as spouses in the country. Currently, at time of writing, questions in the case are under consideration at the Court of Justice of the European Union. However, one vote on family issues had a positive result in the past year: popular initiative in [Switzerland](#), initially described as a vote on tax reform, was discovered to have potentially damaging consequences for same-sex couples. Following an intensive campaign by activists, voters opted not to amend the existing gender-neutral constitutional definition of marriage.

As things progressed in many countries, the ongoing gaps in neighbouring states become even more apparent. Marriage equality still eludes couples in places like Germany, Malta and Northern Ireland. As already alluded to, the civil union debate in Italy was memorable for many reasons. Sadly, one of the negative memories associated with the Bill's passage was the [derogatory](#) language used by parliamentarians and the eventual removal of second parent adoption from the law.

Sadly, there are several negative trends to report on from 2016. Civil society groups in several European countries faced additional stress imposed by their respective governments. Pressure on civil society was notably increased in [Turkey](#) in the wake of the attempted coup in July. The offices of LGBTI NGOs were [shut down](#) amidst apparent fears of terrorism. Multiple violent threats were publicly issued by extremist groups, attempting to intimidate Pride organisers and curtail LGBTI events; activities that subsequently fell foul of the authorities' bans. Their Polish activist counterparts saw their offices [attacked](#) on several

occasions. In Hungary, the southern village of **Ásotthalom** gained notoriety at the end of the year as it introduced an 'anti-propaganda' law targeting 'non-traditional' marriage.

In addition to this, counter-terrorism measures are increasingly being used to justify limiting fundamental freedoms, such as the right to peacefully protest, to form associations, organise public LGBTI events or speak out freely. The disruption caused to the 2016 Pride march in **Paris** or the fact that the authorities in two Italian cities only authorised Prides following heavy pressure are prime examples. LGBTI activists can never take the safeguarding of their spaces for granted. **Pride marches** have always been a visible symbol of fundamental human rights and an indicator of how well democracy is functioning. However, Europe's rapidly changing political context means that past successes are no guarantee for the future – **Istanbul** was a particularly shocking and physical regression. In many places, such as **Poland** and **Hungary**, Pride marches are still being held successfully but activists are working in a climate that is becoming more hostile to their work. Happily, the opposite can also be true; **Kiev Pride** saw its largest attendance and **Odessa** held its inaugural march in 2016. Prides have been viewed as litmus test for democracy, but this test cannot be one-off - it needs to be applied every year.

Bias-motivated speech by public figures (politicians, church leaders, media, to name a few) sadly continues to be a very prominent feature of each year we look back. There were several cases of derogatory comments about sexual orientation or how people choose to identify and express their gender made in a public forum. Such comments were identified in TV programmes in Armenia and Georgia, textbooks in FYR Macedonia and Poland, in Belarusian media following monitoring work by Journalists for Tolerance, and via social media in Bosnia and Herzegovina (see ILGA-Europe's **Annual Review 2017** for detail).

When bias-motivated speech comes from the mouth of a well-known public figure, politician, or other influential leaders, its message is often widely disseminated – increasing the negative impact on LGBTI people who hear it, and potentially emboldening other who hold discriminatory views. LGBTI activists in Italy also emphasised the divisive and offensive nature of some of the arguments employed by politicians during the acrimonious civil union's debate. NGOs documented many examples of bias speech by elected officials, with the most callous remarks reserved for rainbow families. In 2016, examples of anti-LGBTI speech also could be found on election posters in Georgia, on the social media pages of politicians in FYR Macedonia (also in advance of elections), a high school professor in Serbia, and from church officials and the man who would become president by the end of the year in Moldova (see ILGA-Europe's **Annual Review 2017** for detail).

One puzzling feature of this year's review concerns asylum. It is puzzling because despite the fact that it has become such a clear priority for many LGBTI organisations, there are limited positive developments to report on from the national and European authorities' side. **Latvia** finalised an asylum law with references to sexual orientation and gender identity, but in many other countries, activists spoke out with concerns. Swedish NGOs **criticised** the effect that legal changes could have on LGBTI asylum seekers and their families. Worries over the lack of safe housing for LGBTI asylum seekers started to be raised more systematically by civil society, for example in Spain, Finland, Iceland and the UK. The EU Fundamental Rights Agency started to **monitor** the situation. Civil society groups and NGOs across Europe stepped up the support provided to LGBTI asylum seekers throughout the application process, and beyond where possible. But there is clearly a need for public authorities to step in to address safety

concerns, as some **German** authorities started to do in 2016 by opening the first accommodation specifically for LGBTI asylum seekers.

ILGA-Europe is continually reminded of the scale of the work that still has to be done in some parts of Europe. Arbitrary detention, torture and extra-judicial killing sound (thankfully) like alien terms to most of us, but this is exactly the reality faced by (perceived) gay and bisexual men in **Chechnya**. The true enormity of what is happening is unfolding as we go to print, but hopefully next year we will be able to include updates on how the international community was able to support the LGBTI community there. Let us not shy away from these challenges. Parts of the human condition are terrifying, but our work as an activist movement requires us to face it. The LGBTI movement has demonstrated, time and time again, that it can withstand and counter even the most entrenched opposition. In 2017, the European movement needs to call on all its determination, strength, and resilience to create the change we would like to see in the world.

CRIMINALISATION																		
Country	Legal		Age of consent		Illegal		Penalising text					Expression		Max Sentences (M)onths and (Y)ears				
	All genders	Equal	Unequal	Male	Female	Sexual act	Sodomy	Against nature	Buggery	Indecency/ other	Promotion law	Morality code	1 M - 2 Y	3 Y - 7 Y	8 Y - 14 Y	15-Y - Life	Death	
Australia																		
Cook Islands (NZ)																		
Fiji																		
Kiribati																		
Marshall Islands																		
Micronesia																		
New Zealand																		
Nauru																		
Palau																		
Papua New Guinea																		
Samoa																		
Solomon Islands																		
Tonga																		
Tuvalu																		
Vanuatu																		

		PROTECTION										RECOGNITION					
Arrests in past three (3) years	NGO Ban	NRHI - inclusive of sexual orientation?				Discrimination protection					CT BAN	Relationship recognition				Country	
		Yes	No	Unclear	None	Constitution	Employment	Other	Hate Crime	Incitem.		Yes	Marriage	Civil recognition	Joint adoption		2nd parent adoption
		Yes															Australia
					None												Cook Islands (NZ)
		Yes															Fiji
					None												Kiribati
					None												Marshall Islands
					None												Micronesia
		Yes											Yes	Yes	Yes	Yes	New Zealand
					None												Nauru
					None												Palau
Yes			Yes														Papua New Guinea
		Yes															Samoa
			Yes														Solomon Islands
					None												Tonga
					None												Tuvalu
					None												Vanuatu

OCEANIA: A YEAR OF STEADY PROGRESS TOWARDS EQUALITY

RAYMOND ROCA AND HENRY 'AHO

Raymond Roca is President of Kaleidoscope Human Rights Foundation and Henry 'Aho is President of the Tonga Leitis Association.

The authors would like to thank Tetryanna Utanga of the Te Tiare Association (Cook Islands) and Tebeio Tamton (Kiribati) for their input into this chapter.

OVERVIEW

Several positive developments for the rights of lesbian, gay and bisexual (LGB) people in Oceania have taken place in the past 12 months. In Australia, significant progress has been achieved at the state and territory level, particularly in jurisdictions that had previously lagged behind on LGB equality. Queensland enacted adoption equality and an equal age of consent, while removing the ability for murderers of LGB people to use the “homosexual advance defence”. South Australia passed laws creating a registered relationship scheme, introducing adoption equality and allowing same-sex couples to access artificial reproductive technology and altruistic surrogacy, while Victoria introduced a new health complaints regime that allows more effective action to be taken against providers of gay conversion therapy. However, at the federal level, marriage equality legislation continued to stall, while the Safe Schools education inclusion program was significantly curtailed by the current Liberal-National Government. The New Zealand Government, having already achieved significant legal progress towards LGB equality in previous years, announced its intention to expunge the criminal records of persons convicted historically of consensual same-sex sexual conduct.

In the Pacific, law reform continued in some countries: Nauru decriminalised same-sex sexual conduct and Samoa introduced laws allowing for enhanced sentences for hate crimes based on sexual orientation. In jurisdictions that continue to criminalise same-sex sexual conduct, international human rights mechanisms such as the Universal Periodic Review are working together with local activists to maintain pressure for reform. Indeed, the past year has witnessed increased mobilisation and networking by activists both nationally and regionally, providing hope that, gradually, criminalisation will become less widespread across the region, while protective laws and policies will become more common.

CRIMINALISATION

Nauru **decriminalised** same-sex sexual conduct in May 2016 through the passage of a new Crimes Act. This reduced the number of criminalising jurisdictions within the Pacific to seven: the Cook Islands, Kiribati, Papua New Guinea, Samoa, the Solomon Islands, Tonga and Tuvalu.

However, the prospects for decriminalisation in the remaining seven jurisdictions remain relatively low. In 2016, Samoa, the Solomon Islands and Papua New Guinea underwent their Universal Periodic Review at the United Nations (UN) Human Rights Council. All three states received recommendations to decriminalise same-sex sexual conduct, but chose to “note” such recommendations rather than accepting them. In its response to the Human Rights Council, Samoa **stated** (para. 20) that the decriminalisation of “sodomy” was “not possible at this time because of cultural sensitivities and Christian beliefs of the Samoan society”. Papua New Guinea **noted** (fn. 53) that “LGBT is currently not a priority of the government”, while the Solomon Islands **mentioned** (para. 101) that recommendations regarding same-sex sexual conduct did not enjoy its support.

During national consultations with LGBTI activists in 2016 and early 2017, the Tongan government indicated its reluctance to support the decriminalisation of same-sex sexual conduct. However, the government emphasised the importance of sexual minorities to the fabric of Tongan society and recommended further consultations.

In the Cook Islands, the Crown Law Office has for the past few years been conducting a comprehensive review of the Crimes Act which may recommend the removal of criminal prohibitions on same-sex sexual conduct (among other reforms). Activists from the Te Tiare Association, the peak LGBTI rights body in the Cook Islands, have suggested that the review is still pending and that there is no confirmed date for the release of draft legislation or for a parliamentary vote on such draft legislation.

In November 2016, Kiribati, Samoa and Tuvalu **voted** in support of the mandate of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity (IE-SOGI) at UN General Assembly, despite maintaining laws that criminalise same-sex sexual conduct. It is unclear if their supportive vote signifies a subtle shift in their stance towards the rights of LGB people (including decriminalisation) or is simply a reflection of voting bloc dynamics and alliances within the UN. This is not the first time that criminalising states in the Pacific have voted in favour of LGB rights at the UN level. Nauru, Palau, Samoa and Tuvalu supported the March 2011 Joint Statement on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity at the UN Human Rights Council, despite criminalising same-sex sexual conduct at the time. The other Oceanian countries to vote in support of the IE-SOGI mandate were Australia, Fiji, New Zealand, Palau and Vanuatu, while Papua New Guinea abstained and the Federated States of Micronesia, Solomon Islands and Tonga were not present at the vote. Interestingly, Nauru voted in favour of abolishing the IE-SOGI mandate, despite only a few months ago decriminalising same-sex sexual conduct.

AGE OF CONSENT REFORM AND EXPUNGEMENT OF HISTORICAL CONVICTIONS

The only jurisdiction in the region to retain an unequal age of consent—the Australian state of Queensland—**reformed its laws** in September 2016, creating an equal age of consent of 16 for same-sex and opposite-sex sexual activity.

Australia and New Zealand also recorded progress regarding the expungement of the criminal records of persons convicted of consensual adult same-sex sexual conduct prior to decriminalisation. In July 2016,

the Government of Tasmania **introduced draft legislation** establishing an expungement scheme. The Queensland Government **announced** its intention to introduce an expungement scheme in November 2016, with legislation putting in place such a scheme expected to be introduced in the first half of 2017. In February 2017, the New Zealand Government similarly **announced** its intention to introduce an expungement scheme, with legislation to be introduced later in the year. The Australian states of New South Wales and Victoria, as well as the Australian Capital Territory, already have expungement schemes in place.

DISCRIMINATION AND PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

ANTI-DISCRIMINATION LAWS

Across Oceania, criminal laws targeting same-sex sexual conduct are rarely enforced yet discrimination continues to significantly affect the lives of LGB people, including the realisation of their economic, social and cultural rights, such as their rights to work, education, health and housing. Laws prohibiting discrimination on the basis of sexual orientation exist in all major areas of social and economic life in Australia, Fiji and New Zealand, as well as in the Cook Islands and Samoa, in employment only. Fiji also prohibits sexual orientation discrimination in its Constitution (see full listing of laws and provisions in the “Overview Legislation” section above). Unfortunately, no significant progress in respect of anti-discrimination laws was made in the past 12 months.

Palau, the Marshall Islands and the Federated States of Micronesia received recommendations to enact laws prohibiting sexual orientation discrimination as part of during their Universal Periodic Review sessions in 2015–16. Palau **responded** (para. 21) that “[f]urther work and consultations” were needed in order to “further progress in this area”. The Federated States of Micronesia **noted** (para. 13) the importance of addressing “sexual orientation ... in our laws in order to be fully compliant with human rights standards” but provided no firm commitments. The Marshall Islands did not provide a specific response to recommendations regarding sexual orientation discrimination.

A significant challenge to the **adoption of LGB-inclusive anti-discrimination laws** in many Pacific jurisdictions is lack of capacity, particularly given that many countries do not have any legal frameworks for protecting against discrimination (even on other grounds, such as race or gender). This means that prohibiting discrimination on the basis of sexual orientation is not simply a matter of making minor amendments to existing laws, but instead requires creating a comprehensive legal regime, including new or expanded institutions, for tackling discrimination across all grounds. Accordingly, in many jurisdictions, an incremental strategy may be to push for anti-discrimination protections to be included in sector-specific regulations and policies (e.g. health and education policies or national gender policies). For example, in the Cook Islands, activists are pushing for the inclusion of sexual orientation and gender identity/expression within the National Gender Policy, which is due for review in April 2017. *Education inclusion*

In Australia, the past 12 months saw significant political controversy over the government-funded Safe Schools program, which provides resources and support to schools to create more inclusive environments for LGBTI students. Following a barrage of opposition to the Safe Schools program from the tabloid press and conservative parliamentarians, the Federal Government significantly curtailed the

program from March 2016 onwards. Certain resources have been removed or restricted, the program is now confined to secondary schools and parental consent is required for student participation in lessons or activities that are part of the program (see [official statement](#)). In addition, the Safe Schools Coalition Australia, which administers the program, [will not be funded](#) beyond 2017.

In response to the changes, the governments of [Victoria](#) and the [Australian Capital Territory](#) have announced that they will allocate funding to allow the program to go ahead in its original, more comprehensive form in their respective jurisdictions.

PROHIBITIONS ON GAY CONVERSION THERAPY

In February 2017, the [Health Complaints Act](#) came into force in Victoria (Australia), which provides new tools for cracking down on providers of “gay conversion therapy”. The Act requires the establishment of a new Health Complaints Commissioner who has the power to issue prohibition orders (and take other action) in respect of health service providers that violate the “General Code of Conduct in respect of General Health Services” (Section 95). This includes providers that misinform or misrepresent the services they provide, or that fail to provide services in a safe and ethical manner (Schedule 2). While the Act does not explicitly mention conversion therapy, the Minister for Health’s press release announcing the introduction of the proposed legislation into Parliament [made explicit reference](#) to the Health Claims Commissioner having the power to take action against persons offering gay conversion therapy.

HATE CRIMES AND VIOLENCE

Samoa enacted a new [Sentencing Act](#) in 2016 which treats a motive of hostility based on sexual orientation as an aggravating factor in the sentencing of crimes [Section 7(1)(h)]. This is a significant step forward, in a context where very few jurisdictions in the region make specific provisions for hate crimes against lesbian, gay and bisexual people (see section on “Hate crimes based on sexual orientation considered an aggravating circumstance” above).

In March 2017, the Queensland Legislative Assembly passed [legislation](#) to disallow the use of the homosexual advance defence (also known as the “gay panic defence”). Prior to this, a person who killed another in response to a non-violent same-sex sexual advance could plead the partial defence of provocation, which allows a murder charge to be downgraded to manslaughter. South Australia therefore remains the only Australian state to allow the use of the homosexual advance defence. The South Australian Government has signalled its willingness to reform the law, and the South Australian Law Reform Institute is currently preparing a [report](#) on amending the law of provocation, which is likely to recommend disallowing the use of the homosexual advance defence. The deputy director of the South Australian Law Reform Institute [has described](#) the homosexual advance defence as “offensive and discriminatory”.

In Fiji, a same-sex couple was attacked in the street in February 2017 and reported that they were too scared to reveal their names and report the attack to the police for fear of reprisals. The director of the Human Rights and Anti-Discrimination Commission, Ashwin Raj, [condemned](#) the attack and encouraged people to report sexual orientation-related violence to the Commission as well as to the police.

RELATIONSHIP RECOGNITION

AUSTRALIA

In Australia, several states and territories enacted reforms to improve the legal recognition of same-sex couples. **Queensland** and **South Australia** passed legislation allowing same-sex couples to adopt, which came into effect in November 2016 and February 2017, respectively. The Northern Territory now remains the only Australian jurisdiction to restrict adoption to different-sex couples, although the election of a Labor Government in August 2016 has improved prospects for adoption reform. Chansey Paech, a Labor member of the Northern Territory Legislative Assembly and Australia's first gay Indigenous parliamentarian, has publicly **called** on the Northern Territory Government to allow joint same-sex adoption.

Aside from adoption equality, South Australia has also enacted several pieces of legislation to increase the legal rights of same-sex couples. This includes a **registered relationship scheme** which broadly mirrors those already in place in the Australian Capital Territory, New South Wales, Queensland, Tasmania and Victoria and also allows same-sex couples married overseas to have their relationships recognised under South Australian law. In addition, after years of lagging behind on this issue, South Australia became the last Australian jurisdiction to allow same-sex couples to access **artificial reproductive technology** (as well as to enter into altruistic surrogacy arrangements) in March 2017.

Several areas of inequality for same-sex couples remain throughout Australia. Aside from the Northern Territory not recognising same-sex adoption, neither the Northern Territory nor Western Australia have any relationship registration schemes, which creates uncertainty as to whether same-sex couples fit the definition of a "de facto relationship". Altruistic surrogacy also remains unavailable for same-sex couples in Western Australia [**Surrogacy Act 2008**, section 19(2)] while commercial surrogacy is illegal in all parts of Australia.

However, the most visible area of inequality for same-sex couples remains their inability to marry. After parliamentary elections in July 2016, both houses of Parliament have a majority of members in favour of marriage equality. However, the governing Liberal and National parties have refused to allow their members a free vote and instead made an election promise to hold a national plebiscite on same-sex marriage (which, if carried, would be followed by a free vote in Parliament). The plebiscite was **widely opposed** by the LGBTI communities, on the basis that it is legally unnecessary and would provide a platform for opponents of marriage equality to stigmatise same-sex couples and their children. In November 2016, legislation to allow the plebiscite to be carried out **was defeated** in the Senate, where the governing parties do not have a majority. Since then, LGBTI activists have continued to push for a free vote in Parliament, which the governing parties have so far refused to allow.

NEW ZEALAND

Given that New Zealand has allowed same-sex couples to marry since August 2013, no significant developments have taken place in the past 12 months regarding relationship recognition. New Zealand **continues to receive** a large number of same-sex couples visiting the country to get married: out of 2118 same-sex marriages which took place in New Zealand up until August 2016, 45.8% involved overseas residents (the majority of whom are from Australia).

PACIFIC ISLANDS

With the exception of certain territories under Chilean, French, UK or US jurisdiction, same-sex relationships are not recognised anywhere in the Pacific Islands. At its Universal Periodic Review in January 2016, Palau received a **recommendation** from Spain (para. 104.81) to “legislate in order to permit marriage between persons of the same sex”. In its response, Palau “took note” of this recommendation and **stated** that “[f]urther work and consultations need to be taken to further progress in this area in the Republic” (para. 21). Nevertheless, achieving marriage equality is likely to be difficult, as **Palau’s Constitution** (as amended in 2008) defines marriage as being between a man and a woman (Article IV, section 13).

REGIONAL AND NATIONAL ADVOCACY

In October 2016, the inaugural Pacific LGBTI Youth Forum was **held** in Sydney, Australia. The two-day event was organised by Kaleidoscope Human Rights Foundation with the support of the U.S. Embassy in Canberra and global law firm DLA Piper. The forum brought together 38 young activists from Australia, New Zealand and the Pacific and included a range of strategic sessions on advancing the rights of LGBTI people in the region. The forum also created significant opportunities for networking and experience-sharing among activists. In March 2016, Kaleidoscope also conducted a week-long capacity building program with Tongan LGBTI activists in Sydney and Canberra, which involved the activists meeting with politicians and community leaders to share experiences about LGBTI law reform and social change.

In December 2016, two milestone advocacy events took place for sexual and gender minorities in Tonga and Samoa. In Tonga, a national consultation on LGBTI rights was organised by the *Tonga Leitis Association* (TLA). The consultation took place between LGBTI activists and government and church representatives. The TLA **called on the government to repeal** laws criminalising same-sex sexual conduct, while calling on churches to adopt a more accepting attitude towards LGBTI people. The consultation offered decision-makers a snapshot into the lives of LGBTI people living in Tonga and how the current legislation has a negative impact on societal attitudes towards them. While the government and church leaders recognised the rampant discrimination against LGBTI people in Tonga, they were hesitant to support any legislative change. However, the government, church leaders and other working partners of the TLA called for further consultations, to continue a dialogue on fighting discrimination through law reform.

In Samoa, the **inaugural Fa’afafine Week** took place in December 2016. *Fa’afafine* is a traditional Samoan identity category describing persons who are assigned a male sex at birth but have a gender identity that is either primarily feminine or integrates elements of both femininity and masculinity. The event, organised by the Samoan Fa’afafine Association, did not only relate to *fa’afafine*, but also included LGBTI people more broadly. It involved a series of events aimed at celebrating sexual and gender diversity and raising awareness of discrimination, including visits to several schools.

Finally, in Kiribati, the first non-government organisation focusing on the rights of LGBTI people, *Boutokaan, Inaomataia ao Mauriia Binabinaine Association* (**BIMBA**), was established in September 2016. The establishment of BIMBA is likely to lead to increased effort towards decriminalising same-sex sexual conduct and broader law reform in Kiribati.

READING ILGA WORLD MAPS

THERE ARE FOUR MAPS ON THE FOLLOWING PAGES, AND THIS OVERVIEW IS DESIGNED TO FACILITATE INITIAL READING OF THEM, BY BRIEFLY GOING THROUGH THEIR 'LANGUAGE' ONE BY ONE

These maps are best viewed in PDF format.

The first of these is an **Overview** map that looks (from a red to green spectrum) at laws that criminalise same-sex sexual relations, laws that include the protection of sexual minorities, and laws that recognise our relationships and families.

1. As explained on the map's legend in more detail, in the criminalising countries different punishments are indicated in shades of red: for example, death is deep red, and 'promotion' laws are orange.
2. Countries that have decriminalised, or where same sex relations were never penalised, are coloured yellow.
3. There are small blue shields across this map that indicate there is some form of protection in law, for example, from hate crime or non-discrimination in employment.
4. The countries in shades of green represent those where marriage or civil unions of some form are recognised. On a number of these, small icons represent the presence of joint adoption or second parent adoption that are inclusive of same sex couples.

Example: reading this Overview map, and looking at Samoa – the coding reads that it is a criminalising country, with a penalty of under five years, but it also has some non-discrimination provisions that are inclusive of sexual orientation.

The second map focuses on **Criminalisation**. This map delves deeper into the nature of the criminalisation:

1. The base colour of a country indicates the nature of the actual crime – sodomy, acts against nature, buggery, etc. This is explained in the legend in more depth.
2. The second element - maximum sentences - is indicated by a capital letter A through E – ranging from death (A) to 1 month in jail or a fine (E).
3. There are male/female icons for men and for women to indicate which of the binary genders (or those perceived to be in one category or the other by law) is included within the scope of that law.
4. The handcuffs symbol indicates whether there have been arrests in the past three years (as found in our research).
5. The house symbol indicates whether laws create insurmountable barriers to the formation of SOGI-based NGOs.

Example: reading this Criminalisation map, and looking at Tanzania, one sees the charge is 'against nature', with a sentence of between 15 years and life, where the law only applies to men (except Zanzibar), and where there have been arrests in the past three years. Further, there are restrictions on the formation of SOGI-based NGOs, and penalties for 'morality'-based offences.

The third map (blue) concerns **Protection**. The Overview map indicated protection with a shield – this map explains the nature of those protections in detail.

1. Where a country is coloured blue, it has employment law that protects against discrimination on grounds of sexual orientation.
2. A pink dot signifies Constitutional protection, and an orange dot means there are other protections (health, education, housing, etc) that include sexual orientation in their texts. A purple dot signifies that the State outlaws so called "conversion therapy".
3. The letter **A** indicates hate crime legislation inclusive of sexual orientation.
4. **B** means laws that protect from incitement to hatred (hate speech).
5. **C** indicates that there is a national human rights institution active. These are often important sites for the early development of what will become laws and policies in States.

Example: reading this Protection map, and looking at Germany, one sees that it has protective employment law (blue), some other non-discrimination law (orange dot), but no hate crime or incitement to hatred laws (absence of A and B), while it does have a human rights institution inclusive of sexual orientation (C). Luxembourg on the other hand has the same, but has both hate laws (A and B).

The final map is on **Recognition**. Much as the Overview map, this specifies

1. The status of relationship recognition: marriage or some form of civil partnership recognition.
2. Where joint adoption and second parent adoption exist in the world in 2017.

Example: reading this Recognition map, and looking at Colombia, one sees there is marriage equality in that State, but also civil partnership (light green dot), and joint adoption as well as second-parent adoption are available to same-sex couples.

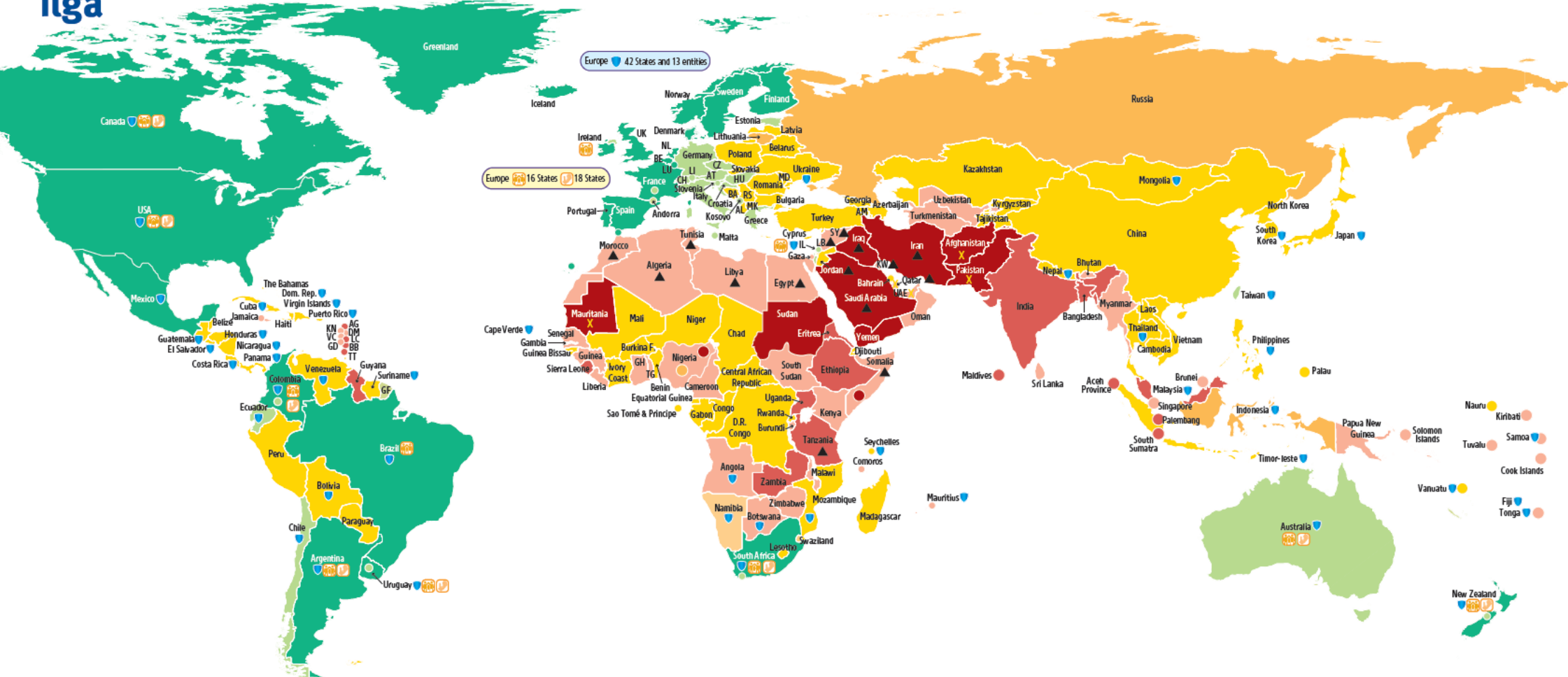
The data represented in these maps are based on *State-Sponsored Homophobia: a World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, an ILGA report by Aengus Carroll and Lucas Ramón Mendos. The report and these maps are available in the six official UN languages: English, Chinese, Arabic, French, Russian and Spanish on ILGA.org. This edition of the world map (May 2017) was coordinated by Aengus Carroll and Lucas Ramón Mendos (ILGA), and designed by Eduardo Enoki (eduardo.enoki@gmail.com).



SEXUAL ORIENTATION LAWS IN THE WORLD - OVERVIEW

ILGA, THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION

MAY 2017
ILGA.ORG



CRIMINALISATION

72 STATES

	implemented in 8 States (or parts of)		14 Y - life (prison)	14 States
	not implemented in 5 States		Up to 14 Y	57 States
	Religious-based laws alongside the civil code: 19 States		'Promotion' laws	3 States
			No penalising law	

In green, yellow and orange countries, same-sex sexual acts were decriminalised or never penalised: 123 States

PROTECTION

85 States
Many States run concurrent protections

	Constitution	9 States
	Employment	72 States
	Various	63 States
	Hate crime	43 States
	Incitement to hate	39 States
	Ban on 'conversion therapy'	3 states

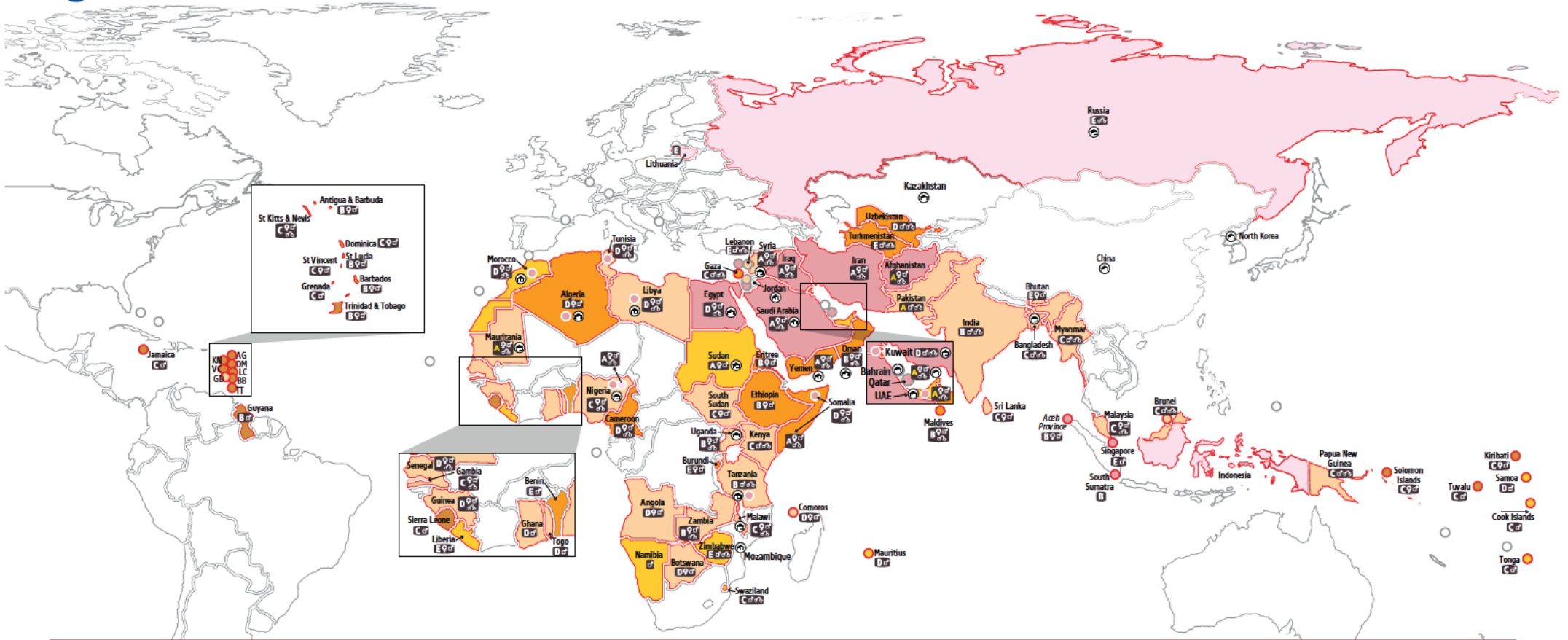
RECOGNITION

47 States
A small number of States provide for marriage and partnership concurrently

	Marriage	22 States		Joint adoption	26 States
	Partnership	28 States		2nd parent adoption	27 States

Separate detailed maps for these three categories are produced alongside this Overview map.

The data represented in these maps are based on *State-Sponsored Homophobia: a World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, an ILGA report by Aengus Carroll and Lucas Ramón Mendos. The report and these maps are available in the six official UN languages: English, Chinese, Arabic, French, Russian and Spanish on ILGA.org. This edition of the world map (May 2017) was coordinated by Aengus Carroll and Lucas Ramón Mendos (ILGA), and designed by Eduardo Enoki (eduardo.enoki@gmail.com).



ACTUAL OFFENCE THAT GENERATES MAXIMUM SENTENCES

Promotion ("propaganda") laws 3 States	Against nature 30 States
Sexual act 15 States	Buggery 13 States
Sodomy 11 States	Morality law: LGB expression 19 States (and some provinces)

CATEGORIES OF MAXIMUM SENTENCES

- A** Death 8 States (implemented)
- A** Death 5 States (not implemented)
- B** 15 years to Life (12 States)
- C** 8 to 14 years (23 States)
- D** 3 to 7 years (20 States)
- E** 1 month – 2 years (or a fine) (10 States)

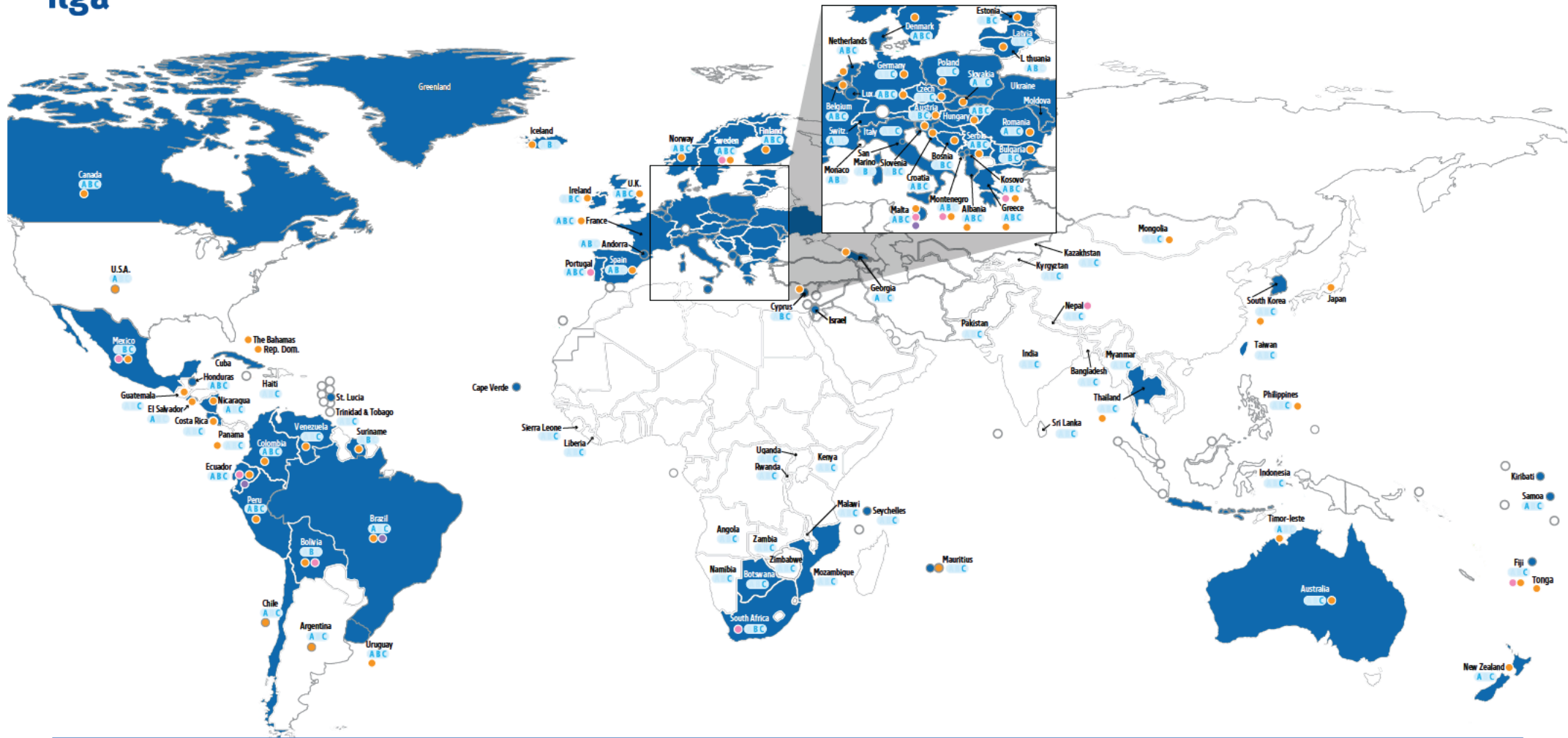
- Relationship between females is illegal
45 States (including Egypt)
- Relationship between males is illegal
72 States (including Egypt)

- Arrests (documented) in the past 3 years (45 States)

- Barriers to NGO formation, establishment or registration (25 States)

Note: the country entries on these criminalizing States in *State Sponsored Homophobia* outline the full range of penal provisions and sanctions under which same-sex sexual relations are targeted. In this map we chart only the category in which maximum sentences fall.

The data represented in these maps are based on *State-Sponsored Homophobia: a World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, an ILGA report by Aengus Carroll and Lucas Ramón Mendos. The report and these maps are available in the six official UN languages: English, Chinese, Arabic, French, Russian and Spanish on ILGA.org. This edition of the world map (May 2017) was coordinated by Aengus Carroll and Lucas Ramón Mendos (ILGA), and designed by Eduardo Enoki (eduardo.enoki@gmail.com).



PROTECTION

Non-discrimination in employment
72 States

- A** Hate crimes based on sexual orientation considered an aggravating circumstance (43 States)
- B** Incitement to hatred based on sexual orientation prohibited (39 States)
- C** Presence of a National Human Rights Institution [NHRI] that includes sexual orientation in its human rights work (86 States)

- Constitutional prohibition of discrimination based on sexual orientation (9 States)
- Other non-discrimination provisions specifying sexual orientation (63 States)

- Ban on so-called 'conversion therapy' (3 States)

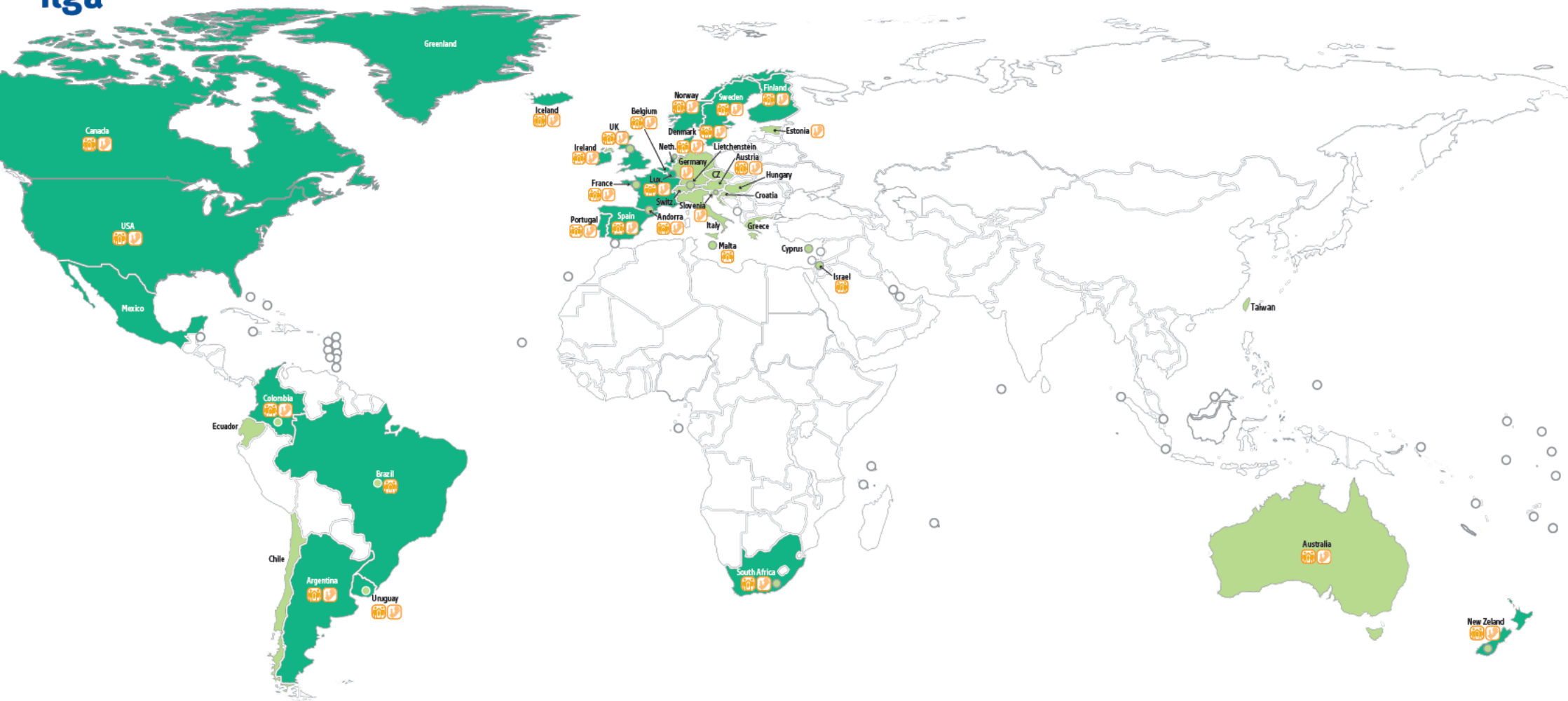
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SEXUAL ORIENTATION LAWS IN THE WORLD - RECOGNITION

ILGA, THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION

MAY 2017
ILGA.ORG



RECOGNITION

Marriage
22 States

Partnership
28 States



Joint Adoption [26 States]



Second parent adoption [27 States]

The data represented in these maps are based on *State-Sponsored Homophobia: a World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, an ILGA report by Aengus Carroll and Lucas Ramón Mendos. The report and these maps are available in the six official UN languages: English, Chinese, Arabic, French, Russian and Spanish on ILGA.org. This edition of the world map (May 2017) was coordinated by Aengus Carroll and Lucas Ramón Mendos (ILGA), and designed by Eduardo Enoki (eduardo.enoki@gmail.com).

Exhibit 16



New gTLD Application Submitted to ICANN by: dotgay llc

String: gay

Originally Posted: 13 June 2012

Application ID: 1-1713-23699

Applicant Information

1. Full legal name

dotgay llc

2. Address of the principal place of business

Contact Information
Redacted

3. Phone number

Contact Information Redacted

4. Fax number

Contact Information Redacted

5. If applicable, website or URL

<http://dotgay.com>

Primary Contact

6(a). Name

Mr. Scott Richard Seitz

6(b). Title

President

6(c). Address

6(d). Phone Number

Contact Information Redacted

6(e). Fax Number

Contact Information Redacted

6(f). Email Address

Contact Information Redacted

Secondary Contact

7(a). Name

Mr. Jamie Baxter

7(b). Title

Vice President

7(c). Address

7(d). Phone Number

Contact Information Redacted

7(e). Fax Number

Contact Information Redacted

7(f). Email Address

Contact Information Redacted

Proof of Legal Establishment

8(a). Legal form of the Applicant

LLC

8(b). State the specific national or other jurisdiction that defines the type of entity identified in 8(a).

USA, California corporation

Employer Identification Number:

45-1650782

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.**9(b). If the applying entity is a subsidiary, provide the parent company.****9(c). If the applying entity is a joint venture, list all joint venture partners.****Applicant Background****11(a). Name(s) and position(s) of all directors**

Scott Richard Seitz	president
---------------------	-----------

11(b). Name(s) and position(s) of all officers and partners

Edward Allen Lent	secretary
Jamie Baxter	vice president

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares**11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or**

executive responsibility

Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

gay

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.**15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.****16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.**

dotgay LLC foresees no known rendering issues in connection with the proposed .gay string which it is seeking to apply for as a gTLD. This answer is based upon consultation with dotgay LLC's preferred backend provider, Neustar, which has successfully launched a number of new gTLDs over the last decade. In reaching this determination, the following data points were analyzed:

- ICANN's Security Stability Advisory Committee (SSAC) entitled Alternative TLD Name Systems and Roots: Conflict, Control and Consequences (SAC009);
- IAB - RFC3696 "Application Techniques for Checking and Transformation of Names"
- Known software issues which Neustar has encountered during the last decade launching new gTLDs;
- Character type and length;
- ICANN supplemental notes to Question 16; and
- ICANN's presentation during its Costa Rica regional meeting on TLD Universal Acceptance

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>).**Mission/Purpose****18(a). Describe the mission/purpose of your proposed gTLD.**

The mission of the .gay TLD is to create an environment on the Internet that addresses

important and primary needs of the Gay Community; safety, visibility and support.

Safety : A safe space will encourage more community members to come out and thrive in the .gay network.

The Gay Community is a community centered on individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior. Individuals of the Gay Community have come out of the shadows with pride and proclaimed their identity, demanding the respect and equal rights due based on international treaties such as the Universal Declaration of Human Rights, as stated by United Nations Secretary-General Ban Ki-moon at the Summit of the African Union (January 29, 2012). Yet often these identities are proclaimed at great risk to personal, family or professional safety.

Visibility : To be visible is to be counted and to be counted is to be relevant to society and the economy.

With the participation and endorsement from many of the largest organizations in the global Gay Community, the .gay TLD will enhance the visibility of the Gay Community so that economic and social disparities can be more easily addressed. Greater visibility will also promote greater competition and consumer choice in and amongst the Gay Community. Developing the .gay TLD as a gathering point that establishes our footprint and demonstrates our presence as one larger global community, it becomes the new banner that rallies the diverse elements of the community. As a community whose presence can be quantified and aggregated, we will all be in a better position to be understood and to create real change.

Support : To support the Gay Community with access to trusted resources, as well as with funding.

The Gay Community has long been a largely self-supporting community in all regions of the world. This fact has demanded action on the part of the community to assemble resources and funding in support of causes and initiatives earmarked as priorities in the community, including but not limited to social service, business and support organizations. The .gay TLD will assemble the largest pool of resources from all segments of the community to support and empower the Gay Community, while realizing tangible and sustainable financial benefits that will directly impact how the community tackles any challenge it faces. The struggles and challenges faced by the Gay Community to date reinforce the need to create the .gay TLD as a community-based TLD and as such must support both social and economic imperatives.

Under dotgay LLC's community-based model for the .gay TLD, 67% of the profits from domain name registrations will be made available to the dotgay Foundation. The dotgay Foundation will be established at the point that ICANN approves dotgay LLC's .gay application and will have a mission to financially support initiatives in the global Gay Community. Additionally, dotgay LLC will provide a commission to organizations in the Gay Community who act as Authentication Partners, through an incentive program that rewards them for their authentication services and marketing efforts.

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

18(b)i

The goal of the .gay TLD is to create a unique name space that showcases the Gay Community in a positive light and that impacts the community in a positive way. As the world continues to understand the Gay Community and embrace its members into civil society, .gay will play an active role in helping the community share their stories, enhance their lives and celebrate their achievements. The .gay TLD will be the springboard of change for the community to document its cultural identity and tackle challenges it is confronted with.

Some of the specific goals that .gay aims to achieve include:

1. Community Trust
2. Economic and Social Visibility
3. Community Resource Information Base
4. Funding

Community Trust

The goal of .gay will be to build a reputation as a trusted platform and resource for the Gay Community. Trust is a very important issue for the community because of the long history of persecution and discrimination that has plagued the community and fostered inequalities. dotgay LLC will focus on garnering the trust of the community by serving the public interest of the community in a safe space on the Internet, while maintaining the highest standard of integrity and transparency in Registry operations.

Economic and Social Visibility

A goal of .gay is to specialize in building economic and social visibility for the Gay Community so as to promote commerce and demonstrate metrics in order to garner local and global equality. Visibility will enable the community to transform from a community of independent islands, to a thriving inter-connected global community. The .gay TLD will provide the foundation and infrastructure for enhancing the resources and solidarity of the community to share organizational excellence, build business and shed light and clarity on the demographics of the Gay Community.

Community Resource Information Base

A goal of .gay is to assemble the most extensive and accessible collection of resources and information of and for the global Gay Community. The community currently has no single resource that connects and aggregates across all dimensions of the community, such as geography, language, culture or stakeholders. The .gay TLD will enable the global community to come together for the first time through a single source and share a common platform as peers, while contributing to the overall resources and capacity building of individuals, organizations and businesses.

Funding

As a community-based TLD, a goal of .gay will be to also realize tangible and sustainable financial benefits for the Gay Community. This will be accomplished by dotgay LLC operating with a non-profit mentality and transparency, under a business model that intentionally and directly drives revenue and profits into the community. dotgay LLC commits to designating funds from registration fees to support gay organizations and other initiatives in the community.

18(b)ii

dotgay LLC anticipates that the community-based .gay TLD will add invaluable service assets to the current Internet space, specifically designed to improve and grow the way the Gay Community interacts and communicates with each other and the rest of the world. The service assets are part of a creative model for .gay that focuses on the mission of addressing needs around safety, visibility and support for the community.

1. Safety

.gay will differentiate itself as the only TLD on the Internet to serve the Gay Community exclusively, adding opportunity to address unique community concerns around safety. It is no secret that the community and its members face innumerable acts of prejudice, hatred and discrimination around the globe, even in locations where legal protections for the community exist. United Nations Secretary-General Ban Ki-moon recently addressed this global concern for the Gay Community at the Summit of the African Union (January 29, 2012), stating "one form of discrimination that has been ignored or even sanctioned by many States for far too long... discrimination based on sexual orientation or gender identity."

.gay will add a dimension of safety on the Internet because of registration policies that ensure registrants are legitimate members of the Gay Community and are open to interaction within the Gay Community.

dotgay LLC policies will address specific concerns related to eligibility, name selection, content & use and enforcement on .gay, creating a conducive environment and catalyst for identity expression by the Gay Community. By establishing the .gay TLD as a safe place it adds a competitive edge and desirable option for community members. Kenya's Chief Justice Dr. Willy Mutunga declared "gay rights are human rights" at a ceremony hosted in Uganda (September 8, 2011) and the statement was echoed by US Secretary of State Hillary Rodham Clinton in her speech to the United Nations (December 6, 2011) specifically addressing the need to eliminate law that criminalizes or marginalizes the Gay Community, making it clear that the Gay Community lacks protection. dotgay LLC will be vigilant in protecting the .gay name space through enforcing compliance to Registry policies.

a. Protect community participation

As part of dotgay LLC's innovative approach, and in order to insure that .gay is restricted to qualified registrants, Authentication Partners will be responsible for approving all registrations to the name space. The registry will provide an online authentication tool that will provide the registry with the information necessary to insure that only bona fide members of the community are allowed to register. This mechanism, complimented by "community watch" of the name space, will help to insure that .gay becomes the envisioned safe place for the community.

2. Index Directory

.gay will also differentiate itself with community-resource portals—"index directories"—based on community relevant keyword domain names. Key community domain names (like health.gay, lesbian.gay and travel.gay) will not be sold off to the highest bidder, but instead be operated by dotgay LLC as innovative, vibrant hubs to help organize the global community and drive networking, ecommerce and interactions within the community.

.gay registrants will have the opportunity to tag their domain name by choosing from a set of predefined relevant keywords to attach their domain name to the .gay index. An example of this would be a gay rights organization being listed on the index domain "rights.gay." dotgay LLC will be offering the index directory as a free service for all registrants on .gay.

A community relevant domain name like "hotel.gay" in the hands of one registrant (e.g. a hotel chain) is of great value to that registrant, but doesn't really create added value for the community of Internet users or any other .gay registrant. dotgay LLC does not exploit the financial value of the most important community relevant keyword domain names by auctioning them to registrants. Our solution is more sustainable, making the community relevant name space "inclusive," instead of leaving it "exclusively" to singular owners.

a. Easier to Identify

dotgay LLC anticipates that .gay will add a competitive edge for registrants and Internet users by making it easier to identify those members of the community who are comfortable being identified. In the clutter of the existing marketplace, membership in the community and the openness and willingness to engage with the Gay Community is not always obvious from a web address. The challenge for the community is to more easily identify where they are welcome and even celebrated, in a trusted and safe environment.

For example, a brand using brand.tld/gay as a targeted entry point to their business for the Gay Community provides no assurance to the gay consumer that the brand is part of the community, or just a business looking for revenue from the community. If the brand is an authenticated community member, using brand.gay is a much more intuitive way for the brand to identify and a quicker and easier way to communicate that fact to Internet users.

The .gay name space will provide a means by which a registrant can declare their community membership in a simple and direct manner, easily understood by Internet users. A .gay domain name will serve as a conventional web address as well as a trusted label, similar to organic food labels that help consumers identify grower information. By ownership of a .gay name it is understood that you are a member of the Gay Community and have been declared as such because of the Registry's registration policy.

b. Easier to Find

dotgay LLC anticipates that .gay will add a competitive edge in the area of searchability, aggregating large segments of the community to allow Internet users the ability to query more easily in the narrower pool of the Gay Community. The .gay index directory of domain names based on community relevant key word domains (eg., lawyer.gay, doctor.gay) will become a valuable tool to assist in directing Internet users to relevant domain names within the community, based on their key word searches. Through the participation and use of the index directory, the .gay TLD will drive business-to-business and business-to-consumer interaction within the community. This will be accomplished when index directories reveal and heighten visibility of community domain names that may not have been identified otherwise, creating opportunities for the community to enlist the services of its own members.

18(b)iii

The goal of .gay in terms of user experience is to create an environment on the Internet where users are empowered to have an authentic experience with the Gay Community. As a restricted TLD, users will benefit from knowing that owners of .gay domain names have been pre-screened as legitimate community members. This relevant information helps to cut through the clutter on the Internet, building trust and lessening risk for users.

Among the specific goals of .gay for Internet users:

1. Identification
2. Security
3. Organization
4. Competition
5. Interaction

Identification

A goal of .gay is to provide a simple identifier for users that indicate a member of the Gay Community is the owner of a domain name. Unlike sports teams who have uniforms to identify them, or airlines that use branding to differentiate themselves from the competition, the Gay Community does not have such a common or consistent method of identification. The .gay TLD offers the solution to creating a single, universal method of identification for the community. Internet users will no longer need to look beyond the domain name itself to confirm status in the community.

Security

A goal of .gay is to provide users with a level of security around their experience. This is achieved through registration policies that restrict eligibility on the .gay TLD. Users will have the advantage of knowing that the owners of websites they visit in the .gay domain space have been authorized based on qualifiers established to safeguard and protect the community. Additionally, a community-watch reporting mechanism will help to ensure that the .gay TLD remains a secure space on the Internet for the community.

Organization

A goal of .gay is to provide an organized resource for users to improve navigation and interaction with or within the Gay Community. With the development of the index directory, users will have easier and faster access to information. Although the community has an acknowledged presence globally, there have always been challenges to organizing the community in ways consistent with other communities that share a common geography or a common language. Being able to organize on the Internet in a clearly defined space will be a huge step forward to building visibility and accessibility of the community.

Competition

A goal of .gay is to offer a competitive edge to registrants. Gay consumers are more likely to support their own community members when given the choice and when the information of their community membership is visible. The .gay TLD will help to surface this qualifying information faster for the user by the domain name itself (because it ends with .gay) and via queries in the index directory.

Interaction

A goal of .gay is to enhance user interaction through ease of use, driving networking and

transactions through the community index domains, essentially become hubs for community interaction. Disseminating relevant information to the community becomes a powerful tool to mobilization and could include advisories or breaking news that is relevant to indices (ie. gay travel advisories on travel.gay).

18(b)iv

The following are dotgay LLC's intended registration policies in support of the goals listed above. Other policies related to Registry governance as a community-based TLD are covered in section 20. dotgay LLC is committed to adhering to all ICANN policy requirements including trademark protection, malicious use, auctions, etc.

- dotgay LLC will register and maintain a series of community relevant key word based domain names that will be established and managed as community resource websites, referred to as the "index directory."
- All .gay domain registrations must abide by all applicable ICANN and dotgay LLC policies.
- dotgay LLC will use Authentication Partners (AP) to authenticate eligible registrants according to criteria defined in the Registry agreement.
- dotgay LLC, with the advice of its Registry Advisory Board (RAB), will be solely responsible for accrediting and discrediting all APs.
- APs must meet and maintain all requirements outlined by dotgay LLC.
- All registrants will be required to authenticate and obtain a Community Identifier Code (CIC) through an AP in order to register, transfer or renew .gay domain names.
- Data supplied during the authentication process will be protected, not sold and used exclusively by dotgay LLC for the purposes for which it was collected.
- The registrant agreement will contain the following representations from the registrant:
 - They have a valid association to the name
 - They are not selecting a name in bad faith or for malicious use
 - They are not engaging in cybersquatting activity in which the goal is to obtain desirable names for the purpose of generating profit or other advantage.
 - They are not engaging in speculative registration activity for the purpose of reselling domains or parking the names for traffic.
- Registry will provide an internal complaint and resolution mechanism for Registry related policy violations, referred to as the Registry Policies Dispute Resolution Procedure (RPDRP).
- Breach of registrant agreement, or representations made in that agreement, will subject the registrant to the RPDRP and may result in dotgay LLC revoking the ineligible names.
- Sub level domain names of .gay registrations must adhere to all applicable dotgay LLC registration policies.
- dotgay LLC will have an established policy regarding adult content.
- Third level name registrations will be made available on select index domain names.
- dotgay LLC reserves the right to review and reject any third level registration requests on index domains.
- dotgay LLC will host an online process to submit recommendations for names that should be reserved prior to Sunrise including:
 - Community relevant key word domain names for the index directory
 - Domain names for premium auctions
 - Sensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech
- dotgay LLC will seek advice from its RAB on which names to reserve.
- In addition to ICANN defined trademark rights, trademark owners will have the option to request their name be placed on a reserved list on a cost only basis during Sunrise.
- dotgay LLC will provide a registration period before General Availability for community members with registrations obtained before May 1, 2012 on other IANA TLDs.
- All auction processes will be made public prior to the beginning of any period that includes a potential auction.

18(b)v

In accordance with ICANN requirements, Registry will maintain a thick WHOIS for each domain name that is registered.

In addition, the Registry will collect two further sets of data; Authentication Data and Index Mapping Data. Both sets of data are collected directly from the registrant, without

involvement of the registrars or APs. The security and confidentiality of registrant data is extremely important and the Registry will take a number of steps to safeguard any personally identifiable information or credit card information provided. dotgay LLC will follow the US Dept. of Commerce work on establishing codes of conduct for the protection of data.

Authentication Data

The authentication data is required to support the authentication process, a key component to establishing the .gay TLD as a safe space for community members. This data will include the name of the AP of which the applicant is a member, as well as other data determined by the Registry from time to time as essential to authentication. Delivery of this data is mandatory and is held by the Registry. The Registry has the right to use all authentication data and to authorize its direct agents to use all authentication data for the purpose of authenticating eligibility of the applicants, including verification and validation with the appropriate AP. Registry will not provide the authentication data to third parties. Recognizing the threat that the Gay Community is under in many parts of the world because of political and cultural climates, this data will be handled by dotgay LLC with the utmost care and attention.

Index Mapping Data

Index mapping data is the data that will be used to create the registrant's entry in the index directory developed by dotgay LLC, consisting of basic information to identify the nature of use for the .gay domain name (ie. hotel, non-profit). The index mapping data is not mandatory but is a value added service being provided for no additional fee.

Outreach & Communication

dotgay LLC has engaged in an aggressive outreach and communication plan aimed directly at the Gay Community around the world to raise awareness and encourage participation in the development of the .gay TLD. dotgay LLC has itself engaged in the ICANN process, serving as the conduit for the community to fully understand the opportunity for building a community-based .gay TLD. The targeted approach encompasses an effort to affect and empower those who will become future registrants and those who will benefit from the support services and funding. The approach takes into consideration the community's diversity and long history of working together to create change while protecting and providing for its own members.

The outreach and communication plan includes three segments as outlined below:

Exploration

Understanding and participating in the ICANN process, while opening a dialogue with the largest aggregated segments of the community to explore and fully consider the implications of the new gTLD program and how it relates to the Gay Community. Discussions centered on determining the usefulness and viability of the .gay TLD.

Strategy

Upon determination that .gay could bring a great deal of value and benefit to the Gay Community, focus shifted to strategy by way of accessing gay resources and assembling leadership from the largest community hubs, including organizations and businesses. The dotgay Application Advisory Group (dAAG) was established to guide the .gay application and advise dotgay LLC as needed.

Engagement

Gaining support of the Gay Community for the community-based .gay TLD and building partnerships to move the message into the community through established, trusted and respected distribution channels and communication hubs.

18(c). What operating rules will you adopt to eliminate or minimize social costs?

18(c)i

Creating .gay as a vibrant community-based TLD requires an innovative approach to registration that ensures names are distributed in a fair and orderly manner during launch, and redistribution after expiration, in order to create the maximized benefits for the intended registrants and Internet users. This includes rights protection offered during Sunrise A and B, as well as a level of protection based on domain names that community members have built their organizations and businesses around on other IANA-recognized TLDs. In all cases described below each .gay domain name registration requires community authentication, which is manifested through a unique Community Identifier Code (CIC) per registrant and domain. The exception is the Sunrise B period, which does not require community authentication.

dotgay LLC will create an extensive reserved names list consisting of potential index directory domain names, sensitive names and a wide array of common generic names in several languages. The Registry and the Internet users will later determine which words may be released as premium auction names. The Registry reserved names noted above will be excluded from all registration periods prior to General Availability.

Founders

The Founders period is tied to the Founders Program created by dotgay LLC, a pre-launch opportunity for members of the Gay Community to contribute financially, while reinforcing their commitment to building the .gay TLD. As is common practice in the Gay Community with new emerging organizations, Founders become stewards because of their commitment, setting the tone to build trust for future membership. Founders with and without trademarks will have the opportunity to submit requests for .gay names prior to the Sunrise Period. Requests during the Founders period are submitted directly to dotgay LLC.

Resolution: Applications for domain names during the Founders Period will be distributed on a first-come/first serve basis and placed on the Registry reserved list of Founders Names.

Sunrise

The Sunrise period will consist of Sunrise A (Community Trademark) and Sunrise B (Non-Community Trademark), as described below. Both periods run simultaneously and last for a minimum of 30 days. Sunrise A applications will be submitted to approved Registrars and Sunrise B requests will be submitted directly to dotgay LLC through the provided online process, or another process outlined at a later date when details about how the Trademark Clearinghouse will operate are revealed.

- Sunrise A - Community Trademark - The opportunity for authenticated community members (who have obtained a CIC) registered in the Trademark Clearinghouse to submit Registration Requests for .gay names corresponding to their registered trademarks.
- Sunrise B - Non-Community Trademark - The opportunity for those who are not members of the Gay Community to submit requests for names corresponding to their trademarks, as registered in the Trademark Clearinghouse, to be added to the Registry Sunrise B Reserved names list. A nominal fee will be charged for successful Sunrise B requests, to cover the cost of the Trademark Clearinghouse inquiry (amount TBD) and Registry administration fee (TBD). Registry will publish a complete list of names from Sunrise B that have been reserved. Reserved names will not result in a Registration in the .gay TLD, and will convey no other rights to successful Sunrise B applicants. Community authentication is not required for Sunrise B.

Resolution: Multiple applications for a particular domain name during Sunrise A will be resolved with an auction in the Sunrise Auction period. Sunrise A applications will trump all Sunrise B applications, meaning that if there is a viable Sunrise A and B applicant then the Sunrise A applicant will be awarded the name. Multiple Sunrise B applications do not require any prioritization.

NOTE: dotgay LLC reserves the right to release Sunrise B reserved domain names for registration if an authenticated community member with a trademark (corresponding to the name) included in the Trademark Clearinghouse requests so in writing to dotgay LLC.

Sunshine

The Sunshine period is designed to give community members with registrations obtained before May 1, 2012 on other IANA-recognized TLDs, an opportunity to become part of the .gay domain

prior to General Availability. This period follows the conclusion of the Sunrise period and is designed to provide a protection for existing community domain names. Applications received during Sunshine require a CIC and are treated as received at the same time.

Resolution: Multiple applications for the same name during Sunshine will be resolved by an auction in the Sunshine Auction period.

Premium Name Auction

Premium Name Auction periods will take place periodically as scheduled by dotgay LLC, as early as the conclusion of the Sunshine Period. Premium Name auctions include domains reserved by dotgay LLC specifically for sale during Premium Name Auctions to those who have obtained a CIC.

Resolution: All premium name auctions will be awarded to the highest bidder.

Land Rush

The Land Rush period opens following the conclusion of the Sunshine period and will serve as an opportunity for community members who have obtained a CIC to apply for any available name they are entitled to apply for. Applications received during Land Rush are treated as received at the same time.

Resolution: Multiple applications received during Land Rush for a particular domain will be resolved by an auction in the Land Rush Auction period.

General Availability

The General Availability Period will follow the conclusion of the Land Rush Period and will serve as an opportunity for community members who have obtained a CIC to apply for any available name.

Resolution: Applications for domain names during the General Availability will be distributed on a first-come/first serve basis.

18(c)ii

dotgay LLC does not intend to implement any cost benefits for registrants, such as discounts or bulk rates. All pricing will stem from standardized wholesale rates. As a community-based initiative, the .gay TLD is designed to address the needs of the Gay Community by using a 'pay it back to the community' strategy around achieving cost benefits for its registrants. Registrations in the .gay TLD contribute to a community resource from which registrants can ultimately benefit in ways that extend beyond a financial saving on the domain name itself, including progress in the areas of social services and social change. The benefits for registrants will also be realized over the long-term.

dotgay LLC views a certain monetary "entry barrier" into the second level as a healthy instrument to prevent unnecessary drain of the available namespace and in order to preserve availability for future years to come. Registrants in financial strain will be able to obtain less expensive third level registrations on index domain names.

An indirect cost benefit for registrants will be realized through the incentive program designed as a commission for the essential community support organizations serving as dotgay LLC's Authentication Partners. This is an exclusive offering to Authentication Partners as described below and based on the uniqueness of the Gay Community, and their needs.

Uniqueness of the .gay TLD

Unique to the .gay TLD is the challenge of identifying eligible community members and garnering their trust to participate. Because the Gay Community is not always visible and because the Gay Community is still healing (and in some cases still suffering) from prejudice and injustice, the task of outreach and engagement remains difficult, except when initiated from within the community. Understanding the landscape of the Gay Community and approaching registrants from a trusted source is mandatory to the registration process. dotgay LLC does

not believe that standard practice used in marketing existing TLDs can be applied to the .gay TLD. Establishing entry points that are linked into the Gay Community and seen as trusted sources remains critical to the .gay community-based model.

Through the use of established membership organizations in the Gay Community as Authentication Partners, dotgay LLC not only complies with the most restrictive community registration requirements, but also provides the best solution for connecting with potential registrants. Authentication Partners are the community membership organizations used by dotgay LLC to confirm eligibility. Authentication Partners become advocates for the .gay TLD and provide a trusted entry point for members of the community. Authentication Partners are also the advocates for their registrants within the .gay community-model.

Eligibility is required of all registrants of the .gay TLD, so the first step of registration begins with the acquisition of a Community Identifier Code (CIC) through one of the Authentication Partners. As dotgay LLC will utilize a uniquely innovative and targeted marketing plan via the Authentication Partners, it will create a more strategic and cost effective approach to seeking out registrants. The majority of potential registrants will ultimately be driven by dotgay LLC and the Authentication Partners to the registrars.

No pricing discounts for registrars will be offered initially. The registrars that meet dotgay LLC requirement for handling name registrations for .gay will not need to put the same necessary efforts into marketing .gay as with other TLDs, but will benefit from the Authentication Partner network created by dotgay LLC to drive registrations. Registrars will also benefit greatly from the level of trust that dotgay LLC bestows upon them as an approved registrar for the .gay TLD.

Because Authentication Partners offer the direct link to eligible registrants through their membership base, dotgay LLC will focus on incentive programs that reward the Authentication Partners for each confirmed registration. Committed to an overall community-based approach to the .gay TLD, dotgay LLC feels it is essential to integrate and channel financial support back into the Gay Community wherever possible.

Authentication Partner Incentive Program

dotgay LLC's Authentication Partner Incentive Program is intended to catapult growth in the early years of operation and fulfill the intended mission. Authentication Partners will be compensated for engaging their membership base with registrations in the .gay TLD while assisting in building out the index directory that will become a vital resource for the Gay Community globally.

By providing an opportunity to strengthen and financially support the Authentication Partners who have served as the foundation of the Gay Community in their regions, dotgay LLC will provide a separate and distinct way of funding the Gay Community beyond the dotgay Foundation discussed in the mission outlined in 18(a) above. Registrants who are members of multiple Authentication Partners will also have the option to choose which Authentication Partner receives credit for their registration by using them to acquire their CIC, giving registrants a choice of which organizations receive the credit.

18(c)iii

With the understanding that names on the .gay TLD will be sold at an initial premium wholesale price, it will be the goal of dotgay LLC to avoid any price escalation in the foreseeable future.

It is dotgay LLC's commitment that the wholesale cost of second and third level names will not increase during the five years that follow the beginning of the Sunrise period. At the conclusion of the initial five year period, dotgay LLC reserves the right to, but is not required to, introduce a wholesale price increase at both second and third level on an annual basis with prior written notice as required by ICANN. The price escalation -if ever required- will not exceed 5% per year.

Community-based Designation

19. Is the application for a community-based TLD?

Yes

20(a). Provide the name and full description of the community that the applicant is committing to serve.

Name and full description of the community

dotgay LLC is committed to serving the Gay Community. The Gay Community is a community centered on individuals whose gender identities [1] and sexual orientation [2] are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA [3]. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however "Gay".

Delineation

The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

How the community is structured and organized

While there isn't a hierarchical structure that organizes the community, there is a cooperating loose mesh of organizations that represent the diverse segments and various interests of the Gay Community, often created to work towards ending discrimination of the Gay Community. The following examples will help to provide further understanding of representing organizations:

Discrimination in the workplace; Resulted in the creation of organizations to advocate for gay employees including: Out & Equal (USA), Parks Diversity (Italy), OutServe (USA Military employee group).

Discrimination in the travel industry; Resulted in the creation of organizations to identify safe space and promote gay travel including: International Gay & Lesbian Travel Association (IGLTA), Travel Gay Canada, Brazilian Gay & Lesbian Travel Association.

Discrimination in the marketplace; Resulted in the creation of organizations to promote gay

business including: Canadian Gay & Lesbian Chamber of Commerce, National Gay Lesbian Chamber of Commerce (USA), Argentina Gay and Lesbian Chamber of Commerce.

Discrimination in sports; Resulted in the creation of gay sports teams and leagues including: Federation of Gay Games (FGG), Gay and Lesbian International Sport Association (GLISA).

Discrimination in human rights; Resulted in the creation of organizations including the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), Federacion Estatal de Lesbianas Gays Transexuales y Bisexuales (Spain), Lesben und Schwulenverband in Deutschland (Germany).

Discrimination in social services; Resulted in the formation of Gay Community centers and service organizations including: CenterLink (community center support), Parents, Families, and Friends of Lesbians and Gays (ally support), Trans-Fuzja Foundation (transgender support), Broadway Cares Equity Fights AIDS (HIV/AIDS support), Lambda Legal (legal services) and the Trevor Project (teen suicide prevention).

Discrimination in media; Resulted in the formation of organizations including: Gay Lesbian Alliance Against Defamation (GLAAD), National Lesbian and Gay Journalist Association (NLGJA).

It is these exact organizations that form the cooperating loose mesh of organizations that serve as the foundation of the Gay Community and enable it to structure and organize efforts.

When the community was established

While gay individuals have always existed, visibility of these individuals only began in the 19th century. One of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897). In the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). In the ensuing years additional organizations continued to emerge, but it was a watershed event in the streets of New York City that would kick-started what would become known as the modern gay rights movement. At the Stonewall Bar in New York City's Greenwich Village in June 1969 male and female homosexuals, bisexual, transgendered, intersexed and allied patrons fought back against routine police raids on gay bars in the Village and the events of that evening spiraled into several nights of riots in the streets. The ensuing mayhem helped not only galvanize the Gay Community and moved many individuals out of the dark bars and into the comparatively brighter streets, but resulted in global media coverage that had the unintended effect of both launching the modern gay rights movement and connecting gay individuals around the world to a larger Gay Community. For those gays living in remote parts not only of the US but of the world, knowledge of an angry mob of gays in New York City gave otherwise isolated individuals a community to finally identify with.

To commemorate the anniversary of Stonewall, three American cities organized "gay pride" demonstrations one year later. At this writing hundreds of gay pride celebrations occur around the world and an international organization of Pride Organizers called InterPride has been created. Along with other global gay organizations InterPride is one of dotgay LLC's Authentication Partners linking dotgay LLC to the origins of the modern global gay community.

This is just one of the many timelines that can be drawn in Gay Community history. Each of the organizations endorsing dotgay LLC has a similar record of activities in the organization of the community.

Estimated size of the community

As stated above, the Gay Community is global. Since the Gay Community is self-identifying, it becomes a difficult challenge to measure accurate statistics using tradition standards. Most studies place the global gay population at 1.2% (Williams 1996), higher in countries with existing gays rights protections projected at 4-6% (eg. Australia, Canada, United Kingdom, United States). Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners

and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.

[1] “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.” The Yogyakarta Principles www.yogyakartaprinciples.org/principles_en.pdf

[2] “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and relations with, individuals of a different gender or the same gender or more than one gender” The Yogyakarta Principles

[3] LBGTQIA - Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community.

20(b). Explain the applicant's relationship to the community identified in 20(a).

The applicant for the community-based .gay TLD is dotgay LLC, a company created to engage in the new gTLD program, by preparing an application designed for and supported by the Gay Community. dotgay LLC was founded in 2009 and is now under the guidance of CEO Scott Seitz, longtime advocate, entrepreneur and member of the Gay Community.

Leadership

Following an extensive career in fortune 500 companies, Scott began searching for opportunities to support and advocate for the Gay Community from within the corporate structure. Fueled by first-hand experience in the early days of HIV/AIDS, political action and corporate outreach, Scott formed SPI Marketing to create visibility for the Gay Community in the corporate world. Over 16 years, SPI has directed more than 30 million dollars into gay nonprofits and businesses. SPI prides itself on modest offices, nominal overhead, producing measurable results, and maintaining the highest ethical commitments and involvement with the Gay Community.

Among the first agencies of its kind to launch in the gay market, SPI has a well-documented history and working relationship with corporations, nonprofits and small businesses, including numerous and frequent pro-bono efforts. SPI works with the Gay Community to communicate with corporations and government agencies, as well as with corporations to speak to the Gay Community. All of these activities are based on a fundamental principal of visibility through financial and verbal transactions, which has earned SPI the respect of consumers, corporations and institutions. This has resulted in a nearly two-decade relationship with the community that is based on respect and trust, garnering SPI and Scott Seitz numerous community service awards from various nonprofit organizations.

SPI offers a unique vantage point and 360 degree approach to working with consumers, nonprofits, corporate and government agencies. With an ability to see many sides of the equation, understand the dynamics of the constituents and maintain an eye on trends and moving parts that ultimately affect the community, SPI found itself uniquely qualified to address the new gTLD program and mobilize with the community.

Advocacy

Through the longstanding commitment, efforts and experience of SPI, a natural step forward was taking on majority ownership in dotgay LLC to participate in the new gTLD program on behalf of the community. Most critical was the fact that no organizations were addressing Internet

advocacy on behalf of the community, and restrictions in the area of resources and finances prevented organizations from taking on the responsibility. dotgay LLC provided the much needed focus, resources and advocacy to evaluate the gTLD program, communicate the implications and opportunities, and spearhead efforts to ensure the .gay application moved forward as a community-based initiative in service of the community.

Both SPI and dotgay LLC have been recognized by the National Gay & Lesbian Chamber of Commerce as "Certified LGBT Business Enterprises," an important acknowledgment confirming membership in the community as gay owned and operated businesses.

Transparency

While dotgay LLC will remain a for-profit business, many traditional nonprofit policies will be adapted to live up to a commitment of transparency and accountability. Trust is one of the most important elements required to engage the Gay Community and that trust begins inside the organizations that serve the community. dotgay LLC opened dialogue with the most influential and well-respected community organizations to surface expectations for best practice around transparency. Through endorsement and guidance from these organizations, dotgay LLC took steps to create a website where plans, strategies and support for the .gay TLD became visible to the community.

dotgay LLC has always believed that transparency will be critical to the success of the .gay TLD, fully anticipating expectations from the community in the area of accountability. More specifically, dotgay LLC is committed to providing a minimum of 67% of profits from domain name registrations to the dotgay Foundation, a separate entity created after ICANN approval, with a Board of Directors that will guide redistribution of funds to support initiatives in the community. Upon ICANN approval, dotgay LLC will also establish a Registry Advisory Board (RAB), comprised of leaders in the community around the world committed to developing and evolving policy for the .gay TLD that reflects the true needs of the community.

Outreach

A deep understanding of the networking and operational aspects of the Gay Community was key to dotgay LLC's ability to mobilize the community. Through established relationships and the trusted reputation of dotgay LLC's leadership, organizations in the community very quickly began to listen, respond and engage in dotgay LLC's outreach, participating at various levels within their capacity.

As part of stewardship, dotgay LLC's global outreach strategy focused on "hubs" within the community. This included United Nations accredited organizations representing the Gay Community and a cross section of the largest nonprofits, service units, commerce, media and human rights groups. Outreach included speaking engagements and panel discussions at conferences, email and social media campaigns, townhalls, teleconferences and in-person meetings in more than 17 countries on five continents. The hubs in the community also serve as trusted communication networks, helping to further move information about the pending Internet expansion and .gay TLD into the community around the globe.

Participation

With over 125 community endorsements, representing hundreds of organizations and 7+ million members of the community in more than 110 countries, the Gay Community has voiced their support for the .gay TLD through participation. dotgay LLC will continue to seek participation beyond the application deadline and update endorsements online at www.dotgay.com.

dotgay LLC and the team of Internet consultants enlisted to guide the .gay application were complimented with participation from leadership in the community. Community perspective was provided across a variety of segments, cultures and regions of the world. The dotgay Application Advisory Group (dAAG) was formed to advise dotgay LLC during the application process. This group includes a panel of 11 community leaders from eight countries, with representation from nonprofit, human rights, commerce and equality platforms within the community.

Authentication Partners (AP) will also contribute to the community participation in .gay, consisting of membership organizations that will provide service in the area of eligibility. APs will ultimately determine who is qualified to register a .gay domain name, providing the most trusted entry points into .gay and reducing risk to unqualified registrations. dotgay LLC has confirmation from several of the largest membership organizations in the community to serve as APs including; International, Lesbian, Gay, Bisexual, Trans and Intersex Assoc. (ILGA), International Gay & Lesbian Travel Assoc. (IGLTA), InterPride (global network of pride organizers), CenterLink (global network of community centers) and the gay chambers of commerce in Argentina, Canada and USA.

Relations

Relationships are a huge part of the collaboration to create a community-based .gay TLD and dotgay LLC is committed to those relationships with a mission of serving the needs of the community. dotgay LLC was first to take on the challenge of moving the community to create a TLD that would bring value and benefit to the community. By sharing our vision, passion and an invitation to the community to participate, the Gay Community has ultimately invited dotgay LLC to lead the initiative, evidenced through their endorsement, support and participation throughout the process.

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

The intended registrants for the .gay TLD are those who identify as members of the Gay Community and meet eligibility requirements outlined by the dotgay LLC registration policies. Registrants will be comprised of a wide variety of constituents in the Gay Community, including but not limited to the service and non-profit community, business community, advertisers and media, plus a diverse range of individuals and emerging community groups.

The intended end-users (the visitors to .gay domain names) of the .gay TLD are members of the global Gay Community and those interested in understanding, supporting or engaging with the Gay Community. .gay domains will become community identifiers and trusted entry points to the Gay Community that highlight, and make clear to the end-users, who legitimate community members are.

Community-based Purpose of .gay

The community-based purpose of .gay is to put forth a coordinated effort from the Gay Community to take control of an Internet space that uniquely identifies our community and that will serve some unique needs of the global community. The .gay TLD will create a trusted foundation on the Internet to build tangible economic and social visibility for the Gay Community, while demonstrating metrics and commerce in an effort to garner local and global equality.

Since 2009, dotgay LLC has been working with the largest and most visible organizations, in all segments of the community, to develop a model for the .gay TLD that addresses the issues of safety and visibility. In the process it was revealed that a community-based TLD could also fill a financial need, one that is far too common in the community because of discrimination and non-inclusive policy that prevents access to business, institutional or governmental resources.

dotgay LLC has been educating and engaging the Gay Community in the opportunities around creating a community-based gTLD since 2009. The communications strategy has included an interactive website, one-on-one office visits, town hall meetings, teleconferences, social-media, speaking engagements, panel discussions at conferences and community events globally. At all levels, the Gay Community has been encouraged to participate in the discussion and

formation of models and policy for the .gay TLD, while drawing on best practices used within the community.

As of writing (May 29, 2012) dotgay LLC has received more than 125 endorsements from all regions and from all segments of the Gay Community, including support from the world's largest Gay Community organizations and United Nations accredited organizations in the Gay Community. During the many months when applications are being processed and evaluated, dotgay LLC will continue its outreach to the Gay Community through community organizations and the gay media.

Three items have been identified by dotgay LLC and the Gay Community as fundamental to the community-based purpose of the .gay TLD and integral in creating a direct response to addressing safety, visibility (economic & metric) and support. These items include the:

1. Authentication Partners
2. Index Directory
3. Giving Back

Authentication Partners

The foundation of the Gay Community is largely rooted in the membership organizations that emerged to provide service, support and a voice for the community at critical times in gay history. They created "safe places" for members of the Gay Community to organize and became the collective voice for those who had fear or risk in standing up for themselves. Today, the efforts of these organizations continue to improve the lives of the Gay Community around the globe, amplifying their voices in the pursuit of progress while providing a trusted platform to claim status and be confirmed into the Gay Community.

Fundamental to building the community-based .gay TLD is the need to support and strengthen Gay Community organizations, while incorporating their proven and community adapted methodology for accepting membership. dotgay LLC will incorporate these organizations as Authentication Partners, becoming part of the eligibility process in determining who is eligible to register .gay domain names.

Index Directory

dotgay LLC will use a selection of domain names based on generic community relevant key words to create an index directory within the .gay TLD, safeguarding important key words based domain names that will serve the community and be administered accordingly. This will be critical for key words that offer a greater value for registrants and end-users when used for the benefit of the Gay Community and not just one solitary owner. Key word based domains such as "travel.gay" will not be sold, but instead maintained by dotgay LLC as an index page so that it can become a community hub and a trusted resource for queries related to gay travel.

Registrants in the .gay TLD will be able to identify their registrations via an index questionnaire provided by dotgay LLC and, without charge, utilized to place them into the index directory. For example, travel related .gay registrations will be included in the travel.gay index. The normal function of a domain name is to route to one website, however the travel.gay index domain name would instead point to many websites based on geographical preferences and a sorting mechanism used by the end-users. This creates added value for the end-users and it creates awareness that results in valuable traffic for .gay domain name registrants.

End-users visiting index domains like travel.gay will be able to access information relevant to their travel needs. For example, end-users looking for beach resorts in Cape Town, South Africa would be able to visit travel.gay and then narrow down search by country, city and other preferences. Additionally, the search results produced will represent a trusted source of travel related registrants who are open for business with the Gay Community.

Over all, the index directory attracts traffic for the most important generic key word based .gay domain names, drives that traffic to user relevant .gay registrations and thus provides useful service to the end-user. This is a win-win situation for the entire Gay Community.

Giving Back

The Gay Community is intimately familiar with struggles around funding, often excluded or delayed in accessing resources because of discrimination, non-inclusive policy or lack of statistics. The struggles are widespread in the community and the challenges vary country by country based on governmental and cultural influences. In response, the Gay Community has looked to its own community members to financially support programs and services that emerge as priorities. An example of this is the immediate response of the community to the HIV/AIDS crisis in the 1980's, funding programs and services well before any external support was provided.

dotgay LLC will channel funds back into the Gay Community using two methods. The first is to compensate all Authentication Partners in the community for each confirmed name registration or renewal. Secondly, dotgay LLC has also committed to giving a minimum of 67% of the profits from domain name registrations to the dotgay Foundation for redistribution back into the Gay Community.

Lasting nature of .gay

.gay will be of a lasting nature because of the community-based solutions built into the design, bringing value and benefit to the community with disregard to traditional short-term revenue streams for the Registry (eg. Landrush). Otherwise lucrative domain names will be used to create awareness and channel aggregated traffic to .gay registrants, enhancing the popularity and usefulness of the .gay TLD space. The .gay TLD will offer an immediate and lasting impact on the Gay Community by providing solutions to real issues the community struggles with on a daily basis, while being flexible enough to address new and changing challenges confronting the community.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

Like most words in most languages, "gay" has an interesting and complicated history that moves across cultures, definitions and meanings before eventually settling on one culturally agreed upon definition, the definition that refers to the Gay Community as defined in section 20a. Etymology is an often disputed and tangled science, and "gay," like virtually every word that originates and has been imported into the English language, has shifted meaning over time before becoming today's word.

Early uses of the word gay

The Anglo-Norman *gai* and *gaye*, along with the Middle French *gai* was used as early as the second half of the 11th century throughout Western Europe to refer to people and incidents that ranged from happy and cheerful to those that would be described as carefree, frivolous and later even licentious, lewd and lascivious (OED). At the risk of oversimplification, the various regional variants of "gay" throughout the middle ages generally focused on "gay" as a sense relating to a variety of qualities ranging from noble and beautiful to bright, and lively (all in use in the 1300s). At a time when mass communication was non-existent, it is understandable that the same word could have so many simultaneous meanings that would vary regionally. As an example, "gay" at various moments in time would refer to "finely dressed," simply those people who could be described as "carefree," and to other divergent meanings ranging from the science of poetry to a description of a dog's tail carried high and erect (OED).

In the 1400s, "gay" was widely in use to refer to "Wanton, lewd, lascivious" behavior. This sense of gay as "dedicated to social pleasures" or "frivolous" and "hedonistic" behaviors helps shed light on the transition of "gay" from its earlier 12th-15th century meanings to the

modern and dominant understanding of gay as both a noun and adjective referring to a specific group of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society, and thus were judged harshly by that society.

Gay used to for homosexuality

As cited in the OED, "Gay by the early 20th century progressed to its current reference to a sexuality that was non-heterosexual. Writing in 1953, D.W. Cory explains: "In France as early as the sixteenth century the homosexual was called gaie; significantly enough, the feminine form was used to describe the male. The word made its way to England and America, and was used in print in some of the more pornographic literature after the First World War. Psychoanalysts recorded that homosexual patients were calling themselves gay in the nineteen-twenties, and certainly by the nineteen-thirties it was the most common word in use among homosexuals themselves" (qtd. in OED).

Language is anything but stable and fixed. All words in all languages across the globe shift meaning over time and "gay" is certainly no exception to this rule. What this brief etymology of the term suggests however is that at least since the early 20th century "gay" had morphed from describing a series of attributes ranging from lively, to happy, to sexually promiscuous that coalesced around a particular gender identity. Notably this transition of usage of "gay," while commonly thought to be a US American invention was actually a global undertaking. The word "gay," in fact, is used without any translation in a diverse set of world languages including French, Italian, Portuguese and many Spanish-speaking nations. In many other languages, including German, while a unique translation of gay exists officially, "Schwul," absolutely all German-speaking individuals would understand the English translation "gay" and most are using it. Not surprisingly, the availability of global communications technologies, like the Internet, has made agreed-upon definitions of terms like "gay" possible. Whereas once regional, national and other localized variations would be able to survive, today's instant and global communications infrastructure makes cohesion around particular meanings more inevitable.

Gay as an umbrella term

The term "gay" today is a term that has solidified around encompassing several sub-communities of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. Within these sub-communities even further classifications and distinctions can be made that further classify its members but are equally comfortable identifying as gay, particularly to those outside their own sub-communities. As an example, it has become commonplace for celebrities to acknowledge their homosexuality with the now routine declaration of "Yup, I'm gay" on the cover of newsmagazines as the comedienne Ellen Degeneres did when she "came out" on the cover of TIME magazine.

Notably, "gay" is used to super-identify all these groups and circumstances. Whether homosexual, bisexual, transgender, intersex or ally, all members of the Gay Community march in the "gay pride parade" read the same "gay media" and fight for the same "gay rights." Gay has become the prevalent term in how members of this community refer to themselves when speaking about themselves as demonstrated by the large number of organizations that use the term globally.

Gay means gay

While it is true that "gay" has at various points in history signified other meanings, the current definition is not only the most prominent and widely used, but also the most stable that indicates permanence and longevity. Not only are other uses of the term gay archaic (e.g. the gay nineties), they also do not name any communities. When references are made to the Gay Community, there can be not confusion for any other possible meaning of the term. At the present time the string "gay" when used as a noun is understood to indicate a member of the Gay Community (as defined in section 20a) and has no other meaning. This is not only true in the English language it is true in all other languages where the word gay is used to indicate a member of the Gay Community.

As a word in the modern lexicon, the word gay has only one meaning as a noun – to be a member of the Gay Community. As an adjective, however, it still has meanings that have largely slipped into archaic or historic use. To understand other possible meanings of the term in the English language, one needs to test using substitution as is often done in language theory (eg. can the word ‘happy’ be substituted for the word ‘gay’ in the normal sentence). When one utters the phrase ‘I think he is gay’ one cannot assume the substituted ‘I think he is happy’. And if there were to be any question, it would be followed up with something such as: do you mean gay as in ‘gay’ or do you mean gay as in ‘happy’? The initial presumption is that gay refers to a member of the Gay Community.

Additionally while there are a few historical references such as Gay Nineties – reference to the 1890s, there are very few remaining uses, and there is no chance of the term being misunderstood in the context of gTLD usage. In the context of new gTLD applications, the name does not have any connotation beyond the Gay Community. The idea that one would look at a domain such as lawyer.gay or health.gay and misunderstand that to mean lawyer.happy or health.happy is inconceivable.

OED – Oxford English Dictionary

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

.gay Registration Policies

- All registrants will be required to authenticate and obtain a Community Identifier Code (CIC) through an Authentication Partner in order to register or renew .gay domain names.
- One CIC will permit the registration of one domain name on the .gay TLD.
- All domain names at all levels within the .gay domain name space must abide by all applicable dotgay LLC policies.
- Data supplied during the authentication process will be protected, not sold and used exclusively by dotgay LLC for the purposes for which it was collected.
- dotgay LLC will adhere to all name selection restrictions that flow from ICANN policies and contracts.
- The registrant agreement will contain the following representations from the registrant:
 - They have a valid association to the name
 - They are not selecting a name in bad faith or for malicious use
 - They are not engaging in cybersquatting activity in which the goal is to obtain desirable names for the purpose of generating profit or other advantage.
 - They are not engaging in speculative registration activity for the purpose of reselling domains or parking the names for traffic.
- Breach of registrant agreement, or representations made in that agreement, will subject the registrant to the Registry Policies Dispute Resolution Procedure (RPDRP) and may result in dotgay LLC revoking the ineligible names.
- dotgay LLC will host an online process to submit recommendations for names that should be reserved prior to Sunrise including:
 - Community relevant key word domain names for the index directory
 - Domain names for premium auctions
 - Sensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech
- Third level name registrations will be made available on select index domain names.
- Registry reserves the right to review and reject any third level registration requests.
- dotgay LLC will have an established policy regarding adult content.

Eligibility

.gay is restricted to members of the Gay Community. Eligibility is determined through formal

membership with any of dotgay LLC's Authentication Partners (AP) from the community.

Early organizations of the Gay Community provided "safe places" during a period in history when community members became empowered to step out of the closet. They created a trusted network of community members sharing a common ambition; from gay rights to a response around the AIDS epidemic. Individuals who willingly associated themselves with these organizations affirmed themselves as members of the community.

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as "hubs" and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community.

In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

1. Have an active and reputable presence in the Gay Community
2. Have a mission statement that incorporates a focus specific to the Gay Community
3. Have an established policy that affirms community status for member enrolment
4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

dotgay LLC will work within the community to identify and approve APs that meet the above requirements, providing as many opportunities for the community to participate as possible. A complete list of APs will be provided when .gay is placed in the root and the list will be maintained and updated as APs are added or removed. APs will be reviewed by dotgay LLC on a periodic basis (eg. every 1-3 years) to ensure they meet all requirements. dotgay LLC will provide APs with the means of allocating CICs required to register names on .gay.

Name Selection

Registerable names on .gay

Community members that have received a CIC as per the requirements set forth in Eligibility will be permitted to register second-level names that are:

1. Not words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.
2. In accordance with the ICANN-related name restrictions outlined in Specification 5 of the Registry agreement (unless otherwise expressly authorized in writing by ICANN).
3. Not part of the Registry-defined reserved lists outlined below;
 - a. Index words. Words designated for the index directory.
 - b. Founders names. These are names that are reserved for Founders of .gay as outlined in 18(c)(i). They will remain reserved only until they are registered by the Founders, either at the beginning or the end of the Sunrise period accordingly.
 - c. Sunrise B names. Includes names from Sunrise B as outlined on 18(c)(i).
 - d. Registry Designated names. Includes names designated by dotgay LLC for use in operation of the Registry.
 - e. Premium Auction names. Names reserved for auctions conducted by dotgay LLC, including generic words.
 - f. Sensitive names. Names that the Registry Advisory Board (RAB) may recommend be reserved by dotgay LLC because they are deemed sensitive on .gay, including words or phrases that incite or promote discrimination or violent behavior.

Content & Use:

Content & Use Restrictions

- dotgay LLC will make best efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression,

ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law.

- Registrants are not permitted to give non-community members access to sub-level domains.
- dotgay LLC will use web metasearch technology to help determine that policies are adhered to at all levels.

Enforcement:

Investigation Practices & Mechanisms

Registry will utilize an Ombudsman function to be the initial point of contact for reports, including complaints, disputes and matters related to abuse of policy. The Office of the Ombudsman (OTO) will be responsible for receiving and evaluating all such reports, including those from law enforcement and governmental and quasi-governmental agencies.

Registry will use a Community Watch mechanism, wherein the members of the community can easily report any infraction of Registry policies. A web-based reporting system established by the Registry will be the suggested method of contact for all matters related to enforcement. The OTO will be responsible for investigating all such reports. To the extent possible, all communications between the Registry, claimants and registrants regarding enforcement matters will be conducted electronically, however at the discretion of the OTO other methods of communication may be used.

The Ombudsman function will also have within its responsibility, creation and management of a statistical method of sampling adherence to the policies of the Registry. The Ombudsman function will be responsible for periodic reporting on the statistics related to complaints, enforcement and solutions.

Reporting will ultimately be addressed by one of the following enforcement agents, using the appropriate dispute resolution policy. Matters that cannot be resolved by the OTO will be referred to the appropriate dispute resolution process. The Registry will be bound by the decisions made by the dispute resolution processes.

Resources Allocated to Enforcement

- Ombudsman
 - o Registry provided independent agent or agents
 - o Attempts to resolve issues amicably between complainant and registrant
 - o Acknowledges and documents all Registry related reports and resolutions
 - o Administers notifications and warnings related to Registry policy
 - o Reports to Registry when policy violations are not corrected in the required time
 - o As required by due process and ICANN rules, cooperates with law enforcement, privacy protection regulations and other regulatory frameworks
 - o Redirect complaints that cannot be resolved by the OTO, to the appropriate dispute resolution process.
 - Uniform Dispute Resolution Policy (UDRP) as defined by ICANN
 - Uniform Rapid Suspension (URS) as defined by ICANN
 - Registry Restrictions Dispute Resolution Procedures (RRDRP) as defined by ICANN
 - Trademark Post Delegation Dispute Resolution Procedure (Trademark PDDRP) as defined by ICANN
 - Registry Policies Dispute Resolution Procedure (RPDRP) as defined below.
- Registry Policies Dispute Resolution Procedure (RPDRP)
 - o The RPDRP is similar to the RRDRP except that it is responsible for resolving all disputes concerning Registry established policies, such as naming policy.

Appeals Mechanism

Registrants who have not been successful in Registry policy dispute resolution will have the one-time opportunity to make a reconsideration appeal around the policy decision. The reconsideration appeal will be through an online appeal mechanism provided by the Registry. Reconsideration appeals must include a stated reason for request of reconsideration.

Any Registrant taken down or suspended for a Registry related violation will also have the option to submit an appeal for reinstatement. Registrants will submit appeals directly with

the RPDRP appointed dispute resolution provider. All claimants must follow the online appeal process provided by the appointed dispute resolution provider.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

Geographic Names

21(a). Is the application for a geographic name?

No

Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

Geographical names predetermined to require protection will initially be reserved at the second level and at all other levels within the .gay TLD at which the Registry provides for registrations. This includes all two-character labels, country and territory names included in Specification 5 of the Registry agreement with ICANN.

According to the Applicant Guidebook “the rules for release can be developed or agreed to by governments, the GAC, and/or approved ICANN after a community discussion.”

Registry initially proposes the following procedure but reserves the right to later introduce additional procedures in case agreement can be reached with governments, the GAC, and/or ICANN.

Rules for release of Geographical Names

The following rules are suggested for requests pertaining to the release of reserved geographic names:

1. Requesting registrants must meet eligibility requirements for the .gay TLD.
2. Requesting registrants must specify whether they are seeking a second or third level registrations, or any combination thereof.
3. Reserved geographical names will only be eligible for release and delegation to the government agency to which the geographical name represents.
4. Reserved geographical names in the form of two-character labels that are not currently assigned may only be released through an agreement between ICANN and Registry.

5. Requests for the release of restricted geographical names must followed the appropriate procedure outlined below.

Procedures for release of Geographical Names

The suggested procedure for releasing and registering an unassigned two-character label from the reserved geographical names on the .gay TLD will be as follows:

1. Confirm eligibility requirements of the .gay TLD as outlined in 20(e), which will result in the generation of a CIC.
2. The requesting registrant informs dotgay LLC of their interest to register an unassigned two-character label geographical name and provides a CIC in the request.
3. The requesting registrant will then provide the Registry with a detailed explanation of the intended purpose for the name and how it relates to the Gay Community, as well as if it is a second and/or third level request.
4. The Registry will consider the proposal and offer an approval or denial of the request.
5. If the two-character label geographical name request is denied, the Registry will continue to hold the requested geographical name on the reserved list.
6. If approved, the Registry will submit a request to ICANN to verify the availability of the name and seek approval for the release of the two-character label.
7. If denied by ICANN, the two-character label will remain on the reserved list.
8. If approved by ICANN, the designated beneficiary (the Registrant) will be provide with a unique Authentication code provided by the Registry to register the exact two-label character, with a Registry approved and accredited Registrar, using the Authorization code as their authority.

The suggested procedures for releasing and registering all other reserved geographical names on the .gay TLD will be as follows:

1. Confirm eligibility requirements of the .gay TLD as outlined in 20(e), which will result in the generation of a CIC.
2. The Government or relevant public authority related to a geographical name informs the GAC Secretariat of their request to register the geographical name, and the designated beneficiary.
3. The GAC Secretariat authenticates the request and transfers it to ICANN and to the Registry to verify the CIC and availability of the name.
4. The Government or public authority will then provide the Registry with a detailed explanation of the intended purpose for the name and how it relates to the gay community, as well as if it is a second and/or third level request.
5. The Registry will consider the proposal and offer an approval or denial of the request.
6. If the geographical name request is denied, the Registry will continue to hold the requested geographical name on the reserved list.
7. If approved, the Registry will issue a unique Authentication code to register the exact geographical name, with a Registry approved and accredited Registrar, using the Authorization code as their authority.

Registry Services

23. Provide name and full description of all the Registry Services to be provided.

23.1 Introduction

dotgay LLC has elected to partner with Neustar, Inc (Neustar) to provide back-end services for the .gay registry. In making this decision, dotgay LLC recognized that Neustar already possesses a production-proven registry system that can be quickly deployed and smoothly operated over its robust, flexible, and scalable world-class infrastructure. The existing registry services will be leveraged for the .gay registry. The following section describes the registry services to be provided.

23.2 Standard Technical and Business Components

Neustar will provide the highest level of service while delivering a secure, stable and comprehensive registry platform. dotgay LLC will use Neustar's Registry Services platform to deploy the .gay registry, by providing the following Registry Services (none of these services are offered in a manner that is unique to .gay):

- Registry-Registrar Shared Registration Service (SRS)
- Extensible Provisioning Protocol (EPP)
- Domain Name System (DNS)
- WHOIS
- DNSSEC
- Data Escrow
- Dissemination of Zone Files using Dynamic Updates
- Access to Bulk Zone Files
- Dynamic WHOIS Updates
- IPv6 Support
- Rights Protection Mechanisms
- Internationalized Domain Names (IDN).

The following is a description of each of the services.

23.2.1 SRS

Neustar's secure and stable SRS is a production-proven, standards-based, highly reliable, and high-performance domain name registration and management system. The SRS includes an EPP interface for receiving data from registrars for the purpose of provisioning and managing domain names and name servers. The response to Question 24 provides specific SRS information.

23.2.2 EPP

The .gay registry will use the Extensible Provisioning Protocol (EPP) for the provisioning of domain names. The EPP implementation will be fully compliant with all RFCs. Registrars are provided with access via an EPP API and an EPP based Web GUI. With more than 10 gTLD, ccTLD, and private TLDs implementations, Neustar has extensive experience building EPP-based registries. Additional discussion on the EPP approach is presented in the response to Question 25.

23.2.3 DNS

dotgay LLC will leverage Neustar's world-class DNS network of geographically distributed nameserver sites to provide the highest level of DNS service. The service utilizes Anycast routing technology, and supports both IPv4 and IPv6. The DNS network is highly proven, and currently provides service to over 20 TLDs and thousands of enterprise companies. Additional information on the DNS solution is presented in the response to Questions 35.

23.2.4 WHOIS

Neustar's existing standard WHOIS solution will be used for the .gay. The service provides supports for near real-time dynamic updates. The design and construction is agnostic with regard to data display policy is flexible enough to accommodate any data model. In addition, a searchable WHOIS service that complies with all ICANN requirements will be provided. The following WHOIS options will be provided:

Standard WHOIS (Port 43)
Standard WHOIS (Web)
Searchable WHOIS (Web)

23.2.5 DNSSEC

An RFC compliant DNSSEC implementation will be provided using existing DNSSEC capabilities. Neustar is an experienced provider of DNSSEC services, and currently manages signed zones for three large top level domains: .biz, .us, and .co. Registrars are provided with the ability to submit and manage DS records using EPP, or through a web GUI. Additional information on DNSSEC, including the management of security extensions is found in the response to Question 43.

23.2.6 Data Escrow

Data escrow will be performed in compliance with all ICANN requirements in conjunction with an approved data escrow provider. The data escrow service will:

- Protect against data loss
- Follow industry best practices
- Ensure easy, accurate, and timely retrieval and restore capability in the event of a hardware failure
- Minimizes the impact of software or business failure.

Additional information on the Data Escrow service is provided in the response to Question 38.

23.2.7 Dissemination of Zone Files using Dynamic Updates

Dissemination of zone files will be provided through a dynamic, near real-time process. Updates will be performed within the specified performance levels. The proven technology ensures that updates pushed to all nodes within a few minutes of the changes being received by the SRS. Additional information on the DNS updates may be found in the response to Question 35.

23.2.8 Access to Bulk Zone Files

dotgay LLC will provide third party access to the bulk zone file in accordance with specification 4, Section 2 of the Registry Agreement. Credentialing and dissemination of the zone files will be facilitated through the Central Zone Data Access Provider.

23.2.9 Dynamic WHOIS Updates

Updates to records in the WHOIS database will be provided via dynamic, near real-time updates. Guaranteed delivery message oriented middleware is used to ensure each individual WHOIS server is refreshed with dynamic updates. This component ensures that all WHOIS servers are kept current as changes occur in the SRS, while also decoupling WHOIS from the SRS. Additional information on WHOIS updates is presented in response to Question 26.

23.2.10 IPv6 Support

The .gay registry will provide IPv6 support in the following registry services: SRS, WHOIS, and DNS/DNSSEC. In addition, the registry supports the provisioning of IPv6 AAAA records. A detailed description on IPv6 is presented in the response to Question 36.

23.2.11 Required Rights Protection Mechanisms

dotgay LLC, will provide all ICANN required Rights Mechanisms, including:

- Trademark Claims Service
- Trademark Post-Delegation Dispute Resolution Procedure (PDDRP)
- Registration Restriction Dispute Resolution Procedure (RRDRP)

- UDRP
- URS
- Sunrise service.

More information is presented in the response to Question 29.

23.2.12 Internationalized Domain Names (IDN)

IDN registrations are provided in full compliance with the IDNA protocol. Neustar possesses extensive experience offering IDN registrations in numerous TLDs, and its IDN implementation uses advanced technology to accommodate the unique bundling needs of certain languages. Character mappings are easily constructed to block out characters that may be deemed as confusing to users. A detailed description of the IDN implementation is presented in response to Question 44.

23.3 Unique Services

The .gay Registry will initially reserve an extensive list of domain names as part of the Registry-defined reserved list. It will contain –but is not limited to– potential premium auction domains, registration prohibited domains, potential index directory domains, Sunrise B domains, and recently expired domains. The .gay Registry will route a subset of the Registry-defined reserved list to an automated, but not monetized landing page which will enable the community to:

- Engage in the identification of the index directory
- Identify prohibited domains and
- Request to be notified about the upcoming event of the availability of a certain domain that registrants are interested in registering.

23.4 Security or Stability Concerns

All services offered are standard registry services that have no known security or stability concerns. Neustar has demonstrated a strong track record of security and stability within the industry.

Demonstration of Technical & Operational Capability

24. Shared Registration System (SRS) Performance

24.1 Introduction

dotgay LLC has partnered with NeuStar, Inc (“Neustar”), an experienced TLD registry operator, for the operation of the .gay Registry. The applicant is confident that the plan in place for the operation of a robust and reliable Shared Registration System (SRS) as currently provided by Neustar will satisfy the criterion established by ICANN.

Neustar built its SRS from the ground up as an EPP based platform and has been operating it reliably and at scale since 2001. The software currently provides registry services to five TLDs (.BIZ, .US, TEL, .CO and .TRAVEL) and is used to provide gateway services to the .CN and .TW registries. Neustar’s state of the art registry has a proven track record of being secure, stable, and robust. It manages more than 6 million domains, and has over 300 registrars connected today.

The following describes a detailed plan for a robust and reliable SRS that meets all ICANN

requirements including compliance with Specifications 6 and 10.

24.2 The Plan for Operation of a Robust and Reliable SRS

24.2.1 High-level SRS System Description

The SRS to be used for .gay will leverage a production-proven, standards-based, highly reliable and high-performance domain name registration and management system that fully meets or exceeds the requirements as identified in the new gTLD Application Guidebook.

The SRS is the central component of any registry implementation and its quality, reliability and capabilities are essential to the overall stability of the TLD. Neustar has a documented history of deploying SRS implementations with proven and verifiable performance, reliability and availability. The SRS adheres to all industry standards and protocols. By leveraging an existing SRS platform, dotgay LLC is mitigating the significant risks and costs associated with the development of a new system. Highlights of the SRS include:

- State-of-the-art, production proven multi-layer design
- Ability to rapidly and easily scale from low to high volume as a TLD grows
- Fully redundant architecture at two sites
- Support for IDN registrations in compliance with all standards
- Use by over 300 Registrars
- EPP connectivity over IPV6
- Performance being measured using 100% of all production transactions (not sampling).

24.2.2 SRS Systems, Software, Hardware, and Interoperability

The systems and software that the registry operates on are a critical element to providing a high quality of service. If the systems are of poor quality, if they are difficult to maintain and operate, or if the registry personnel are unfamiliar with them, the registry will be prone to outages. Neustar has a decade of experience operating registry infrastructure to extremely high service level requirements. The infrastructure is designed using best of breed systems and software. Much of the application software that performs registry-specific operations was developed by the current engineering team and as a result the team is intimately familiar with its operations.

The architecture is highly scalable and provides the same high level of availability and performance as volumes increase. It combines load balancing technology with scalable server technology to provide a cost effective and efficient method for scaling.

The Registry is able to limit the ability of any one registrar from adversely impacting other registrars by consuming too many resources due to excessive EPP transactions. The system uses network layer 2 level packet shaping to limit the number of simultaneous connections registrars can open to the protocol layer.

All interaction with the Registry is recorded in log files. Log files are generated at each layer of the system. These log files record at a minimum:

- The IP address of the client
- Timestamp
- Transaction Details
- Processing Time.

In addition to logging of each and every transaction with the SRS Neustar maintains audit records, in the database, of all transformational transactions. These audit records allow the Registry, in support of the applicant, to produce a complete history of changes for any domain name.

24.2.3 SRS Design

The SRS incorporates a multi-layer architecture that is designed to mitigate risks and easily

scale as volumes increase. The three layers of the SRS are:

- Protocol Layer
- Business Policy Layer
- Database.

Each of the layers is described below.

24.2.4 Protocol Layer

The first layer is the protocol layer, which includes the EPP interface to registrars. It consists of a high availability farm of load-balanced EPP servers. The servers are designed to be fast processors of transactions. The servers perform basic validations and then feed information to the business policy engines as described below. The protocol layer is horizontally scalable as dictated by volume.

The EPP servers authenticate against a series of security controls before granting service, as follows:

- The registrar's host exchanges keys to initiate a TLS handshake session with the EPP server.
- The registrar's host must provide credentials to determine proper access levels.
- The registrar's IP address must be preregistered in the network firewalls and traffic-shapers.

24.2.5 Business Policy Layer

The Business Policy Layer is the brain of the registry system. Within this layer, the policy engine servers perform rules-based processing as defined through configurable attributes. This process takes individual transactions, applies various validation and policy rules, persists data and dispatches notification through the central database in order to publish to various external systems. External systems fed by the Business Policy Layer include backend processes such as dynamic update of DNS, WHOIS and Billing.

Similar to the EPP protocol farm, the SRS consists of a farm of application servers within this layer. This design ensures that there is sufficient capacity to process every transaction in a manner that meets or exceeds all service level requirements. Some registries couple the business logic layer directly in the protocol layer or within the database. This architecture limits the ability to scale the registry. Using a decoupled architecture enables the load to be distributed among farms of inexpensive servers that can be scaled up or down as demand changes.

The SRS today processes over 30 million EPP transactions daily.

24.2.6 Database

The database is the third core components of the SRS. The primary function of the SRS database is to provide highly reliable, persistent storage for all registry information required for domain registration services. The database is highly secure, with access limited to transactions from authenticated registrars, trusted application-server processes, and highly restricted access by the registry database administrators. A full description of the database can be found in response to Question 33.

Figure 24-1 attached depicts the overall SRS architecture including network components.

24.2.7 Number of Servers

As depicted in the SRS architecture diagram above Neustar operates a high availability architecture where at each level of the stack there are no single points of failures. Each of the network level devices run with dual pairs as do the databases. For the .gay registry, the SRS will operate with 8 protocol servers and 6 policy engine servers. These expand horizontally as volume increases due to additional TLDs, increased load, and through organic

growth. In addition to the SRS servers described above, there are multiple backend servers for services such as DNS and WHOIS. These are discussed in detail within those respective response sections.

24.2.8 Description of Interconnectivity with Other Registry Systems

The core SRS service interfaces with other external systems via Neustar's external systems layer. The services that the SRS interfaces with include:

- WHOIS
- DNS
- Billing
- Data Warehouse (Reporting and Data Escrow).

Other external interfaces may be deployed to meet the unique needs of a TLD. At this time there are no additional interfaces planned for .gay.

The SRS includes an external notifier concept in its business policy engine as a message dispatcher. This design allows time-consuming backend processing to be decoupled from critical online registrar transactions. Using an external notifier solution, the registry can utilize control levers that allow it to tune or to disable processes to ensure optimal performance at all times. For example, during the early minutes of a TLD launch, when unusually high volumes of transactions are expected, the registry can elect to suspend processing of one or more backend systems in order to ensure that greater processing power is available to handle the increased load requirements. This proven architecture has been used with numerous TLD launches, some of which have involved the processing of over tens of millions of transactions in the opening hours. The following are the standard three external notifiers used the SRS:

24.2.9 WHOIS External Notifier

The WHOIS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on WHOIS. It is important to note that, while the WHOIS external notifier feeds the WHOIS system, it intentionally does not have visibility into the actual contents of the WHOIS system. The WHOIS external notifier serves just as a tool to send a signal to the WHOIS system that a change is ready to occur. The WHOIS system possesses the intelligence and data visibility to know exactly what needs to change in WHOIS. See response to Question 26 for greater detail.

24.2.10 DNS External Notifier

The DNS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on DNS. Like the WHOIS external notifier, the DNS external notifier does not have visibility into the actual contents of the DNS zones. The work items that are generated by the notifier indicate to the dynamic DNS update sub-system that a change occurred that may impact DNS. That DNS system has the ability to decide what actual changes must be propagated out to the DNS constellation. See response to Question 35 for greater detail.

24.2.11 Billing External Notifier

The billing external notifier is responsible for sending all billable transactions to the downstream financial systems for billing and collection. This external notifier contains the necessary logic to determine what types of transactions are billable. The financial systems use this information to apply appropriate debits and credits based on registrar.

24.2.12 Data Warehouse

The data warehouse is responsible for managing reporting services, including registrar reports, business intelligence dashboards, and the processing of data escrow files. The Reporting Database is used to create both internal and external reports, primarily to support registrar billing and contractual reporting requirement. The data warehouse databases are updated on a daily basis with full copies of the production SRS data.

24.2.13 Frequency of Synchronization between Servers

The external notifiers discussed above perform updates in near real-time, well within the prescribed service level requirements. As transactions from registrars update the core SRS, update notifications are pushed to the external systems such as DNS and WHOIS. These updates are typically live in the external system within 2-3 minutes.

24.2.14 Synchronization Scheme (e.g., hot standby, cold standby)

Neustar operates two hot databases within the data center that is operating in primary mode. These two databases are kept in sync via synchronous replication. Additionally, there are two databases in the secondary data center. These databases are updated real time through asynchronous replication. This model allows for high performance while also ensuring protection of data. See response to Question 33 for greater detail.

24.2.15 Compliance with Specification 6 Section 1.2

The SRS implementation for .gay is fully compliant with Specification 6, including section 1.2. EPP Standards are described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. Extensible Provisioning Protocol or EPP is defined by a core set of RFCs that standardize the interface that make up the registry-registrar model. The SRS interface supports EPP 1.0 as defined in the following RFCs shown in Table 24-1 attached.

Additional information on the EPP implementation and compliance with RFCs can be found in the response to Question 25.

24.2.16 Compliance with Specification 10

Specification 10 of the New TLD Agreement defines the performance specifications of the TLD, including service level requirements related to DNS, RDDS (WHOIS), and EPP. The requirements include both availability and transaction response time measurements. As an experienced registry operator, Neustar has a long and verifiable track record of providing registry services that consistently exceed the performance specifications stipulated in ICANN agreements. This same high level of service will be provided for the .gay Registry. The following section describes Neustar's experience and its capabilities to meet the requirements in the new agreement.

To properly measure the technical performance and progress of TLDs, Neustar collects data on key essential operating metrics. These measurements are key indicators of the performance and health of the registry. Neustar's current .biz SLA commitments are among the most stringent in the industry today, and exceed the requirements for new TLDs. Table 24-2 compares the current SRS performance levels compared to the requirements for new TLDs, and clearly demonstrates the ability of the SRS to exceed those requirements.

Their ability to commit and meet such high performance standards is a direct result of their philosophy towards operational excellence. See response to Question 31 for a full description of their philosophy for building and managing for performance.

24.3 Resourcing Plans

The development, customization, and on-going support of the SRS are the responsibility of a combination of technical and operational teams, including:

- Development/Engineering
- Database Administration
- Systems Administration
- Network Engineering.

Additionally, if customization or modifications are required, the Product Management and

Quality Assurance teams will be involved in the design and testing. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably.

The necessary resources will be pulled from the pool of operational resources described in detail in the response to Question 31. Neustar's SRS implementation is very mature, and has been in production for over 10 years. As such, very little new development related to the SRS will be required for the implementation of the .gay registry. The following resources are available from those teams:

- Development/Engineering 19 employees
- Database Administration 10 employees
- Systems Administration 24 employees
- Network Engineering 5 employees

The resources are more than adequate to support the SRS needs of all the TLDs operated by Neustar, including the .gay registry.

25. Extensible Provisioning Protocol (EPP)

25.1 Introduction

dotgay LLC's back-end registry operator, Neustar, has over 10 years of experience operating EPP based registries. They deployed one of the first EPP registries in 2001 with the launch of .biz. In 2004, they were the first gTLD to implement EPP 1.0. Over the last ten years Neustar has implemented numerous extensions to meet various unique TLD requirements. Neustar will leverage its extensive experience to ensure dotgay LLC is provided with an unparalleled EPP based registry. The following discussion explains the EPP interface which will be used for the .gay registry. This interface exists within the protocol farm layer as described in Question 24 and is depicted in Figure 25-1.

25.2 EPP Interface

Registrars are provided with two different interfaces for interacting with the registry. Both are EPP based, and both contain all the functionality necessary to provision and manage domain names. The primary mechanism is an EPP interface to connect directly with the registry. This is the interface registrars will use for most of their interactions with the registry.

However, an alternative web GUI (Registry Administration Tool) that can also be used to perform EPP transactions will be provided. The primary use of the Registry Administration Tool is for performing administrative or customer support tasks.

The main features of the EPP implementation are:

- Standards Compliance: The EPP XML interface is compliant to the EPP RFCs. As future EPP RFCs are published or existing RFCs are updated, Neustar makes changes to the implementation keeping in mind of any backward compatibility issues.
- Scalability: The system is deployed keeping in mind that it may be required to grow and shrink the footprint of the Registry system for a particular TLD.
- Fault-tolerance: The EPP servers are deployed in two geographically separate data centers to provide for quick failover capability in case of a major outage in a particular data center. The EPP servers adhere to strict availability requirements defined in the SLAs.
- Configurability: The EPP extensions are built in a way that they can be easily configured to turn on or off for a particular TLD.
- Extensibility: The software is built ground up using object oriented design. This allows for easy extensibility of the software without risking the possibility of the change rippling through the whole application.
- Auditable: The system stores detailed information about EPP transactions from provisioning to DNS and WHOIS publishing. In case of a dispute regarding a name registration, the

Registry can provide comprehensive audit information on EPP transactions.

-Security: The system provides IP address based access control, client credential-based authorization test, digital certificate exchange, and connection limiting to the protocol layer.

25.3 Compliance with RFCs and Specifications

The registry-registrar model is described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. As shown in Table 25-1, EPP is defined by the core set of RFCs that standardize the interface that registrars use to provision domains with the SRS. As a core component of the SRS architecture, the implementation is fully compliant with all EPP RFCs.

Neustar ensures compliance with all RFCs through a variety of processes and procedures. Members from the engineering and standards teams actively monitor and participate in the development of RFCs that impact the registry services, including those related to EPP. When new RFCs are introduced or existing ones are updated, the team performs a full compliance review of each system impacted by the change. Furthermore, all code releases include a full regression test that includes specific test cases to verify RFC compliance.

Neustar has a long history of providing exceptional service that exceeds all performance specifications. The SRS and EPP interface have been designed to exceed the EPP specifications defined in Specification 10 of the Registry Agreement and profiled in Table 25-2. Evidence of Neustar's ability to perform at these levels can be found in the .biz monthly progress reports found on the ICANN website.

EPP Toolkits

Toolkits, under open source licensing, are freely provided to registrars for interfacing with the SRS. Both Java and C++ toolkits will be provided, along with the accompanying documentation. The Registrar Tool Kit (RTK) is a software development kit (SDK) that supports the development of a registrar software system for registering domain names in the registry using EPP. The SDK consists of software and documentation as described below.

The software consists of working Java and C++ EPP common APIs and samples that implement the EPP core functions and EPP extensions used to communicate between the registry and registrar. The RTK illustrates how XML requests (registration events) can be assembled and forwarded to the registry for processing. The software provides the registrar with the basis for a reference implementation that conforms to the EPP registry-registrar protocol. The software component of the SDK also includes XML schema definition files for all Registry EPP objects and EPP object extensions. The RTK also includes a "dummy" server to aid in the testing of EPP clients.

The accompanying documentation describes the EPP software package hierarchy, the object data model, and the defined objects and methods (including calling parameter lists and expected response behavior). New versions of the RTK are made available from time to time to provide support for additional features as they become available and support for other platforms and languages.

25.4 Proprietary EPP Extensions

dotgay LLC will be implementing a pre-authentication model that requires registrants to be pre-validated and obtain a Unique Identification Number (UIN) (planned to be referred to as the Community Identifier Code or CIC) token from a verification agent which is then provided to the registry to permit a domain name registration to occur. Using an extension to the EPP create domain transaction, this token will be submitted at the time of registration. The registry will validate the token and if valid, permit the registration to proceed. Attached is the schema of the EPP extension to be used for the UIN.

Neustar has implemented various EPP extensions for both internal and external use in other TLD registries. These extensions use the standard EPP extension framework described in RFC 5730. Table 25-3 provides a list of extensions developed for other TLDs. Should the .gay registry require additional EPP extensions at some point in the future, those extensions will be implemented in compliance with all RFC specifications including RFC 3735.

The full EPP schema to be used in the .gay registry is attached in the document titled "EPP Schema Files." For the .gay TLD there will be authentication of registrations via a UIN token as described above. The EPP extension required to execute this authentication is attached in the document titled "EPP Extension - Unique Identification Number."

25.5 Resourcing Plans

The development and support of EPP is largely the responsibility of the Development/Engineering and Quality Assurance teams. As an experience registry operator with a fully developed EPP solution, on-going support is largely limited to periodic updates to the standard and the implementation of TLD specific extensions.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

Development/Engineering - 19 employees
Quality Assurance - 7 employees.

These resources are more than adequate to support any EPP modification needs of the .gay registry.

26. Whois

26.1 Introduction

dotgay LLC recognizes the importance of an accurate, reliable, and up-to-date WHOIS database to governments, law enforcement, intellectual property holders and the public as a whole and is firmly committed to complying with all of the applicable WHOIS specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement. dotgay LLC's back-end registry services provider, Neustar, has extensive experience providing ICANN and RFC-compliant WHOIS services for each of the TLDs that it operates both as a Registry Operator for gTLDs, ccTLDs and back-end registry services provider. As one of the first "thick" registry operators in the gTLD space, Neustar's WHOIS service has been designed from the ground up to display as much information as required by a TLD and respond to a very stringent availability and performance requirement.

Some of the key features of dotgay LLC's solution include:

- Fully compliant with all relevant RFCs including 3912
- Production proven, highly flexible, and scalable with a track record of 100% availability over the past 10 years
- Exceeds current and proposed performance specifications
- Supports dynamic updates with the capability of doing bulk updates
- Geographically distributed sites to provide greater stability and performance
- In addition, dotgay LLC's thick-WHOIS solution also provides for additional search capabilities and mechanisms to mitigate potential forms of abuse as discussed below. (e.g., IDN, registrant data).

26.2 Software Components

The WHOIS architecture comprises the following components:

- An in-memory database local to each WHOIS node: To provide for the performance needs, the WHOIS data is served from an in-memory database indexed by searchable keys.
- Redundant servers: To provide for redundancy, the WHOIS updates are propagated to a cluster of WHOIS servers that maintain an independent copy of the database.
- Attack resistant: To ensure that the WHOIS system cannot be abused using malicious queries or DOS attacks, the WHOIS server is only allowed to query the local database and rate limits on queries based on IPs and IP ranges can be readily applied.

- Accuracy auditor: To ensure the accuracy of the information served by the WHOIS servers, a daily audit is done between the SRS information and the WHOIS responses for the domain names which are updated during the last 24-hour period. Any discrepancies are resolved proactively.
- Modular design: The WHOIS system allows for filtering and translation of data elements between the SRS and the WHOIS database to allow for customizations.
- Scalable architecture: The WHOIS system is scalable and has a very small footprint. Depending on the query volume, the deployment size can grow and shrink quickly.
- Flexible: It is flexible enough to accommodate thin, thick, or modified thick models and can accommodate any future ICANN policy, such as different information display levels based on user categorization.
- SRS master database: The SRS database is the main persistent store of the Registry information. The Update Agent computes what WHOIS updates need to be pushed out. A publish-subscribe mechanism then takes these incremental updates and pushes to all the WHOIS slaves that answer queries.

26.3 Compliance with RFC and Specifications 4 and 10

Neustar has been running thick-WHOIS Services for over 10+ years in full compliance with RFC 3912 and with Specifications 4 and 10 of the Registry Agreement. RFC 3912 is a simple text based protocol over TCP that describes the interaction between the server and client on port 43. Neustar built a home-grown solution for this service. It processes millions of WHOIS queries per day.

Table 26-1 describes Neustar's compliance with Specifications 4 and 10.

26.4 High-level WHOIS System Description

26.4.1 WHOIS Service (port 43)

The WHOIS service is responsible for handling port 43 queries. Our WHOIS is optimized for speed using an in-memory database and a master-slave architecture between the SRS and WHOIS slaves.

The WHOIS service also has built-in support for IDN. If the domain name being queried is an IDN, the returned results include the language of the domain name, the domain name's UTF-8 encoded representation along with the Unicode code page.

26.4.2 Web Page for WHOIS queries

In addition to the WHOIS Service on port 43, Neustar provides a web based WHOIS application (www.whois.gay). It is an intuitive and easy to use application for the general public to use. WHOIS web application provides all of the features available in the port 43 WHOIS. This includes full and partial search on:

- Domain names
- Nameservers
- Registrant, Technical and Administrative Contacts
- Registrars.

It also provides features not available on the port 43 service. These include:

1. Redemption Grace Period calculation: Based on the registry's policy, domains in pendingDelete can be restorable or scheduled for release depending on the date/time the domain went into pendingDelete. For these domains, the web based WHOIS displays "Restorable" or "Scheduled for Release" to clearly show this additional status to the user.
2. Extensive support for international domain names (IDN)
3. Ability to perform WHOIS lookups on the actual Unicode IDN
4. Display of the actual Unicode IDN in addition to the ACE-encoded name
5. A Unicode to Punycode and Punycode to Unicode translator
6. An extensive FAQ
7. A list of upcoming domain deletions

26.5 IT and Infrastructure Resources

As described above the WHOIS architecture uses a workflow that decouples the update process

from the SRS. This ensures SRS performance is not adversely affected by the load requirements of dynamic updates. It is also decoupled from the WHOIS lookup agent to ensure the WHOIS service is always available and performing well for users. Each of Neustar's geographically diverse WHOIS sites use:

- Firewalls, to protect this sensitive data
- Dedicated servers for MQ Series, to ensure guaranteed delivery of WHOIS updates
- Packetshaper for source IP address-based bandwidth limiting
- Load balancers to distribute query load
- Multiple WHOIS servers for maximizing the performance of WHOIS service.

Additional hardware details can be found in the response to Question 32.

Figure 26-1 depicts the different components of the WHOIS architecture.

26.6 Interconnectivity with Other Registry System

As described in Question 24 about the SRS and further in response to Question 31, "Technical Overview", when an update is made by a registrar that impacts WHOIS data, a trigger is sent to the WHOIS system by the external notifier layer. The update agent processes these updates, transforms the data if necessary and then uses messaging oriented middleware to publish all updates to each WHOIS slave. The local update agent accepts the update and applies it to the local in-memory database. A separate auditor compares the data in WHOIS and the SRS daily and monthly to ensure accuracy of the published data.

26.7 Frequency of Synchronization between Servers

Updates from the SRS, through the external notifiers, to the constellation of independent WHOIS slaves happens in real-time via an asynchronous publish/subscribe messaging architecture. The updates are guaranteed to be updated in each slave within the required SLA of $95\% \leq 60$ minutes. Please note that Neustar's current architecture is built towards the stricter SLAs ($95\% \leq 15$ minutes) of .BIZ. The vast majority of updates tend to happen within 2-3 minutes.

26.8 Provision for Searchable WHOIS Capabilities

Neustar will create a new web-based service to address the new search features based on requirements specified in Specification 4 Section 1.8. The application will enable users to search the WHOIS directory using any one or more of the following fields:

- Domain name
- Contacts and registrant's name
- Contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.)
- Name server name and name server IP address
- The system will also allow search using non-Latin character sets which are compliant with IDNA specification.

The user will choose one or more search criteria, combine them by Boolean operators (AND, OR, NOT) and provide partial or exact match regular expressions for each of the criterion name-value pairs. The domain names matching the search criteria will be returned to the user.

Figure 26-2 shows an architectural depiction of the new service.

To mitigate the risk of this powerful search service being abused by unscrupulous data miners, a layer of security will be built around the query engine which will allow the registry to identify rogue activities and then take appropriate measures. Potential abuses include, but are not limited to:

- Data Mining
- Unauthorized Access
- Excessive Querying
- Denial of Service Attacks

To mitigate the abuses noted above, Neustar will implement any or all of these mechanisms as appropriate:

- Username-password based authentication
- Certificate based authentication
- Data encryption
- CAPTCHA mechanism to prevent robo invocation of Web query
- Fee-based advanced query capabilities for premium customers.

The searchable WHOIS application will adhere to all privacy rules and policies of the .gay registry.

26.9 Resourcing Plans

As with the SRS, the development, customization, and on-going support of the WHOIS service is the responsibility of a combination of technical and operational teams. The primary groups responsible for managing the service include:

- Development/Engineering - 19 employees
- Database Administration - 10 employees
- Systems Administration - 24 employees
- Network Engineering - 5 employees

Additionally, if customization or modifications are required, the Product Management and Quality Assurance teams will also be involved. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably. The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. Neustar's WHOIS implementation is very mature, and has been in production for over 10 years. As such, very little new development will be required to support the implementation of the .gay registry. The resources are more than adequate to support the WHOIS needs of all the TLDs operated by Neustar, including the .gay registry.

27. Registration Life Cycle

27.1 Registration Life Cycle

Introduction

.gay will follow the lifecycle and business rules found in the majority of gTLDs today. Our back-end operator, Neustar, has over ten years of experience managing numerous TLDs that utilize standard and unique business rules and lifecycles.

Domain Lifecycle - Description

The registry will use the EPP 1.0 standard for provisioning domain names, contacts and hosts. Each domain record is comprised of three registry object types: domain, contacts, and hosts.

Domains, contacts and hosts may be assigned various EPP defined statuses indicating either a particular state or restriction placed on the object. Statuses are an integral part of the domain lifecycle and serve the dual purpose of indicating the particular state of the domain and indicating any restrictions placed on the domain. The EPP standard defines 17 statuses, however only 14 of these statuses will be used in the .gay registry per the defined .gay business rules.

The following is a brief description of each of the statuses. Server statuses may only be applied by the Registry, and client statuses may be applied by the Registrar.

- OK - Default status applied by the Registry.
- Inactive - Default status applied by the Registry if the domain has less than 2 nameservers.
- PendingCreate - Status applied by the Registry upon processing a successful Create

command, and indicates further action is pending. This status will not be used in the .gay registry.

- PendingTransfer - Status applied by the Registry upon processing a successful Transfer request command, and indicates further action is pending.
- PendingDelete - Status applied by the Registry upon processing a successful Delete command that does not result in the immediate deletion of the domain, and indicates further action is pending.
- PendingRenew - Status applied by the Registry upon processing a successful Renew command that does not result in the immediate renewal of the domain, and indicates further action is pending. This status will not be used in the .gay registry.
- PendingUpdate - Status applied by the Registry if an additional action is expected to complete the update, and indicates further action is pending. This status will not be used in the .gay registry.
- Hold - Removes the domain from the DNS zone.
- UpdateProhibited - Prevents the object from being modified by an Update command.
- TransferProhibited - Prevents the object from being transferred to another Registrar by the Transfer command.
- RenewProhibited - Prevents a domain from being renewed by a Renew command.
- DeleteProhibited - Prevents the object from being deleted by a Delete command.

The lifecycle of a domain begins with the registration of the domain. All registrations must follow the EPP standard, as well as the specific business rules described in the response to Question 18 above. Upon registration a domain will either be in an active or inactive state. Domains in an active state are delegated and have their delegation information published to the zone. Inactive domains either have no delegation information or their delegation information is not published in the zone. Following the initial registration of a domain, one of five actions may occur during its lifecycle:

- Domain may be updated
- Domain may be deleted, either within or after the add-grace period
- Domain may be renewed at anytime during the term
- Domain may be auto-renewed by the Registry
- Domain may be transferred to another registrar.

Every domain must eventually be renewed, auto-renewed, transferred, or deleted. A registrar may apply EPP statuses described above to prevent specific actions such as updates, renewals, transfers, or deletions; however none of these statuses, including the renewprohibited status will prevent the Registry from auto-renewing the domain.

27.1.1 Registration States

Domain Lifecycle - Registration States

As described above the .gay registry will implement a standard domain lifecycle found in most gTLD registries today.

- Active
- Inactive
- Locked
- Pending Transfer
- Pending Delete.

All domains are always in either an Active or Inactive state, and throughout the course of the lifecycle may also be in a Locked, Pending Transfer, and Pending Delete state. Specific conditions such as applied EPP policies and registry business rules will determine whether a domain can be transitioned between states. Additionally, within each state, domains may be subject to various timed events such as grace periods, and notification periods.

Active State

The active state is the normal state of a domain and indicates that delegation data has been provided and the delegation information is published in the zone. A domain in an Active state may also be in the Locked or Pending Transfer states.

Inactive State

Indicates that a domain has not been delegated or that the delegation data has not been published to the zone. A domain in an Inactive state may also be in the Locked or Pending Transfer states. By default all domain in the Pending Delete state are also in the Inactive state.

Locked State

Indicates that certain specified EPP transactions may not be performed to the domain. A domain is considered to be in a Locked state if at least one restriction has been placed on the domain; however up to eight restrictions may be applied simultaneously. Domains in the Locked state will also be in the Active or Inactive, and under certain conditions may also be in the Pending Transfer or Pending Delete states.

Pending Transfer State

Indicates a condition in which there has been a request to transfer the domain from one registrar to another. The domain is placed in the Pending Transfer state for a period of time to allow the current (losing) registrar to approve (ack) or reject (nack) the transfer request. Registrars may only nack requests for reasons specified in the Inter-Registrar Transfer Policy.

Pending Delete State

Occurs when a Delete command has been sent to the Registry after the first 5 days (120 hours) of registration. The Pending Delete period is 35-days during which the first 30-days the name enters the Redemption Grace Period (RGP) and the last 5-days guarantee that the domain will be purged from the Registry Database.

27.1.2 Typical Registration Lifecycle Activities

Domain Creation Process

The creation (registration) of domain names is the fundamental registry operation. All other operations are designed to support or compliment a domain creation. The following steps occur when a domain is created.

1. Contact objects are created in the SRS database. The same contact object may be used for each contact type, or they may all be different. If the contacts already exist in the database this step may be skipped.
2. Nameservers are created in the SRS database. Nameservers are not required to complete the registration process; however any domain with less than 2 name servers will not be resolvable.
3. The domain is created using the each of the objects created in the previous steps. In addition, the term and any client statuses may be assigned at the time of creation.

The actual number of EPP transactions needed to complete the registration of a domain name can be as few as one and as many as 40.

Update Process

Registry objects may be updated (modified) using the EPP Modify operation. The Update transaction updates the attributes of the object.

For example, the Update operation on a domain name will only allow the following attributes to be updated:

- Domain statuses
- Registrant ID
- Administrative Contact ID
- Billing Contact ID
- Technical Contact ID
- Nameservers
- AuthInfo
- Additional Registrar provided fields.

The Update operation will not modify the details of the contacts. Rather it may be used to associate a different contact object (using the Contact ID) to the domain name.

Renew Process

The term of a domain may be extended using the EPP Renew operation. ICANN policy general establishes the maximum term of a domain name to be 10 years, and Neustar recommends not deviating from this policy. A domain may be renewed/extended at any point time, even immediately following the initial registration. The only stipulation is that the overall term of the domain name may not exceed 10 years. If a Renew operation is performed with a term value will extend the domain beyond the 10 year limit, the Registry will reject the transaction entirely.

Transfer Process

The EPP Transfer command is used for several domain transfer related operations:

- Initiate a domain transfer
- Cancel a domain transfer
- Approve a domain transfer
- Reject a domain transfer.

To transfer a domain from one Registrar to another the following process is followed:

1. The gaining (new) Registrar submits a Transfer command, which includes the AuthInfo code of the domain name.
2. If the AuthInfo code is valid and the domain is not in a status that does not allow transfers the domain is placed into pendingTransfer status
3. A poll message notifying the losing Registrar of the pending transfer is sent to the Registrar's message queue
4. The domain remains in pendingTransfer status for up to 120 hours, or until the losing (current) Registrar Ack (approves) or Nack (rejects) the transfer request
5. If the losing Registrar has not Acked or Nacked the transfer request within the 120 hour timeframe, the Registry auto-approves the transfer
6. The requesting Registrar may cancel the original request up until the transfer has been completed.

A transfer adds an additional year to the term of the domain. In the event that a transfer will cause the domain to exceed the 10 year maximum term, the Registry will add a partial term up to the 10 year limit. Unlike with the Renew operation, the Registry will not reject a transfer operation.

Deletion Process

A domain may be deleted from the SRS using the EPP Delete operation. The Delete operation will result in either the domain being immediately removed from the database or the domain being placed in pendingDelete status. The outcome is dependent on when the domain is deleted. If the domain is deleted within the first five days (120 hours) of registration, the domain is immediately removed from the database. A deletion at any other time will result in the domain being placed in pendingDelete status and entering the Redemption Grace Period (RGP). Additionally, domains that are deleted within five days (120) hours of any billable (add, renew, transfer) transaction may be deleted for credit.

27.1.3 Applicable Time Elements

The following section explains the time elements that are involved.

Grace Periods

There are six grace periods:

- Add-Delete Grace Period (AGP)
- Renew-Delete Grace Period
- Transfer-Delete Grace Period
- Auto-Renew-Delete Grace Period
- Auto-Renew Grace Period
- Redemption Grace Period (RGP).

The first four grace periods listed above are designed to provide the Registrar with the ability to cancel a revenue transaction (add, renew, or transfer) within a certain period of time and receive a credit for the original transaction.

The following describes each of these grace periods in detail.

Add-Delete Grace Period

The APG is associated with the date the Domain was registered. Domains may be deleted for credit during the initial 120 hours of a registration, and the Registrar will receive a billing credit for the original registration. If the domain is deleted during the Add Grace Period, the domain is dropped from the database immediately and a credit is applied to the Registrar's billing account.

Renew-Delete Grace Period

The Renew-Delete Grace Period is associated with the date the Domain was renewed. Domains may be deleted for credit during the 120 hours after a renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly renewed. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP (see below).

Transfer-Delete Grace Period

The Transfer-Delete Grace Period is associated with the date the Domain was transferred to another Registrar. Domains may be deleted for credit during the 120 hours after a transfer. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP. A deletion of domain after a transfer is not the method used to correct a transfer mistake. Domains that have been erroneously transferred or hijacked by another party can be transferred back to the original registrar through various means including contacting the Registry.

Auto-Renew-Delete Grace Period

The Auto-Renew-Delete Grace Period is associated with the date the Domain was auto-renewed. Domains may be deleted for credit during the 120 hours after an auto-renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly auto-renewed. It should be noted that domains that are deleted during the auto-renew delete grace period will be placed into pendingDelete and will enter the RGP.

Auto-Renew Grace Period

The Auto-Renew Grace Period is a special grace period intended to provide registrants with an extra amount of time, beyond the expiration date, to renew their domain name. The grace period lasts for 45 days from the expiration date of the domain name. Registrars are required to provide registrants with at least 30 days of the period. The registrar is obliged to delete the domain within the Auto-Renew Grace Period in order to initiate the RGP. It is also not permitted to transfer the domain to a third entity (eg. the registrar itself or a redistribution partner) instead of deleting the domain name. If the registrar does not delete the domain within the RGP it automatically authorizes the registry operator to do so on its (the registrar's) behalf. During the Auto-Renew Grace Period, the registrar is not permitted to transfer ownership of domains.

Redemption Grace Period

The RGP is a special grace period that enables Registrars to restore domains that have been inadvertently deleted but are still in pendingDelete status within the Redemption Grace Period. All domains enter the RGP except those deleted during the AGP. The RGP period is 60 days, during which time the domain may be restored using the EPP RenewDomain command as described below. Following the 30day RGP period the domain will remain in pendingDelete status for an additional five days, during which time the domain may NOT be restored. The domain is released from the SRS, at the end of the 5 day non-restore period. A restore fee applies and is detailed in the Billing Section. A renewal fee will be automatically applied for any domain past expiration. Neustar has created a unique restoration process that uses the EPP Renew transaction to restore the domain and fulfill all the reporting obligations required under ICANN policy. The following describes the restoration process.

Cool Down Period

For a period between 1 - 12 months, and at the sole discretion of the registry operator, the domain will not be available for re-registration. The Cool Down Period shall enable for all interested potential registrants to become aware of the ability to register domains in order

to minimize the risk that those speculating on domains trump regular registrants. During the Cool Down Period, the registry will have the domain in a reserved names list and reserves the right to route the domain to an automated, non-monetized landing page. This will allow input from the community in the following ways: “Shall this domain be part of the index directory? Shall this domain name be exempted from registration because it causes potential harm to the community? Are you interested in registering this domain and want to be informed in a timely manner once it comes up for re-delegation?”. This way the intended registrants (end users from the community wanting to utilize domain names to publish content and in this way maximizing the awareness of the TLD brand) have a chance to become aware of the availability of the domain.

Redelegation

Expired domains will be made available for registration in the same manner as described in the landrush period. That enables a fair process of delegation if more than one potential registrant is interested in registering the domain name.

27.2 State Diagram

Figure 27-1 provides a description of the registration lifecycle.

The details of each trigger are described below:

- Create: Registry receives a create domain EPP command.
- WithNS: The domain has met the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
- WithoutNS: The domain has not met the minimum number of nameservers required by registry policy. The domain will not be in the DNS zone.
- Remove Nameservers (NS): Domain’s NS(s) is removed as part of an update domain EPP command. The total NS is below the minimum number of NS required by registry policy in order to be published in the DNS zone.
- Add Nameservers: NS(s) has been added to domain as part of an update domain EPP command. The total number of NS has met the minimum number of NS required by registry policy in order to be published in the DNS zone.
- Delete: Registry receives a delete domain EPP command.
- DeleteAfterGrace: Domain deletion does not fall within the add grace period.
- DeleteWithinAddGrace: Domain deletion falls within add grace period.
- Restore: Domain is restored. Domain goes back to its original state prior to the delete command.
- Transfer: Transfer request EPP command is received. Not possible during the Auto-Renew Grace Period
- Transfer Approve/Cancel/Reject: Transfer requested is approved or cancel or rejected.
- TransferProhibited: The domain is in clientTransferProhibited and/or serverTransferProhibited status. This will cause the transfer request to fail. The domain goes back to its original state.
- DeleteProhibited: The domain is in clientDeleteProhibited and/or serverDeleteProhibited status. This will cause the delete command to fail. The domain goes back to its original state.

Note: the locked state is not represented as a distinct state on the diagram as a domain may be in a locked state in combination with any of the other states: inactive, active, pending transfer, or pending delete.

27.2.1 EPP RFC Consistency

As described above, the domain lifecycle is determined by ICANN policy and the EPP RFCs. Neustar has been operating ICANN TLDs for the past 10 years consistent and compliant with all the ICANN policies and related EPP RFCs.

27.3 Resources

The registration lifecycle and associated business rules are largely determined by policy and business requirements; as such the Product Management and Policy teams will play a critical role in working Applicant to determine the precise rules that meet the requirements of the TLD. Implementation of the lifecycle rules will be the responsibility of Development/Engineering team, with testing performed by the Quality Assurance team. Neustar’s

SRS implementation is very flexible and configurable, and in many case development is not required to support business rule changes.

The .gay registry will be using standard lifecycle rules, and as such no customization is anticipated. However should modifications be required in the future, the necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

Development/Engineering - 19 employees
Registry Product Management - 4 employees

These resources are more than adequate to support the development needs of all the TLDs operated by Neustar, including the .gay registry.

28. Abuse Prevention and Mitigation

28.1 Abuse Prevention and Mitigation

Strong abuse prevention of a new gTLD is an important benefit to the internet community and .gay registrants. dotgay LLC and its registry operator and back-end registry services provider, Neustar, agree that a registry must not only aim for the highest standards of technical and operational competence, but also needs to act as a steward of the space on behalf of the Internet community and ICANN in promoting the public interest. Neustar brings extensive experience establishing and implementing registration policies. This experience will be leveraged to help dotgay LLC combat abusive and malicious domain activity within the new gTLD space.

One of those public interest functions for a responsible domain name registry includes working towards the eradication of abusive domain name registrations, including, but not limited to, those resulting from:

- Illegal or fraudulent actions
- Spam
- Phishing
- Pharming
- Distribution of malware
- Fast flux hosting
- Botnets
- Distribution of child pornography
- Online sale or distribution of illegal pharmaceuticals
- Incitement to violence or promotion of hatred to the Gay Community.

More specifically, although traditionally botnets have used Internet Relay Chat (IRC) servers to control registry and the compromised PCs, or bots, for DDoS attacks and the theft of personal information, an increasingly popular technique, known as fast-flux DNS, allows botnets to use a multitude of servers to hide a key host or to create a highly-available control network. This ability to shift the attacker's infrastructure over a multitude of servers in various countries creates an obstacle for law enforcement and security researchers to mitigate the effects of these botnets. But a point of weakness in this scheme is its dependence on DNS for its translation services. By taking an active role in researching and monitoring these sorts of botnets, Applicant's partner, Neustar, has developed the ability to efficiently work with various law enforcement and security communities to begin a new phase of mitigation of these types of threats.

Policies and Procedures to Minimize Abusive Registrations

A Registry must have the policies, resources, personnel, and expertise in place to combat such abusive DNS practices. As dotgay LLC's registry provider, Neustar is at the forefront of the

prevention of such abusive practices and is one of the few registry operators to have actually developed and implemented an active "domain takedown" policy. We also believe that a strong program is essential given that registrants have a reasonable expectation that they are in control of the data associated with their domains, especially its presence in the DNS zone. Because domain names are sometimes used as a mechanism to enable various illegitimate activities on the Internet sometimes the best preventative measure to thwart these attacks is to remove the names completely from the DNS before they can impart harm, not only to the domain name registrant, but also to millions of unsuspecting Internet users.

Removing the domain name from the zone has the effect of shutting down all activity associated with the domain name, including the use of all websites and e-mail. The use of this technique should not be entered into lightly. dotgay LLC has an extensive, defined, and documented process for taking the necessary action of removing a domain from the zone when its presence in the zone poses a threat to the security and stability of the infrastructure of the Internet or the registry.

Abuse Point of Contact

As required by the Registry Agreement, dotgay LLC will establish and publish on its website a single abuse point of contact responsible for addressing inquiries from law enforcement and the public related to malicious and abusive conduct. dotgay LLC will also provide such information to ICANN prior to the delegation of any domain names in the TLD. This information shall consist of, at a minimum, a valid e-mail address dedicated solely to the handling of malicious conduct complaints, and a telephone number and mailing address for the primary contact. We will ensure that this information will be kept accurate and up to date and will be provided to ICANN if and when changes are made. In addition, with respect to inquiries from ICANN-Accredited registrars, our registry services provider, Neustar, shall have an additional point of contact, as it does today, handling requests by registrars related to abusive domain name practices.

28.2 Policies Regarding Abuse Complaints

One of the key policies each new gTLD registry will need to have is an Acceptable Use Policy that clearly delineates the types of activities that constitute "abuse" and the repercussions associated with an abusive domain name registration. In addition, the policy will be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the registry to take the appropriate actions based on the type of abuse. This may include locking down the domain name preventing any changes to the contact and nameserver information associated with the domain name, placing the domain name "on hold" rendering the domain name non-resolvable, transferring to the domain name to another registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation.

dotgay LLC will adopt an Acceptable Use Policy that clearly defines the types of activities that will not be permitted in the TLD and types of activities that are only permitted under specific conditions (eg. labeling of adult content) and reserves the right of the Applicant to lock, cancel, transfer or otherwise suspend or take down domain names violating the Acceptable Use Policy and allow the Registry where and when appropriate to share information with law enforcement. Each ICANN-Accredited Registrar must agree to pass through the Acceptable Use Policy to its Resellers (if applicable) and ultimately to the TLD registrants. Below is the Registry's initial Acceptable Use Policy that we will use in connection with the .gay TLD.

.gay Acceptable Use Policy

This Acceptable Use Policy gives the Registry the ability to quickly lock, cancel, transfer or take ownership of any .gay domain name, either temporarily or permanently, if the domain name is being used in a manner that appears to threaten the stability, integrity or security of the Registry, or any of its registrar partners - and/or that may put the safety and security of any registrant or user at risk. The process also allows the Registry to take preventive measures to avoid any such criminal or security threats.

The Acceptable Use Policy may be triggered through a variety of channels, including, among

other things, private complaint, public alert, government or enforcement agency outreach, and the on-going monitoring by the Registry or its partners. In all cases, the Registry or its designees will alert Registry's registrar partners about any identified threats, and will work closely with them to bring offending sites into compliance.

The following are some (but not all) activities that may be subject to rapid domain compliance:

- Phishing: the attempt to acquire personally identifiable information by masquerading as a website other than you own.
- Pharming: the redirection of Internet users to websites other than those the user intends to visit, usually through unauthorized changes to the Hosts file on a victim's computer or DNS records in DNS servers.
- Dissemination of Malware: the intentional creation and distribution of "malicious" software designed to infiltrate a computer system without the owner's consent, including, without limitation, computer viruses, worms, key loggers, and Trojans.
- Fast Flux Hosting: a technique used to shelter Phishing, Pharming and Malware sites and networks from detection and to frustrate methods employed to defend against such practices, whereby the IP address associated with fraudulent websites are changed rapidly so as to make the true location of the sites difficult to find.
- Botnetting: the development and use of a command, agent, motor, service, or software which is implemented: (1) to remotely control the computer or computer system of an Internet user without their knowledge or consent, (2) to generate direct denial of service (DDOS) attacks.
- Malicious Hacking: the attempt to gain unauthorized access (or exceed the level of authorized access) to a computer, information system, user account or profile, database, or security system.
- Child Pornography: the storage, publication, display and/or dissemination of pornographic materials depicting individuals under the age of majority in the relevant jurisdiction.
- Incitement to violence or promotion of hatred of the Gay Community:

The Registry reserves the right, in its sole discretion, to take any administrative and operational actions necessary, including the use of computer forensics and information security technological services, among other things, in order to implement the Acceptable Use Policy. In addition, the Registry reserves the right to deny, cancel or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status, that it deems necessary, in its discretion; (1) to protect the integrity and stability of the registry; (2) to comply with any applicable laws, government rules or requirements, due process backed requests from law enforcement, or any dispute resolution process; (3) to avoid any liability, civil or criminal, on the part of Registry as well as its affiliates, subsidiaries, officers, directors, and employees; (4) per the terms of the registration agreement or (5) to correct mistakes made by the Registry or any Registrar in connection with a domain name registration. Registry also reserves the right to place upon registry lock, hold or similar status a domain name during resolution of a dispute.

Monitoring for Malicious Activity

dotgay LLC's partner, Neustar is at the forefront of the prevention of abusive DNS practices. Neustar is one of only a few registry operators to have actually developed and implemented an active "domain takedown" policy in which the registry itself takes down abusive domain names.

Neustar's approach is quite different from a number of other gTLD Registries and the results have been unmatched. Neustar targets verified abusive domain names and removes them within 12 hours regardless of whether or not there is cooperation from the domain name registrar. This is because Neustar has determined that the interest in removing such threats from the consumer outweighs any potential damage to the registrar/registrar relationship.

Neustar's active prevention policies stem from the notion that registrants in the TLD have a reasonable expectation that they are in control of the data associated with their domains, especially its presence in the DNS zone. Because domain names are sometimes used as a

mechanism to enable various illegitimate activities on the Internet, including malware, bot command and control, pharming, and phishing, the best preventative measure to thwart these attacks is sometimes to remove the names completely from the DNS before they can impart harm, not only to the domain name registrant, but also to millions of unsuspecting Internet users.

Rapid Takedown Process

Since implementing the program, Neustar has developed two basic variations of the process. The more common process variation is a light-weight process that is triggered by "typical" notices. The less-common variation is the full process that is triggered by unusual notices. These notices tend to involve the need for accelerated action by the registry in the event that a complaint is received by Neustar which alleges that a domain name is being used to threaten the stability and security of the TLD, or is part of a real-time investigation by law enforcement or security researchers. These processes are described below:

Lightweight Process

In addition to having an active Information Security group that, on its own initiatives, seeks out abusive practices in the TLD, Neustar is an active member in a number of security organizations that have the expertise and experience in receiving and investigating reports of abusive DNS practices, including but not limited to, the Anti-Phishing Working Group, Castle Cops, NSP-SEC, the Registration Infrastructure Safety Group and others. Each of these sources are well-known security organizations that have developed a reputation for the prevention of harmful agents affecting the Internet. Aside from these organizations, Neustar also actively participates in privately run security associations whose basis of trust and anonymity makes it much easier to obtain information regarding abusive DNS activity.

Once a complaint is received from a trusted source, third-party, detected by the dotgay LLC's periodic reviews, or detected by Neustar's internal security group, information about the abusive practice is forwarded to an internal mail distribution list that includes members of the operations, legal, support, engineering, and security teams for immediate response as well as representatives of dotgay LLC ("CERT Team"). Although the impacted URL is included in the notification e-mail, the CERT Team is trained not to investigate the URLs themselves since often times the URLs in Question have scripts, bugs, etc. that can compromise the individual's own computer and the network safety. Rather, the investigation is done by a few members of the CERT team that are able to access the URLs in a laboratory environment so as to not compromise the Neustar network. The lab environment is designed specifically for these types of tests and is scrubbed on a regular basis to ensure that none of Neustar's internal or external network elements are harmed in any fashion.

Once the complaint has been reviewed and the alleged abusive domain name activity is verified to the best of the ability of the CERT Team, the sponsoring registrar is given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone.

If the registrar has not taken the requested action after the 12-hNeustar's period (i.e., is unresponsive to the request or refuses to take action), Neustar places the domain on "ServerHold". Although this action removes the domain name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

Full Process. In the event that Neustar receives a complaint which claims that a domain name is being used to threaten the stability and security of the TLD or is a part of a real-time investigation by law enforcement or security researchers, Neustar follows a slightly different course of action.

Upon initiation of this process, members of the CERT Team are paged and a teleconference bridge is immediately opened up for the CERT Team to assess whether the activity warrants immediate action. If the CERT Team determines the incident is not an immediate threat to the security and the stability of critical internet infrastructure, they provide documentation to

the Neustar Network Operations Center to clearly capture the rationale for the decision and either refers the incident to the Lightweight process set forth above. If no abusive practice is discovered, the incident is closed.

However, if the CERT TEAM determines there is a reasonable likelihood that the incident warrants immediate action as described above, a determination is made to immediately remove the domain from the zone. As such, Customer Support contacts the responsible registrar immediately to communicate that there is a domain involved in a security and stability issue. The registrar is provided only the domain name in Question and the broadly stated type of incident. Given the sensitivity of the associated security concerns, it may be important that the registrar not be given explicit or descriptive information in regards to data that has been collected (evidence) or the source of the complaint. The need for security is to fully protect the chain of custody for evidence and the source of the data that originated the complaint.

Coordination with Law Enforcement & Industry Groups

One of the reasons for which Neustar was selected to serve as the back-end registry services provider for dotgay LLC is Neustar's extensive experience with its industry-leading abusive domain name and malicious monitoring program and its close working relationship with a number of law enforcement agencies, both in the United States and internationally. For example, in the United States, Neustar is in constant communication with the Federal Bureau of Investigation, US CERT, Homeland Security, the Food and Drug Administration, and the National Center for Missing and Exploited Children.

Neustar is also a participant in a number of industry groups aimed at sharing information amongst key industry players about the abusive registration and use of domain names. These groups include the Anti-Phishing Working Group and the Registration Infrastructure Safety Group (where Neustar served for several years as on the Board of Directors). Through these organizations and others, Neustar shares information with other registries, registrars, ccTLDs, law enforcement, security professionals, etc. not only on abusive domain name registrations within its own TLDs, but also provides information uncovered with respect to domain names in other registries' TLDs. Neustar has often found that rarely are abuses found only in the TLDs for which it manages, but also within other TLDs, such as .com and .info. Neustar routinely provides this information to the other registries so that it can take the appropriate action.

With the assistance of Neustar as its back-end registry services provider, dotgay LLC can meet its obligations under Section 2.8 of the Registry Agreement where required to take reasonable steps to investigate and respond to reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of its TLD. dotgay LLC and/or Neustar will respond to legitimate law enforcement inquiries within one business day from receiving the request. Such response shall include, at a minimum, an acknowledgement of receipt of the request, Questions or comments concerning the request, and an outline of the next steps to be taken by dotgay LLC and/or Neustar for rapid resolution of the request.

In the event such request involves any of the activities which can be validated by dotgay LLC and/or Neustar and involves the type of activity set forth in the Acceptable Use Policy, the sponsoring registrar is then given 12 hours to investigate the activity further and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), Neustar places the domain on "serverHold".

28.3 Measures for Removal of Orphan Glue Records

As the Security and Stability Advisory Committee of ICANN (SSAC) rightly acknowledges, although orphaned glue records may be used for abusive or malicious purposes, the "dominant use of orphaned glue supports the correct and ordinary operation of the DNS." See <http://www.icann.org/en/committees/security/sac048.pdf>.

While orphan glue often support correct and ordinary operation of the DNS, we understand that such glue records can be used maliciously to point to name servers that host domains used in illegal phishing, bot-nets, malware, and other abusive behaviors. Problems occur when the parent domain of the glue record is deleted but its children glue records still remain in DNS. Therefore, when the Registry has written evidence of actual abuse of orphaned glue, the Registry will take action to remove those records from the zone to mitigate such malicious conduct.

Neustar run a daily audit of entries in its DNS systems and compares those with its provisioning system. This serves as an umbrella protection to make sure that items in the DNS zone are valid. Any DNS record that shows up in the DNS zone but not in the provisioning system will be flagged for investigation and removed if necessary. This daily DNS audit serves to not only prevent orphaned hosts but also other records that should not be in the zone.

In addition, if either dotgay LLC or Neustar become aware of actual abuse on orphaned glue after receiving written notification by a third party through its Abuse Contact or through its customer support, such glue records will be removed from the zone.

28.4 Measures to Promote WHOIS Accuracy

dotgay LLC acknowledges that ICANN has developed a number of mechanisms over the past decade that are intended to address the issue of inaccurate WHOIS information. Such measures alone have not proven to be sufficient and dotgay LLC will offer a mechanism whereby third parties can submit complaints directly to the Applicant (as opposed to ICANN or the sponsoring Registrar) about inaccurate or incomplete WHOIS data. Such information shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their registrants. Thirty days after forwarding the complaint to the registrar, dotgay LLC will examine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or there was some other disposition. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, Applicant reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies.

In addition, dotgay LLC shall on its own initiative, no less than twice per year, perform a manual review of a random sampling of .gay domain names to test the accuracy of the WHOIS information. Although this will not include verifying the actual information in the WHOIS record, dotgay LLC will be examining the WHOIS data for prima facie evidence of inaccuracies. In the event that such evidence exists, it shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their registrants. Thirty days after forwarding the complaint to the registrar, the Applicant will examine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or there was some other disposition. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, dotgay LLC reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies.

28.4.1 Authentication of Registrant Information

Authentication of registrant information as complete and accurate at time of registration. Measures to accomplish this could include performing background checks, verifying all contact information of principals mentioned in registration data, reviewing proof of establishment documentation, and other means.

28.4.2 Monitoring of Registration Data

Regular monitoring of registration data for accuracy and completeness, employing authentication methods, and establishing policies and procedures to address domain names with inaccurate or incomplete WHOIS data.

28.4.3 Policies and Procedures Ensuring Compliance

If relying on registrars to enforce measures, establishing policies and procedures to ensure compliance, which may include audits, financial incentives, penalties, or other means. Note that the requirements of the RAA will continue to apply to all ICANN-accredited registrars.

28.5 Resourcing Plans

Responsibility for abuse mitigation rests with a variety of functional groups. The Abuse Monitoring team is primarily responsible for providing analysis and conducting investigations of reports of abuse. The customer service team also plays an important role in assisting with the investigations, responded to customers, and notifying registrars of abusive domains. Finally, the Policy/Legal team is responsible for developing the relevant policies and procedures.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

Customer Support - 12 employees
Policy/Legal - 2 employees
Ombudsman function - 1 full time equivalent

The resources are more than adequate to support the abuse mitigation procedures of the .gay registry.

29. Rights Protection Mechanisms

29.1. Rights Protection Mechanisms

dotgay LLC is firmly committed to the protection of Intellectual Property rights and to implementing the mandatory rights protection mechanisms contained in the Applicant Guidebook. dotgay LLC recognizes that although the New gTLD program includes significant protections beyond those that were mandatory for a number of the current TLDs, a key motivator for dotgay LLC's selection of Neustar as its registry services provider is Neustar's experience in successfully launching a number of TLDs with diverse rights protection mechanisms, including many the ones required in the Applicant Guidebook. More specifically, dotgay LLC will implement the following rights protection mechanisms in accordance with the Applicant Guidebook as further described below:

- Trademark Clearinghouse: a one-stop shop so that trademark holders can protect their trademarks with a single registration.
- Sunrise and Trademark Claims processes for the TLD.
- Implementation of the Uniform Dispute Resolution Policy to address domain names that have been registered and used in bad faith in the TLD.
- Uniform Rapid Suspension: A quicker, more efficient and cheaper alternative to the Uniform Dispute Resolution Policy to deal with clear cut cases of cybersquatting.
- Implementation of a Thick WHOIS making it easier for rights holders to identify and locate infringing parties

A. Trademark Clearinghouse Including Sunrise and Trademark Claims

The first mandatory rights protection mechanism ("RPM") required to be implemented by each new gTLD Registry is support for, and interaction with, the trademark clearinghouse. The trademark clearinghouse is intended to serve as a central repository for information to be authenticated, stored and disseminated pertaining to the rights of trademark holders. The data maintained in the clearinghouse will support and facilitate other RPMs, including the mandatory Sunrise Period and Trademark Claims service. Although many of the details of how the trademark clearinghouse will interact with each registry operator and registrars, dotgay LLC is actively monitoring the developments of the Implementation Assistance Group ("IAG") designed to assist ICANN staff in firming up the rules and procedures associated with the

policies and technical requirements for the trademark clearinghouse. In addition, dotgay LLC's back-end registry services provider is actively participating in the IAG to ensure that the protections afforded by the clearinghouse and associated RPMs are feasible and implementable.

Utilizing the trademark clearinghouse, all operators of new gTLDs must offer: (i) a sunrise registration service for at least 30 days during the pre-launch phase giving eligible trademark owners an early opportunity to register second-level domains in new gTLDs; and (ii) a trademark claims service for at least the first 60 days that second-level registrations are open. The trademark claim service is intended to provide clear notice to a potential registrant of the rights of a trademark owner whose trademark is registered in the clearinghouse.

dotgay LLC's registry service provider, Neustar, has already implemented Sunrise and/or Trademark Claims programs for numerous TLDs including .biz, .us, .travel, .tel and .co and will implement the both of these services on behalf of dotgay LLC.

Neustar's Experience in Implementing Sunrise and Trademark Claims Processes

In early 2002, Neustar became the first registry operator to launch a successful authenticated Sunrise process. This process permitted qualified trademark owners to pre-register their trademarks as domain names in the .us TLD space prior to the opening of the space to the general public. Unlike any other "Sunrise" plans implemented (or proposed before that time), Neustar validated the authenticity of Trademark applications and registrations with the United States Patent and Trademark Office (USPTO).

Subsequently, as the back-end registry operator for the .tel gTLD and the .co ccTLD, Neustar launched validated Sunrise programs employing processes. These programs are very similar to those that are to be employed by the Trademark Clearinghouse for new gTLDs.

Below is a high level overview of the implementation of the .co Sunrise period that demonstrates Neustar's experience and ability to provide a Sunrise service and an overview of Neustar's experience in implementing a Trademark Claims program to trademark owners for the launch of .BIZ. Neustar's experience in each of these rights protection mechanisms will enable it to seamlessly provide these services on behalf of dotgay LLC as required by ICANN.

a) Sunrise and .co

The Sunrise process for .co was divided into two sub-phases:

- Local Sunrise giving holders of eligible trademarks that have obtained registered status from the Colombian trademark office the opportunity apply for the .CO domain names corresponding with their marks
- Global Sunrise program giving holders of eligible registered trademarks of national effect, that have obtained a registered status in any country of the world the opportunity apply for the .CO domain names corresponding with their marks for a period of time before registration is open to the public at large.

Like the new gTLD process set forth in the Applicant Guidebook, trademark owners had to have their rights validated by a Clearinghouse provider prior to the registration being accepted by the Registry. The Clearinghouse used a defined process for checking the eligibility of the legal rights claimed as the basis of each Sunrise application using official national trademark databases and submitted documentary evidence.

Applicants and/or their designated agents had the option of interacting directly with the Clearinghouse to ensure their applications were accurate and complete prior to submitting them to the Registry pursuant to an optional "Pre-validation Process". Whether or not an applicant was "pre-validated", the applicant had to submit its corresponding domain name application through an accredited registrar. When the Applicant was pre-validated through the Clearinghouse, each was given an associated approval number that it had to supply the registry. If they were not pre-validated, applicants were required to submit the required trademark information through their registrar to the Registry.

As the registry level, Neustar, subsequently either delivered the:

- Approval number and domain name registration information to the Clearinghouse
- When there was no approval number, trademark information and the domain name registration information was provided to the Clearinghouse through EPP (as is currently required under the Applicant Guidebook).

Information was then used by the Clearinghouse as either further validation of those pre-validated applications, or initial validation of those that did not go through pre-validation. If the applicant was validated and their trademark matched the domain name applied-for, the Clearinghouse communicated that fact to the Registry via EPP.

When there was only one validated sunrise application, the application proceeded to registration when the .co launched. If there were multiple validated applications (recognizing that there could be multiple trademark owners sharing the same trademark), those were included in the .co Sunrise auction process. Neustar tracked all of the information it received and the status of each application and posted that status on a secure Website to enable trademark owners to view the status of its Sunrise application.

Although the exact process for the Sunrise program and its interaction between the trademark owner, Registry, Registrar, and IP Clearinghouse is not completely defined in the Applicant Guidebook and is dependent on the current RFI issued by ICANN in its selection of a Trademark Clearinghouse provider, Neustar's expertise in launching multiple Sunrise processes and its established software will implement a smooth and compliant Sunrise process for the new gTLDs.

b) Trademark Claims Service Experience

With Neustar's biz TLD launched in 2001, Neustar became the first TLD with a Trademark Claims service. Neustar developed the Trademark Claim Service by enabling companies to stake claims to domain names prior to the commencement of live .biz domain registrations.

During the Trademark Claim process, Neustar received over 80,000 Trademark Claims from entities around the world. Recognizing that multiple intellectual property owners could have trademark rights in a particular mark, multiple Trademark Claims for the same string were accepted. All applications were logged into a Trademark Claims database managed by Neustar.

The Trademark Claimant was required to provide various information about their trademark rights, including the:

- Particular trademark or service mark relied on for the trademark Claim
- Date a trademark application on the mark was filed, if any, on the string of the domain name
- Country where the mark was filed, if applicable
- Registration date, if applicable
- Class or classes of goods and services for which the trademark or service mark was registered
- Name of a contact person with whom to discuss the claimed trademark rights.

Once all Trademark Claims and domain name applications were collected, Neustar then compared the claims contained within the Trademark Claims database with its database of collected domain name applications (DNAs). In the event of a match between a Trademark Claim and a domain name application, an e-mail message was sent to the domain name applicant notifying the applicant of the existing Trademark Claim. The e-mail also stressed that if the applicant chose to continue the application process and was ultimately selected as the registrant, the applicant would be subject to Neustar's dispute proceedings if challenged by the Trademark Claimant for that particular domain name.

The domain name applicant had the option to proceed with the application or cancel the application. Proceeding on an application meant that the applicant wanted to go forward and have the application proceed to registration despite having been notified of an existing Trademark Claim. By choosing to "cancel," the applicant made a decision in light of an existing Trademark Claim notification to not proceed.

If the applicant did not respond to the e-mail notification from Neustar, or elected to cancel the application, the application was not processed. This resulted in making the applicant ineligible to register the actual domain name. If the applicant affirmatively elected to continue the application process after being notified of the claimants' alleged trademark rights to the desired domain name, Neustar processed the application.

This process is very similar to the one ultimately adopted by ICANN and incorporated in the latest version of the Applicant Guidebook. Although the collection of Trademark Claims for new gTLDs will be by the Trademark Clearinghouse, many of the aspects of Neustar's Trademark Claims process in 2001 are similar to those in the Applicant Guidebook. This makes Neustar uniquely qualified to implement the new gTLD Trademark Claims process.

B. Uniform Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension (URS)

1. UDRP

Prior to joining Neustar, Mr. Neuman was a key contributor to the development of the Uniform Dispute Resolution Policy ("UDRP") in 1998. This became the first "Consensus Policy" of ICANN and has been required to be implemented by all domain name registries since that time. The UDRP is intended as an alternative dispute resolution process to transfer domain names from those that have registered and used domain names in bad faith. Although there is not much of an active role that the domain name registry plays in the implementation of the UDRP, Neustar has closely monitored UDRP decisions that have involved the TLDs for which it supports and ensures that the decisions are implemented by the registrars supporting its TLDs. When alerted by trademark owners of failures to implement UDRP decisions by its registrars, Neustar either proactively implements the decisions itself or reminds the offending registrar of its obligations to implement the decision.

1. URS

In response to complaints by trademark owners that the UDRP was too cost prohibitive and slow, and the fact that more than 70 percent of UDRP cases were "clear cut" cases of cybersquatting, ICANN adopted the IRT's recommendation that all new gTLD registries be required, pursuant to their contracts with ICANN, to take part in a Uniform Rapid Suspension System ("URS"). The purpose of the URS is to provide a more cost effective and timely mechanism for brand owners than the UDRP to protect their trademarks and to promote consumer protection on the Internet.

The URS is not meant to address Questionable cases of alleged infringement (e.g., use of terms in a generic sense) or for anti-competitive purposes or denial of free speech, but rather for those cases in which there is no genuine contestable issue as to the infringement and abuse that is taking place.

Unlike the UDRP which requires little involvement of gTLD registries, the URS envisages much more of an active role at the registry-level. For example, rather than requiring the registrar to lock down a domain name subject to a UDRP dispute, it is the registry under the URS that must lock the domain within 24 hours of receipt of the complaint from the URS Provider to restrict all changes to the registration data, including transfer and deletion of the domain names.

In addition, in the event of a determination in favor of the complainant, the registry is required to suspend the domain name. This suspension remains for the balance of the registration period and would not resolve the original website. Rather, the nameservers would be redirected to an informational web page provided by the URS Provider about the URS.

Additionally, the WHOIS reflects that the domain name will not be able to be transferred, deleted, or modified for the life of the registration. Finally, there is an option for a successful complainant to extend the registration period for one additional year at commercial rates.

dotguy LLC is fully aware of each of these requirements and will have the capability to implement these requirements for new gTLDs. In fact, during the IRT's development of the URS, Neustar began examining the implications of the URS on its registry operations and provided the IRT with feedback on whether the recommendations from the IRT would be feasible

for registries to implement.

Although there have been a few changes to the URS since the IRT recommendations, Neustar continued to participate in the development of the URS by providing comments to ICANN, many of which were adopted. As a result, Neustar is committed to supporting the URS for all of the registries that it provides back-end registry services.

C. Implementation of Thick WHOIS

The .gay registry will include a thick WHOIS database as required in Specification 4 of the Registry agreement. A thick WHOIS provides the ability to more easily manage and control the accuracy of data, and a consistent user experience.

D. Policies Handling Complaints Regarding Abuse

In addition the Rights Protection mechanisms addressed above, dotgay LLC will implement a number of measures to handle complaints regarding the abusive registration of domain names in its TLD as described in dotgay LLC's response to Question 28.

Registry Acceptable Use Policy

One of the key policies each new gTLD registry is the need to have is an Acceptable Use Policy that clearly delineates the types of activities that constitute "abuse" and the repercussions associated with an abusive domain name registration. The policy must be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the registry to take the appropriate actions based on the type of abuse. This may include locking down the domain name preventing any changes to the contact and nameserver information associated with the domain name, placing the domain name "on hold" rendering the domain name non-resolvable, transferring to the domain name to another registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation. dotgay LLC's Acceptable Use Policy, set forth in our response to Question 28, will include prohibitions on phishing, pharming, dissemination of malware, fast flux hosting, hacking, and child pornography. In addition, the policy will include the right of the registry to take action necessary to deny, cancel, suspend, lock, or transfer any registration in violation of the policy.

Monitoring for Malicious Activity

dotgay LLC is committed to ensuring that those domain names associated with abuse or malicious conduct in violation of the Acceptable Use Policy are dealt with in a timely and decisive manner. These include taking action against those domain names that are being used to threaten the stability and security of the TLD, or are part of a real-time investigation by law enforcement as required by due process.

Once a complaint is received from a trusted source, third-party, or detected by the Registry, the Registry will use commercially reasonable efforts to verify the information in the complaint. If that information can be verified to the best of the ability of the Registry and can be shown to be in accordance with due process requirements, the sponsoring registrar will be notified and be given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the Registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry will place the domain on "ServerHold". Although this action removes the domain name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

29.2 Safeguards against Unqualified Registrations

As a community-based TLD, dotgay LLC is firmly committed to safeguarding against unqualified registrations on .gay, a responsibility directly linked to fulfilling the community-based mission outlined in 18(a). Building a trusted TLD for the gay community requires a strategic and well planned approach and through the participation, input and use of established membership protocol from organizations in the gay community, dotgay LLC has identified several

mechanisms to assist with admitting and maintaining qualified registrations, as well as identifying and removing unqualified registrations. More specifically, dotgay LLC will implement the following safeguarding mechanisms as further described below:

- Community Authentication: requirement with a Community Identifier Code (CIC), a unique code used to validate eligibility during name registration
- Authentication Update: periodic requirement for existing registrations
- Community Watch: online reporting
- Audit: periodic scanning and reviews

1. Community Authentication

In order to “qualify to register” a name on the .gay TLD, all registrants will be required to authenticate that they are members of the gay community. The qualifier used by dotgay LLC will draw on the existing practices from the network of membership organizations in the gay community around the world, making membership with these organizations the threshold requirement for admission into the .gay TLD. Membership organizations in the gay community serve as the foundation of the community in all regions of the world, implementing internal policies to identify and admit members of the gay community, while preventing non-community members from taking up membership for reasons primarily focused on misrepresentation and safety. The systems currently employed for admission to the gay community will serve the community-based .gay TLD well since it takes a community approach to who qualifies to register a .gay name. dotgay LLC refers to these organizations as Authentication Partners and they will be comprised of a wide variety of membership organizations in the gay community that focus on human rights, equality, commerce, culture and others designed to serve the gay community (as defined in Question 20e).

Authentication Partners will be the entry point for members of the gay community to begin the process of registering a name on the .gay TLD. Community members will follow an online process with their Authentication Partners to acquire a Community Identifier Code (CIC). The CIC will simultaneously be shared with dotgay LLC and Neustar for future validation during name registration. Each CIC will be good for a one name registration on the .gay TLD and must be provided to the registrar during name registration so that it can be validated with Neustar. If the CIC is confirmed as valid by Neustar, it will permit the name registration to proceed. If the CIC fails validation with Neustar then the name registration will not proceed. By design this process will be the first line of defense for unqualified registrations.

Any transfer of a .gay name, from one registrant to another, will also require that a valid CIC be provided by the registrant taking possession of the name. This is to avoid .gay names from being transferred to non-community members at any point during the registration period.

2. Authentication Update

dotgay LLC will also require authentication updates for all registrations as an ongoing safeguard against unqualified registrations. The authentication updates are intended to provide a double check and ongoing confirmation that registrations are from members of the gay community. To complete an authentication update, registrants will simply return to their chosen Authentication Partner and acquire a new CIC. This CIC will be transmitted directly to dotgay LLC to complete the update. Registrants will be able to update their CIC at any point, or at minimum within the time period required for the authentication update as detailed in the registrant agreement.

3. Community Watch

dotgay LLC will implement an online reporting mechanism to assist in surfacing unqualified registrations that may have fraudulently passed through Community Authentication, or which no longer meet eligibility requirements of the .gay TLD. The community watch approach enables members of the gay community to engage when they have knowledge pertaining to an unqualified registration, by bringing it to the attention of the Registry. The reporting mechanism will require an explanation as to why the registration is believed to not be qualified for the .gay TLD and reports received will be reviewed by the Registry’s Office of the Ombudsman.

4. Audits

dotgay LLC will also reserve the right to conduct an audit on .gay registrations when it

becomes aware of CIC abuse or misconduct of Authentication Partners.

29.3 Resourcing Plans

The rights protection mechanisms described in the response above involve a wide range of tasks, procedures, and systems. The responsibility for each mechanism varies based on the specific requirements. In general the development of applications such as sunrise and IP claims is the responsibility of the Engineering team, with guidance from the Product Management team. Customer Support and Legal play a critical role in enforcing certain policies such as the rapid suspension process. These teams have years of experience implementing these or similar processes.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

Development/Engineering - 19 employees
Product Management- 4 employees
Customer Support - 12 employees
Ombudsman function - 1 full time equivalent

The resources are more than adequate to support the rights protection mechanisms of the .gay registry.

30(a). Security Policy: Summary of the security policy for the proposed registry

30.(a).1 Security Policies

dotgay LLC and our back-end operator, Neustar recognize the vital need to secure the systems and the integrity of the data in commercial solutions. The .gay registry solution will leverage industry-best security practices including the consideration of physical, network, server, and application elements.

Neustar's approach to information security starts with comprehensive information security policies. These are based on the industry best practices for security including SANS (SysAdmin, Audit, Network, Security) Institute, NIST (National Institute of Standards and Technology), and CIS (Center for Internet Security). Policies are reviewed annually by Neustar's information security team.

The following is a summary of the security policies that will be used in the .gay registry, including:

1. Summary of the security policies used in the registry operations
2. Description of independent security assessments
3. Description of security features that are appropriate for .gay
4. List of commitments made to registrants regarding security levels

All of the security policies and levels described in this section are appropriate for the .gay registry.

30.(a).2 Summary of Security Policies

Neustar has developed a comprehensive Information Security Program in order to create effective administrative, technical, and physical safeguards for the protection of its information assets, and to comply with Neustar's obligations under applicable law, regulations, and contracts. This Program establishes Neustar's policies for accessing, collecting, storing, using, transmitting, and protecting electronic, paper, and other records containing sensitive information.

- The policies for internal users and our clients to ensure the safe, organized and fair use of information resources.
- The rights that can be expected with that use.
- The standards that must be met to effectively comply with policy.
- The responsibilities of the owners, maintainers, and users of Neustar's information resources.
- Rules and principles used at Neustar to approach information security issues

The following policies are included in the Program:

1. Acceptable Use Policy

The Acceptable Use Policy provides the rules of behavior covering all Neustar Associates for using Neustar resources or accessing sensitive information.

2. Information Risk Management Policy

The Information Risk Management Policy describes the requirements for the on-going information security risk management program, including defining roles and responsibilities for conducting and evaluating risk assessments, assessments of technologies used to provide information security and monitoring procedures used to measure policy compliance.

3. Data Protection Policy

The Data Protection Policy provides the requirements for creating, storing, transmitting, disclosing, and disposing of sensitive information, including data classification and labeling requirements, the requirements for data retention. Encryption and related technologies such as digital certificates are also covered under this policy.

4. Third Party Policy

The Third Party Policy provides the requirements for handling service provider contracts, including specifically the vetting process, required contract reviews, and on-going monitoring of service providers for policy compliance.

5. Security Awareness and Training Policy

The Security Awareness and Training Policy provide the requirements for managing the on-going awareness and training program at Neustar. This includes awareness and training activities provided to all Neustar Associates.

6. Incident Response Policy

The Incident Response Policy provides the requirements for reacting to reports of potential security policy violations. This policy defines the necessary steps for identifying and reporting security incidents, remediation of problems, and conducting lessons learned post-mortem reviews in order to provide feedback on the effectiveness of this Program. Additionally, this policy contains the requirement for reporting data security breaches to the appropriate authorities and to the public, as required by law, contractual requirements, or regulatory bodies.

7. Physical and Environmental Controls Policy

The Physical and Environment Controls Policy provides the requirements for securely storing sensitive information and the supporting information technology equipment and infrastructure. This policy includes details on the storage of paper records as well as access to computer systems and equipment locations by authorized personnel and visitors.

8. Privacy Policy

Neustar supports the right to privacy, including the rights of individuals to control the dissemination and use of personal data that describes them, their personal choices, or life experiences. Neustar supports domestic and international laws and regulations that seek to protect the privacy rights of such individuals.

9. Identity and Access Management Policy

The Identity and Access Management Policy covers user accounts (login ID naming convention, assignment, authoritative source) as well as ID lifecycle (request, approval, creation, use,

suspension, deletion, review), including provisions for system/application accounts, shared/group accounts, guest/public accounts, temporary/emergency accounts, administrative access, and remote access. This policy also includes the user password policy requirements.

10. Network Security Policy

The Network Security Policy covers aspects of Neustar network infrastructure and the technical controls in place to prevent and detect security policy violations.

11. Platform Security Policy

The Platform Security Policy covers the requirements for configuration management of servers, shared systems, applications, databases, middle-ware, and desktops and laptops owned or operated by Neustar Associates.

12. Mobile Device Security Policy

The Mobile Device Policy covers the requirements specific to mobile devices with information storage or processing capabilities. This policy includes laptop standards, as well as requirements for PDAs, mobile phones, digital cameras and music players, and any other removable device capable of transmitting, processing or storing information.

13. Vulnerability and Threat Management Policy

The Vulnerability and Threat Management Policy provides the requirements for patch management, vulnerability scanning, penetration testing, threat management (modeling and monitoring) and the appropriate ties to the Risk Management Policy.

14. Monitoring and Audit Policy

The Monitoring and Audit Policy covers the details regarding which types of computer events to record, how to maintain the logs, and the roles and responsibilities for how to review, monitor, and respond to log information. This policy also includes the requirements for backup, archival, reporting, forensics use, and retention of audit logs.

15. Project and System Development and Maintenance Policy

The System Development and Maintenance Policy covers the minimum security requirements for all software, application, and system development performed by or on behalf of Neustar and the minimum security requirements for maintaining information systems.

30.(a).3 Independent Assessment Reports

Neustar IT Operations is subject to yearly Sarbanes-Oxley (SOX), Statement on Auditing Standards #70 (SAS70) and ISO audits. Testing of controls implemented by Neustar management in the areas of access to programs and data, change management and IT Operations are subject to testing by both internal and external SOX and SAS70 audit groups. Audit Findings are communicated to process owners, Quality Management Group and Executive Management. Actions are taken to make process adjustments where required and remediation of issues is monitored by internal audit and QM groups.

External Penetration Test is conducted by a third party on a yearly basis. As authorized by Neustar, the third party performs an external Penetration Test to review potential security weaknesses of network devices and hosts and demonstrate the impact to the environment. The assessment is conducted remotely from the Internet with testing divided into four phases:

- A network survey is performed in order to gain a better knowledge of the network that was being tested
- Vulnerability scanning is initiated with all the hosts that are discovered in the previous phase
- Identification of key systems for further exploitation is conducted
- Exploitation of the identified systems is attempted.

Each phase of the audit is supported by detailed documentation of audit procedures and results. Identified vulnerabilities are classified as high, medium and low risk to facilitate management's prioritization of remediation efforts. Tactical and strategic recommendations are provided to management supported by reference to industry best practices.

30.(a).4 Augmented Security Levels and Capabilities

There are no increased security levels specific for .gay. However, Neustar will provide the same high level of security provided across all of the registries it manages. A key to Neustar's Operational success is Neustar's highly structured operations practices. The standards and governance of these processes:

- Include annual independent review of information security practices
- Include annual external penetration tests by a third party
- Conform to the ISO 9001 standard (Part of Neustar's ISO-based Quality Management System)
- Are aligned to Information Technology Infrastructure Library (ITIL) and CoBIT best practices
- Are aligned with all aspects of ISO IEC 17799
- Are in compliance with Sarbanes-Oxley (SOX) requirements (audited annually)
- Are focused on continuous process improvement (metrics driven with product scorecards reviewed monthly).

A summary view to Neustar's security policy in alignment with ISO 17799 can be found in section 30.(a).5 below.

30.(a).5 Commitments and Security Levels

The .gay registry commits to high security levels that are consistent with the needs of the TLD. These commitments include:

Compliance with High Security Standards

- Security procedures and practices that are in alignment with ISO 17799
- Annual SOC 2 Audits on all critical registry systems
- Annual 3rd Party Penetration Tests
- Annual Sarbanes Oxley Audits

Highly Developed and Document Security Policies

- Compliance with all provisions described in section 30.(b) and in the attached security policy document.
- Resources necessary for providing information security
- Fully documented security policies
- Annual security training for all operations personnel

High Levels of Registry Security

- Multiple redundant data centers
- High Availability Design
- Architecture that includes multiple layers of security
- Diversified firewall and networking hardware vendors
- Multi-factor authentication for accessing registry systems
- Physical security access controls
- A 24x7 manned Network Operations Center that monitors all systems and applications
- A 24x7 manned Security Operations Center that monitors and mitigates DDoS attacks
- DDoS mitigation using traffic scrubbing technologies

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Exhibit 17

gTLD String: .gay

Applicant Entity Name: dotgay LLC

Application ID#: 1-1713-23699

SPECIFICATION 11 PUBLIC INTEREST COMMITMENTS

1. Registry Operator will use only ICANN accredited registrars that are party to the Registrar Accreditation Agreement approved by the ICANN Board of Directors on [date to be determined at time of contracting], 2013(or any subsequent form of Registrar Accreditation Agreement approved by the ICANN Board of Directors) in registering domain names. A list of such registrars shall be maintained by ICANN on ICANN's website.

2. X_ Registry Operator will operate the registry for the TLD in compliance with all commitments, statements of intent and business plans stated in the following sections of Registry Operator's application to ICANN for the TLD, which commitments, statements of intent and business plans are hereby incorporated by reference into this Agreement. Registry Operator's obligations pursuant to this paragraph shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN ((posted at [url to be inserted when final procedure is adopted])), as it may be amended by ICANN from time to time, the "PICDRP"). Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Registry Agreement) following a determination by any PICDRP panel and to be bound by any such determination.

The following is a draft of the PIC submitted in time for the 5 March 2013 deadline. As the process for PIC statements is still in flux and still under review, dotgay LLC maintains its prerogative to modify this PIC as the ICANN process begins to take form. All of the commitments made in this PIC are consistent with the details contained in the dotgay LLC's application for .gay (Application ID 1-1713-23699)

As a community applicant, dotgay LLC welcomes the opportunity to affirm its public interest commitments. In our applications we made four types of commitments:

- Commitments to the Gay Community
- Commitments to governments
- Commitments to trademark holders
- General commitments

The commitments described below are taken directly from our application, and are presented as a PIC in order to give the ICANN community access to the 3rd party dispute resolution methods to be organized by ICANN.

Commitments to the Community

- In its application, dotgay LLC "commits to designating funds from registration fees to support gay organizations and other initiatives in the community."

- In its application, dotgay LLC commits to “provide an online authentication tool that will provide the registry with the information necessary to insure that only bona fide members of the community are allowed to register.”
- In its application, dotgay LLC commits to “Establish a “community watch” of the name space,” and that the “Registry will use a Community Watch mechanism, wherein the members of the community can easily report any infraction of Registry policies.”
- In its application dotgay LLC commits to “register and maintain a series of community relevant key word based domain names that will be established and managed as community resource websites, referred to as the “index directory.”
- In its application dotgay LLC commits to “provide a registration period before General Availability for community members with registrations obtained before May 1, 2012 on other IANA TLDs” to provide “a level of protection based on domain names that community members have built their organizations and businesses around on other IANA-recognized TLDs.”
- In its application dotgay LLC commits “to providing a minimum of 67% of profits from domain name registrations to the dotgay Foundation, a separate entity created after ICANN approval, with a Board of Directors that will guide redistribution of funds to support initiatives in the community.”
- In its application dotgay LLC commits that “Upon ICANN approval, dotgay LLC will also establish a Registry Advisory Board (RAB), comprised of leaders in the community around the world committed to developing and evolving policy for the .gay TLD that reflects the true needs of the community.”
- dotgay LLC commits to continue to recruit new Gay Community organizations as authentication partners in order to broaden its access to all members of the Global Gay Community.

Commitments to governments

- In its application dotgay LLC commits to reserve “geographical names will only be eligible for release and delegation to the government agency to which the geographical name represents.”
- dotgay LLC commits to consult with governments on putting sensitive names on the reserved list.

Commitments to trademark holders

- In its application dotgay LLC commits that in “addition to ICANN defined trademark rights, trademark owners will have the option to request their name be placed on a reserved list on a cost only basis during Sunrise.” dotgay LLC further commits that names put on the reserve list will only be removed if a Community member with a trademark request that it be removed.

General Commitments

- dotgay LLC will insure that the domain names will only be used for legal activities by members of the Gay Community
- dotgay LLC will insure that all second level registrations will have verified, authentic and accessible, according to prevailing law, WHOIS entries.
- dotgay LLC will insure that all registrants are accorded their human rights.

Caveat

Given the undefined nature of the PIC Dispute Resolution Methods (PICDRP) dotgay LLC makes the following stipulation concerning the PICDRP.

The Gay Community is under attack in much of the world; it is estimated that there are more countries in which a person can be imprisoned for being a member of the Gay Community than there are countries where we can be wed. Given that the contents of this PIC include dotgay LLC's commitment to defending the safety and Human Rights of global Gay Community members, dotgay LLC will not agree to be bound by any process where it does not have the right to reject a dispute panelist for cause.

3. Registry Operator agrees to perform following specific public interest commitments, which commitments shall be enforceable by ICANN and through the PICDRP. Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Registry Agreement) following a determination by any PICDRP panel and to be bound by any such determination.

[Registry Operator to insert specific commitments here, if applicable]

Exhibit 18

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

On October 6, 2014, ICANN published its Community Priority Evaluation Panel's New gTLD Program Community Priority Evaluation Report for the .GAY gTLD application submitted by the Requester. Reference is made to <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> (hereinafter: the "CPE Report").

According to this CPE Report, the Community Priority Evaluation concluded that:

"After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation."

Although the Disclaimer contained in the Determination states that "[...] these Community Priority Evaluation results do not necessarily determine the final result of the application", ICANN has changed the "Contention Resolution Status" of the Application into "Active", and the "Contention Resolution Result" into "Into Contention", apparently following the publication of the CPE Report. This action by ICANN is hereinafter referred to as the "Determination", which Requester is seeking to have reconsidered.¹

Following receipt of the Determination, Requesters have submitted a detailed Request for Information to ICANN under the latter's Documentary Information

¹ See Requester's Application Status Page at <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/444>.

Disclosure Policy (DIDP).

More in particular, Requester has asked ICANN to disclose further information relating to the Determination. The full Request for Information has been enclosed to this Reconsideration Request as **Annex A-2** and is incorporated herein by reference.

ICANN's Response to the Request for Information states:

“For each of the items identified above as subject to Defined Conditions of Nondisclosure, ICANN has determined that there are no particular circumstances for which the public interest in disclosing the information outweighs the harm that may be caused to ICANN, its contractual relationships and its contractors’ deliberative processes by the requested disclosure” (see **Annex A-3** for the full Response).

Furthermore, Requester has provided ICANN with additional information that demonstrates that certain parties – upon information and belief: even supported by another applicant for the .GAY gTLD – have engaged in spurious activities which have obviously influenced the scoring in the CPE Report (see Annexes **C-2** to **C-12**). However, ICANN informed Requester that they would not take any action in this respect (see **Annexes C-2** and **C-3**).

Considering the fact that all of the above elements are in essence connected, as they relate to the Community Priority Evaluation process, including the criteria and information that have been assessed in this respect, Requester has combined each of these elements into one single Reconsideration Request, seeking:

- reconsideration of the CPE Report and the Determination;
- disclosure of the information requested in its Request for Information;
- reconsideration of ICANN's position towards Requester's allegations regarding spurious activity.

4. Date of action/inaction:

- October 6, 2014 in relation to the publication of the CPE Report and the Determination;
- October 31, 2014 in relation to ICANN's response to Requester's Request for Information;
- November 14, 2014 as regards ICANN's response to Requester's email containing allegations regarding spurious activity;

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

- October 7, 2014 in relation to the publication of the CPE Report and the Determination;
- November 3, 2014 in relation to ICANN's response to Requester's Request for Information;
- November 17, 2014 as regards ICANN's response to Requester's email containing allegations regarding spurious activity.

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

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the "Application").

Requester has elected to participate in the Community Priority Evaluation ("CPE") in accordance with the provisions set out in the Applicant Guidebook.

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester's application for the .GAY gTLD "*did not prevail in Community Priority Evaluation*".

Having experienced the process carried out by ICANN in approving the Application following Initial Evaluation, publishing the Determination, not responding to Requester's Request for Information nor its allegations regarding spurious activity it has become clear that:

- (i) the EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook;
- (ii) the EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination;
- (iii) the EIU has, when carrying out the CPE, intentionally misguided parties who have sponsored and endorsed Requester's Application for the .GAY gTLD;
- (iv) ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE;
- (v) the EIU has not taken into account prior Expert Determinations regarding the .GAY gTLD and Requester's supporters;
- (vi) the EIU has not taken into account relevant information provided to ICANN

- by Requester prior to and after the commencement of CPE;
- (vii) the CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU;
 - (viii) notwithstanding the fact that Requester has requested ICANN to provide them with relevant information in order to obtain a better insight in the actual CPE process and the way how the CPE criteria have been applied in the context of Requester's Application, ICANN has deliberately refused to provide Requester with such information both within and outside ICANN's transparency and accountability processes.

Bearing in mind the above elements, Requester is convinced that the approach taken by ICANN in allowing the latter to define processes and criteria different from those reflected in the Applicant Guidebook, applying scores and scoring criteria that are flawed, in particular by not having conducted a "careful and extensive review" as they have stated in the CPE Report, and this based on the information, arguments and evidence provided herein.

Therefore, the Requester is now facing contention resolution with three other applicants for the same string "*through the other methods as described in Module 4 of the Applicant Guidebook*", requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the Determination had been developed in accordance with ICANN's standards, in particular those set out in the Applicant Guidebook.

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

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and not necessarily having the best interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group by the United Nations, the EU, the USA and in many other countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the self-awareness of this community and its members.

The fact that the gay community is affected by the CPE Report and the

Determination is substantiated by the various letters of support for this Reconsideration Request that have been submitted to ICANN by the Federation of Gay Games (**Annex C-22**), the International Lesbian, Gay, Bisexual, Trans and Intersex Association (**Annex C-23**), and the National Gay & Lesbian Chamber of Commerce (**Annex C-24**).

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

According to the Requester, the EIU and ICANN has not acted in compliance with a wide variety of processes, procedures, and rules, in particular ICANN's own By-Laws as well as the Applicant Guidebook at various stages of the CPE process and thereafter, which has materially affected Requester's Application for the .GAY gTLD and more in particular Requester's position for operating such new gTLD in favor of the gay community.

Requester refers to the claims made in its response to the requirements set out in §6 hereof.

8.2. Summary

As will be outlined in further detail below and in the Annexes hereto, Requester has identified the following issues:

- (1) ICANN having allowed the EIU to develop processes and criteria outside of ICANN's policy development process and the Applicant Guidebook without providing the Requester with an opportunity to amend its Application, and hence discriminate community-based applicants in general, and Requester in particular (§8.3 below);
- (2) Various process errors in identifying, assessing, verifying and evaluating Requester's Application as well as information provided by third parties against the criteria set out in the Applicant Guidebook (§§8.4 – 8.8 below);
- (3) Various inconsistencies in the CPE evaluation processes when comparing the CPE Report with other reports developed by the EIU in the context of the CPE process (§8.9); and
- (4) Clear violations of ICANN's By-Laws, in particular in relation to ICANN's transparency and accountability mechanisms, by not providing clear answers to Requester's Request for Information under ICANN's Documentary Information Disclosure Policy (§8.10).

8.3. The EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook

Following ICANN's announcement that the EIU would be the sole evaluator for community-based applications having selected CPE, the EIU promulgated its own criteria for conducting such reviews, which included requirements in addition to those in the AGB.

According to the first Recommendation of the GNSO, which formed the basis of the New gTLD Program:

"ICANN must implement a process that allows the introduction of new top-level domains.

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."²

The EIU has published four documents in the timeframe September 2013 – September 2014, being more than one and a half years, respectively two and a half years *after* the publication of the final version of the Applicant Guidebook, and more than a year / two years following the closing of the application window for new gTLDs, which are available on ICANN's website:³

- *CPE Panel Process Document*, published on August 6, 2014 (**Annex B-3**);
- *CPE Guidelines*, published on September 27, 2013 (**Annex B-4**);
- *Updated Frequently Asked Questions (FAQs)*, published on September 10, 2014 (**Annex B-5**); and
- *CPE Processing Timeline*, published on September 10, 2014 (**Annex B-6**) (jointly referred to as the "CPE Documents").

Not only could one question the legitimacy of these documents, which undisputedly contain additional criteria, accents, and specifications to the criteria laid down in the Applicant Guidebook, but have not gone through ICANN's policy development processes, it is moreover undisputedly so that applicants have not been in the position to base their applications upon such new requirements when

² This was in fact the first GNSO Recommendation, contained in its Principles, Recommendations & Implementation Guidelines, attached hereto as **Annex B-1**.

³ See **Annex B-2**.

they submitted them in the beginning of 2012 ...⁴

In order to deal with similar situations – for instance in order to respond to concerns expressed by the Governmental Advisory Committee (“GAC”) or brand owners – ICANN has also created additional criteria or interpretations thereof, but these processes have been implemented by allowing affected applicants to clarify their position on an individual basis, or even make changes to their applications.

Requester points out in this respect to the policy development process that led to Specification 13 to the Registry Agreement.⁵ In the context of this process, applicants of so-called brand-TLDs have had the opportunity to indicate in a separate document whether they complied with such new rules, processes and criteria, and have even been given the possibility to draft specific terms and conditions for the registration of domain names in their gTLDs.

Also, applicants for TLDs that have been earmarked by the GAC in 2013 as “Category 2 – Exclusive Access” gTLDs have been given the express opportunity to clarify their positions in relation to such qualification and have been given the opportunity to amend their applications accordingly. Specific response forms have been developed by ICANN to this end, which have been published on the ICANN website.

For community-based gTLDs, however, requests for dialogue expressed by the cTAG went ignored, no such outreach has taken place, no specific clarifying questions have been issued, no opportunities were presented to clarify – on an individual basis – their position in relation to the CPE Documents that have been used by the EIU in order to prepare their CPE reports.

In Requester’s view, ICANN has therefore clearly discriminated community-based gTLDs by changing or “interpreting” the processes and criteria set out in the Applicant Guidebook more than a year and a half after the closing of the application window, without providing applicants with the opportunity to amend their applications accordingly.

Therefore, Requester is of the opinion that:

- ICANN has not acted in compliance with the requirement set out by the GNSO and the ICANN community at large that applicants had to be evaluated against transparent and predictable criteria, since the processes and criteria contained in the CPE Documents are to be considered *“additional selection criteria used in the selection process”* that have not been made *“fully available to the applicants prior to the initiation of the process”*.

⁴ Requester points out to the fact that the final version of the Applicant Guidebook dates from June 2012, i.e. after the closing of the application window.

⁵ Reference is made to <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>.

The fact that ICANN and the EIU have requested input from the ICANN community on the draft CPE Documents:

- (i) is a clear demonstration of the fact that both ICANN and the EIU have attempted to make additional (or modified) criteria or additional or modified interpretations thereof been part of the CPE process. Indeed, if the processes and criteria set out in the Applicant Guidebook were clear, why would there be a need to publish four additional documents dealing with this process ...?; and
 - (ii) does not take away that these CPE Documents have not been made available to applicants prior to the initiation of the selection process (i.e. during the first 5 months of 2012);
- the EIU has not acted in compliance with the criteria set out in the AGB as they have applied their own standards in developing the CPE Report; and
 - ICANN has obviously discriminated community-based applicants by not providing each applicant, and Requester in particular, on an individual basis with the opportunity to clarify its position in relation thereto.

8.4. The EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination

According to the CPE Panel Process document:

With few exceptions, verification emails are sent to every entity that has sent a letter(s) of support or opposition to validate their identity and authority.⁶

Following an enquiry organized by Requester with its sponsors, it appears that only a minority of the 240+ supporters of Requester's Application have received a verification email from the EIU. Indeed, according to the feedback obtained from the Requester's supporters, less than 20% of them have received such a verification email.

According to the EIU's own CPE Panel Process Document, a number of exceptions apply to the EIU's basic obligation to contact all of the parties who have endorsed or who are opposed to a particular application, which exceptions apply in the following circumstances:

- *If there are no contact details included in the letter(s). However, the evaluator will attempt to obtain this information through independent research.*

⁶ CPE Panel Process Document, page 5.

- *If the person sending the letters(s) does not represent an organization. However, if the content of the letter(s) suggests that the individual sending a letter has sent this letter(s) on behalf of an organization/entity the evaluator will attempt to validate this affiliation.*⁷

None of these “exceptions” apply in this case. Furthermore, if the EIU or ICANN would not have access to contact information of a particular supporter, this issue could have been easily resolved by sending a clarifying question to the Requester, who is in permanent contact with all of its sponsoring organizations.

Indeed, according to the EIU’s own CPE Panel Process Document, they clearly had this option:

*“If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified.”*⁸

For reasons unknown to the Requester, the EIU deliberately decided not to issue such clarifying question.

According to the Applicant Guidebook: *“As part of the evaluation process, evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators.”*

According to the Frequently Asked Questions page relating to ICANN’s Clarifying Questions process,⁹ it is clear that such questions may be sent from the following panels:

- Background screening
- Geographic name
- String similarity
- DNS stability
- Registry services
- Technical/Operational
- Financial
- Community priority evaluation (if applicable)

⁷ CPE Panel Process Document, page 5.

⁸ CPE Panel Process Document, page 3.

⁹ See **Annex B-7**.

ICANN has consistently been sending clarifying questions throughout the Initial Evaluation phase if – according to the evaluation panels’ – the applicant’s answers to the evaluation questions did not qualify for a passing score. For instance, Requester received a clarifying question in relation to its response to Question 44.

When ICANN forwarded such clarifying question to Requester on March 4 of 2013, ICANN indicated that *“The evaluators will complete the evaluation based on the most current application information, which will include any new information you submit. If the new information introduces inconsistencies in the application, creates new issues, or is still insufficient for the evaluators to award a passing score, the application will be scored and results posted without further notice.”* (emphasis added)

Requester did not receive any further questions relating to its answers to community-related Questions 20 *et seq.*, it rightfully assumed that ICANN had no further questions with respect to the answers provided by Requester to such community-related questions.¹⁰

Since ICANN has nowhere and never indicated that Requester’s answers to Questions 20 *et seq.* posed issues to the evaluators, ICANN has misguided and misled Requester by creating the impression that the answers to Questions 20 *et seq.* were sufficient for the evaluators to award a passing score.

8.5. The EIU has, when carrying out the CPE, intentionally misguided parties who have sponsored and endorsed Requester’s Application for the .GAY gTLD;

Besides the fact that the EIU has not acted in accordance with the processes designed by ICANN or even by the EIU itself by not reaching out to all of Requester’s supporters, it has moreover intentionally misguided those parties to whom a verification email has been sent.

Indeed, many of the letters that have been sent out by the EIU to the Requester’s sponsors state a response date that predates the date of the actual verification email: as evidence shows, recipients have been invited to respond to the EIU’s verification email, sent on June 30, 2014, by June 24, 2014 ...

Reference is made to **Annexes C-18 to C-21**, which all contain a true copy of the email received by some of Requester’s sponsors, and which clearly show that the EIU has set a due date for a response that predates the actual date of sending the email to Requester’s supporters. Based on the feedback and questions Requester has received, it is clear that many of its sponsors have not provided input or have verified their endorsement for Requester’s Application, since the response due date had already passed at the time of receipt of the

¹⁰ Reference is made to ICANN Case #00022186, where ICANN has asked for additional information in relation to Requester’s response to Question 44.

email.

Requester has received an overwhelming support from various organizations and LGBTQIA interest groups from all over the world, as is shown by the list attached hereto as **Annex C-17**. There is no doubt that all of these endorsers and supporters combined are “clearly recognized by the community members as representative of the community” as required by the Applicant Guidebook in order to qualify for a score of 2. However, the EIU chose to ignore Requester’s supporters.

Furthermore, there is no doubt that the likely limited response received by the EIU following its flawed outreach has led to the latter giving a score of 1 out of 2 possible points.

8.6. ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE

According to the CPE Panel Process Document, the EIU’s “core team” may carry out additional research *“to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures”*.¹¹

Referring to the CPE Report, it is clear that such additional research has been carried out by the EIU. Some examples include:

- the EIU expressly referring to the definition of “gay” in the Oxford English Dictionary, which definition was not referred to in the Application;
- the EIU has referred to an organization within the communities explicitly addressed by the application, which has opposed to Requester’s Application, and which organization – according to the CPE Report – is purported to be *“a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following”*, however without disclosing who this organization was, making it impossible for Requester to verify whether the EIU’s evaluation was accurate.

By doing so, the EIU completely disregarded the transparency requirement that forms an integral part of ICANN’s (and, apparently, also the EIU’s) decision making standards. Requester has submitted a Request for Information under ICANN’s Documentary Information Disclosure Policy. However, ICANN refused to disclose the identity of this organization, leaving Requester completely in the dark with respect to an essential element in determining whether ICANN’s (and the EIU’s) Determination is in line with the Applicant Guidebook ...

¹¹ CPE Panel Process Document, page 3.

For this reason, Requester is of the opinion that:

- the EIU has not followed its own process, which enabled the EIU to issue clarifying questions to Requester when performing additional research;
- the EIU has not acted in a transparent way by not reaching out to Requester when analyzing additional information outside the context of Requester's Application;
- the EIU deliberately acted in an intransparent way in developing the CPE Report, which does not allow Requester to verify whether the CPE Report in general and the information relied upon by the EIU in particular meet the standards set out in the Applicant Guidebook; and
- ICANN has deliberately not provided access to the information relied upon by the EIU following Requester's Request for Information, which made it impossible for Requester to verify whether the Determination was founded.

8.7. The EIU has not taken into account relevant information provided to ICANN by Requester during the CPE process

Bearing in mind the fact that various incorrect allegations have been made with respect to Requester's Application (on public fora, in the context of objections that have been initiated against Requester's Application, etc.), Requester has reached out to ICANN on various occasions, providing proof of the fact that such allegations were false. Such information included clear and irrefutable evidence of the fact that a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based – provided ICANN with false information with respect to Requester's intentions. Reference is made to the correspondence with and evidence provided to ICANN contained in Annex **C-2** to **C-12** hereto.

ICANN staff has confirmed that such information would be provided to the EIU, but the CPE Report does not refer at all to the evidence of spurious activity submitted by Requester to ICANN. However, ICANN allowed misleading and untruthful documents to be presented by at least one other applicant for the .GAY gTLD to be used as evidence, without allowing Requester to provide for any context or challenge.¹²

For these reasons alone, Requester is of the opinion that the EIU has relied on incorrect, at least biased information, and has not taken action (e.g., by reaching out to Requester directly) in order to obtain a position from Requester in relation to any opposition received in connection with its Application.

¹² More in general, ICANN staff refused to hear comments from cTAG and multiple community applicants concerning vulnerability to spurious activity faced by community applicants when opposed by standard applicants.

The EIU (and ICANN) have therefore not complied with their standards of transparency, which makes Requester believe that there was a clear bias against Requester's Application.

8.8. The EIU has not taken into account relevant expert opinions provided to and decisions taken by ICANN in relation to Requester's Application

It is obvious that the EIU has not taken into account the various decisions taken in the context of Community Objections.¹³

Requester hereby particularly refers to §22 of the Decision rendered by Prof. Dr. Bernhard Schlink, who was the Expert appointed by the International Chamber for Expertise of the International Chamber of Commerce *in re: The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited* (sic), and many other objections concerning applications relating to the ".gay" and ".lgbt" gTLDs. Indeed, Dr. Schlink recognized in multiple Expert Determinations, after having carefully examined the more stringent criteria and conditions required to initiate Community Objection proceedings that:

*"[t]he legitimate interests of the gay community can only legitimize a claim to a gTLD that is exclusively linked to the gay community. A community that represents the legitimate interests of its members can claim a safe and secure position in the society and on the market, and this holds particularly for a community that represents the legitimate interests of a minority. Its claim to a safe and secure position on the society and on the market includes a safe and secure position in the internet. Therefore, while the gay community cannot exclude competition, it could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay's community application for the string .gay."*¹⁴

And although Requester respects the fact that CPE and Community Objections are distinct processes, it does not understand the reasons why the EIU has simply and entirely disregarded any of these elements in developing the CPE Report, nor has it provided for any reasons why it did not agree with these unambiguous and unilateral decisions to the contrary. Indeed, not a single reference has been made to these Expert Determinations throughout the CPE

¹³ See ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex B-8**; ICDR Case No. EXP/394/ICANN/11, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. United TLD Holdco Ltd*, **Annex B-9**; ICDR Case No. EXP/392/ICANN/9, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Design, LLC*, **Annex B-10**; and ICDR Case No. EXP/393/ICANN/10, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Domain Holdings Limited*, **Annex B-11**.

¹⁴ See: ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex B-8**.

Report.

Requester is therefore of the opinion that the EIU obviously did not rely on essential information publicly available to ICANN and the EIU that was directly relevant for Requester's Application. Hence, the EIU (and ICANN) did not act in an open and transparent manner in rendering the CPE Report and the Determination, the outcome whereof is diametrically opposed to previous Expert Determinations endorsed by ICANN.

8.9. The CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU

According to the EIU, "*consistency of approach in scoring applications is of particular importance*".¹⁵

In order to verify whether the EIU has been consistent, a comparison needs to be made between the elements and arguments used by the EIU in this particular CPE with other CPE results.

8.9.1. Using the Oxford English Dictionary as a "standard"

In a number of cases, the EIU expressly referred to the definition of the string in the Oxford English Dictionary. However, in some of the CPEs that have been published, no such reference was made which, in essence, shows that the approach propagated by the EIU has not been consistent.

The fact of only using the Oxford English Dictionary as the sole basis for "evaluating" the community definition has not been established as a standard in the community priority evaluation criteria set out in the AGB. Therefore, Requester is of the opinion that this reference point should not have been used, as:

- (i) it shows a clear bias towards using the British English language on the Internet;
- (ii) the different versions of the Oxford English Dictionary appear to use different criteria and standards by themselves: according to the EIU, the Oxford English Dictionary refers to a "gay" person as "a homosexual, especially a man", while the online version of the Oxford English Dictionary defines the term "gay" as "(a): of a person: homosexual; (b) of a place, milieu, way of life, etc.) of or relating to

¹⁵ Community Priority Evaluation Panel Process, page 1.

homosexuals,” whereby it is expressly stated that “Although more frequently used of male homosexuals, this sense can either include or exclude lesbians” (emphasis added).¹⁶

Therefore, notwithstanding the fact that the EIU has apparently *unilaterally* (i.e., not supported by any AGB criterion) promoted the Oxford English Dictionary as *the* standard to evaluate the community definition provided by *some* of the community-based applicants, it is clear that the Oxford English Dictionary by itself is using different (or even contradicting) definitions and standards ...

8.9.2. The EIU is using different standards than the ones set out in the AGB

According to the criteria for Community Priority Evaluation set out by the Applicant Guidebook, as well as the Community Priority Evaluation (CPE) Guidelines, the following question must be scored when evaluating the application:

“Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.”

“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.” “Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.

“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community. “Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’. “Identify” does not simply mean ‘describe’, but means ‘closely describes the community’. “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has”.

As indicated above, Requester has performed an Internet search, as suggested by the CPE Guidelines, and has found substantial evidence that proves that in common language, the words “gay”, “LGBT” and “LGBTQIA” are used as synonyms.¹⁷ Requester refers to various references in quality press, including the

¹⁶ See **Annex C-1**, page 8.

¹⁷ See the research report and press articles contained in **Annex C-16**.

Economist¹⁸ and the New York Times,¹⁹ where the word “gay” is being used as a “catch-all term”, synonym or *pars pro toto* term for LGBTQIAs.

Requester has not only obtained the official endorsement and support for its application for the .GAY gTLD from the Complainant in the case referred to above, namely the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA),²⁰ but is also recognized by the ICDR and ICANN as an established institution associated with a clearly delineated community.²¹

Considering the above, Requester does not understand why, on the one hand, ICANN recognizes the fact that Requester and one of its key supporters “*could file and have filed its own application for a gTLD that is designed to service the gay community and to operate accordingly*” as expressly confirmed by the ICDR, whilst, ICANN and the CPE Panel determining on the other hand that “*the string does not identify or match the name of the community as defined in the application*”.

Furthermore, Requester does not understand that although the ILGA has obtained the recognition from the ICDR – and hence also from ICANN – to be “*clearly recognized by the community members as representative of the community*” as required by the AGB in order to qualify for a score of 2 out of 2 points on the CPE criterion “Support”, the EIU has countered such argument without even having reached out to the ILGA nor the Requester in the context of the CPE process ...

Therefore, it is undisputedly so that the evaluation processes and procedures designed and followed by the EIU is flawed, at least has generated outcomes that are inconsistent with previous determinations made by or on behalf of ICANN.

8.9.3. Community definition not to include non-community members

As regards the definition of the community contained in the various community-based applications, the EIU has considered whether or not the applicant has attempted to include certain “non-community members”. Rightfully so, registries of community-based gTLDs should restrict the registration of domain names to members of their respective community. Therefore, the EIU should indeed assess whether or not a particular applicant is basically not imposing any restrictions or requirements upon registrants of domain names in the proposed community-based gTLDs.

¹⁸ <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;

<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;

¹⁹ <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&r=0>.

²⁰ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>;

²¹ See ICDR Case No. EXP/390/ICANN/7, §13.

In the case of Requester's Application, the EIU has determined that:

"The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus."

The CPE Panel emphasizes the fact that Requester has included "allies" in its community definition, and appears to have found therein an argument for determining that Requester's community definition has been "overreaching substantially" beyond the "gay" concept.

According to Requester:

- the EIU has not taken into account Requester's specific arguments for including "allies" into its community definition;
- the EIU has in this context not considered the Requester's requirement for an "ally" to be verified by Authentication Partners prior to being eligible to register a domain name in the .GAY gTLD and, in general, has ignored endorsing organizations with defined roles for allies;
- the EIU has accepted in other CPE Reports similar concepts as eligibility requirement for a "community-based gTLD"; and
- no clarifying questions have been issued in this respect.

A. Specific arguments for including "allies" into the gay community definition

LGBTQIA stands for "Lesbian", "Gay", "Bisexual", "Transgender", "Queer", "Intersex", and "Allies" and is one of the commonly used terms to emphasize a diversity of sexuality and gender identity-based cultures.

As Requester has demonstrated throughout its Application, it has obtained the support from more than 240 organizations and companies from all over the world for its .gay gTLD application, all of which are supporting at least one of the cultures set out above. Given their membership, posture and outreach, it goes without saying that these sponsors will play an important moral, and – for Authentication Partners – even an operational role in the establishment and management of the .gay gTLD.

Now, since an organization or company in itself can impossibly be "lesbian" or "gay", Requester has been seeking for a way to also position these companies and organizations in this community definition. For this reason, Requester has referred to these organizations as "allies" in the context of the LGBTQIA definition.

Furthermore, as stated in the Application, LGBTQIAs are a vulnerable group in

many countries and societies, and too often still the subject of prosecution for who they are. In order to put in place safeguards for those gay community members who do not wish to be directly associated with a domain name registration, organizations and companies who in essence cannot be “non-heterosexual” should have the possibility to act as a proxy service, which is common practice in the domain name industry.

In any case, any such “ally” must be approved by an Authentication Partner in order to be able to register a domain name in its own name or in the name or on behalf of a third party who meets the LGBTQI requirements.

Irrespective of the fact that the EIU has clearly misunderstood the concept of “allies” in Requester’s Application, it is obvious that they have attempted to find herein an argument that Requester is over-reaching substantially beyond the community. Requesters point out to the fact that the EIU does not seem to have issues with similar concepts in other CPE reports, which clearly shows that the EIU has not been consistently applying the policy requirements for community-based applications:

- the community definition contained in the .OSAKA gTLD application # 1-901-9391 states: *[m]embers of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following: [...] Entities, including natural persons who have a legitimate purpose in addressing the community.*” (emphasis added);²²
- the community definition contained in the .HOTEL gTLD application #1-1032-95136 includes: *“Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2”;*

Request does not understand why, on the one hand, an “ally” who assumes a supporting role for a vulnerable individual or group of individuals and, on the other hand, “other organizations representing hotels” are treated differently in view of community membership criteria. Nor does it understand why someone who “self-identifies as having a tie to [the community]” or “entities or natural persons who have a legitimate purpose in addressing the community” can possibly be considered as have a closer connection to a community than an “ally”, especially when in the latter case such connection is verified by an independent Authentication Partner, and in the former case a self-identified “tie” to the community suffices ...

It is therefore clear to Requester that the EIU has used double standards in preparing the various CPE reports, and is discriminating between the various community-based applicants, since they have been evaluating similar definitions and criteria in a different way.

²² See the .OSAKA CPE Report, attached hereto as **Annex C-13**, page 2.

B. The role of .GAY Authentication Partners

The CPE Panel seems to incorrectly assume here that, in order to become a registrant of a .GAY domain name, the candidate registrant must be a member of an Authentication Partner.

This is not the case: the application clearly states that Authentication Partners have two key tasks in the context of the .GAY gTLD, being: (1) connecting to potential registrants, and (2) confirming whether potential registrants meet the eligibility requirements that are inherent to the .GAY gTLD.²³

Indeed, the Requester's Application clearly states:

“Through the use of established membership organizations in the Gay Community as Authentication Partners, dotgay LLC not only complies with the most restrictive community registration requirements, but also provides the best solution for connecting with potential registrants. Authentication Partners are the community membership organizations used by dotgay LLC to confirm eligibility. Authentication Partners become advocates for the .gay TLD and provide a trusted entry point for members of the community. Authentication Partners are also the advocates for their registrants within the .gay community-model.” Application, answer to Question 18 (c) ii.

Furthermore, the Panel has determined that the community described in Requester's Application “over-reaches substantially” referring to, on the one hand, the 7 million members of the Applicant's Authentication Partners identified at the time of submission of the Application, and – on the other hand – the estimated 1.2% of the global population who are considered to be LGBTQI.

This is, in the Requester's opinion, an obvious misreading of the Application, as these two elements are not interrelated in relation to determining the scope of “gay”. Indeed, the 1.2% of the global population is an illustrative estimate that has been put into Requester's Application in order to demonstrate the size of the community: absent any official numbers. Considering the fact that LGBTQIs are in some countries not recognized (or even prosecuted), there is no way in determining the actual size at this stage.

Therefore, Requester is of the opinion that the perceived “discrepancy” between the two numbers (i.e., 7 million members of Authentication Partners and 1.2% of the global population that is estimated to be LGBTQI) is irrelevant in this respect. Any other uncertainty on behalf of the EIU could have easily been resolved by issuing a clarifying question to Requester.

²³ The latter being a requirement in order to meet the criteria for Registration Policies, for which the Requester obtained a score of 4 out of 4 points.

8.9.4. Support

In relation to the criterion “Support”, the EIU concludes in the CPE Report that

“There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”

It does not appear to Requester that there is one single organization recognized by the “radio” community²⁴ or the “hotel” community²⁵, who have both obtained a score of 2 out of 2 points on this criterion. Based on these CPE reports, it is clear that also these community-based applicants appear to have sought (and found) support from a number of national and international endorsers in a similar way than Requester, who only scored 1 out of 2 points.

8.10. Notwithstanding the fact that Requester has requested ICANN to provide them with relevant information in order to obtain a better insight in the actual CPE process and the way how the CPE criteria have been applied in the context of Requester’s Application, ICANN has deliberately refused to provide Requester with such information both within and outside ICANN’s transparency and accountability processes

Notwithstanding the EIU’s claim that its evaluation process *“respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination”*, ICANN’s response to Requester’s Request for Information clearly shows that this is clearly not the case.

Indeed, ICANN denied Requesters’ Request for Information, whereby Requesters refer to the following quotes from the Response to the Request for Information:

- 1) *“The contract between ICANN and the EIU is not appropriate for public disclosure through the DIDP”*. More in particular, ICANN refers to certain alleged Defined Conditions for Nondisclosure that would apply to the requested contract:

²⁴ <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

²⁵ <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
 - *Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.*
 - *Confidential business information and/or internal policies and procedures.*
- 2) *"ICANN has previously indicated in response to Request No. 20140804-1 that ICANN has communications with persons at EIU that are not involved in the scoring of a CPE (but otherwise assist in the facilitation of a particular CPE), and identified that those communications are not appropriate for public disclosure";*
- 3) *"To help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team. ICANN does not have, nor does it collect or maintain, the work papers of the individual CPE Panels (including the .GAY CPE Panel) that would likely contain the information called for within these items."*

None of the above arguments are convincing in light of ICANN's By-Laws obligations relating to transparency and accountability:

The mere fact of denying Requesters access to information that has been used in connection with the evaluation of the Application without (i) expressly referring on which information the Community Priority Evaluation Panel has relied, (ii) providing a statement regarding the relevancy of such information in connection with the actual evaluation, nor (iii) arguments on why such information is supporting the outcome of the actual evaluation deprives Requesters of the possibility to review the Determination, and restricts their fundamental rights to challenge such Determination in the context of a Reconsideration Request and, ultimately, use the transparency and accountability mechanisms embedded into ICANN's By-Laws.

Indeed, it is not because of the fact that the EIU is independent from ICANN or Requesters, that it would not be required to be subject to the same obligations of transparency and accountability as ICANN itself. Indeed, if a decision or determination by such third party materially affects and/or has a material effect in

a process that is managed by ICANN – as it has been described in the Applicant Guidebook, the CPE Guidelines, etc. – then such party should be subject to the same transparency and accountability mechanisms as ICANN.

In Requester's opinion, the EIU, who has been appointed by ICANN as the community priority evaluation independent panel firm, is subject to the same policies – especially those relating to transparency and accountability – as ICANN. Since the EIU is considered an "ICANN Affiliated Party" under ICANN's Top-Level Domain Application Terms and Conditions,²⁶ the EIU is subject to the same rules and procedures as ICANN, and more precisely those roles and procedures reflected in ICANN's By-Laws.

Therefore, ICANN cannot simply deny its own By-Laws obligations when entering into undisclosed agreements with third parties, in particular when such party or parties assume(s) a role that is actually ICANN's to fulfill.

Indeed, the fact that ICANN has apparently deferred the actual community priority evaluation to a third party does not release ICANN or such third party from the transparency and accountability obligations contained in ICANN's By-Laws.

8.11. Conclusion

Requester has paid USD 22,000 in order to participate to the CPE Process, which is an amount that is far higher than the USD 10,000 estimate that has been referred to in the AGB. One would expect that for such an amount, ICANN and the CPE firm, under the delegated authority of ICANN, would act diligently when applying the standards set out in the AGB, follow the processes defined prior to the establishment of the New gTLD Program, and – at least as a form of what is generally referred to as "customer service" – reach out to applicants if certain elements contained in their application are unclear or verify statements made by others in an open and transparent manner.

None of this has happened in the development of the CPE Report and the Determination:

- new criteria and standards have been developed until more than two years after the closing of the application window in May of 2012, without having given Requester the opportunity to amend its application;
- additional research has been performed without verifying and validating the outcome thereof with the Requester;
- undisputable process errors have been made by the EIU when verifying the identity and statements made by Requester's supporters, including but not limited to:

²⁶ See <http://newgtlds.icann.org/en/applicants/agb/terms>.

- not having reached out to all of Requester's supporters, although the CPE Panel had the express obligation to do so;
- for the limited number of cases where a supporter of Requester has been contacted, the EIU has provided a response time to its enquiry that was in the past, which has obviously misguided quite a few of Requester's supporters;
- information that has been provided by Requester to ICANN in order to counter and put into context certain false information has been disregarded despite multiple attempts to gain resolve;
- inconsistent standards have been used by the EIU in actually performing the evaluation, especially when comparing the arguments and information relied upon by the EIU in other CPEs.

On top of this, ICANN has refused to provide additional information to Requester in accordance with ICANN's own transparency and accountability processes, and more in particular specific information relating to the various process and policy errors identified, as well as the inconsistencies identified, notwithstanding the fact that also the EIU is committed to these transparency and accountability obligations.

Therefore, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester's Application in a discriminatory manner.

9. What are you asking ICANN to do now?

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

- (i) acknowledge receipt of this Reconsideration Request;
- (ii) review the Requester's requests referred to in §§8.2 to 8.9 above, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN, and hence to reverse the Determination as set out in (viii) below;
- (iii) in the meantime, suspend the process for string contention resolution in relation to the .GAY gTLD;
- (iv) provide Requester with all relevant information in light of the elements set out in §8.10 above, and more in particular the information requested in Requester's Request for Information;
- (v) request a third party appointed by ICANN to or have ICANN perform a new determination in view of the CPE criteria set out in the Applicant

Guidebook, and bearing in mind the information provided by Requester as referred to in §8.10 above;

- (vi) within a timeframe of one month following the appointment of such third party, allow Requester to submit a written statement to such third party;
- (vii) following that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue;
- (viii) if ICANN would decide not to award the remedies sought by Requester set out in (i) to (vii) above, Requester respectfully requests ICANN to reconsider the Determination and determine that the Application meets the required thresholds for eligibility under the Community Priority Evaluation criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application:
 - a score of 4 out of 4 points in relation to Criterion #2: Nexus between Proposed String and Community; and
 - a score of 4 out of 4 points in relation to Criterion #4: Community Endorsement,

whilst keeping the scores on the other criteria reflected in the CPE Report.

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

As stated above, ICANN published on October 7, 2014 its Determination on the basis of the CPE Report, stating that Requester's application for the .GAY gTLD did not meet the criteria for community-based applications, as defined in the Applicant Guidebook.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the

complaining parties? Explain.

N/A

Do you have any documents you want to provide to ICANN?

Reference is made to the Annexes attached hereto, a list whereof has been contained in a separate overview.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

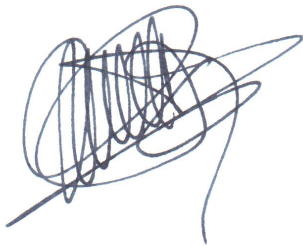
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,



November 29, 2014

Bart Lieben

Date

Attorney-at-Law

Exhibit 19

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

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

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

Council of Europe report
DGI(2016)17

Report by **Eve Salomon
& Kinanya Pijl**

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

by¹

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

Foreword

This report aims to contribute to ICANN's discussions. Top-level domain names enable people across borders to communicate and access information and ideas in new ways. Domain names make an important contribution to the enjoyment of freedom of expression and freedom of assembly and association, and the prohibition of discrimination which is especially important for minorities and vulnerable groups. Ensuring that public policy for the Internet respects the core values of human rights, the rule of law, and democracy, is the key objective of the Council of Europe's Internet Governance Strategy 2016-2019².

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

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

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

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

Jan Kleijssen
Director of Information Society and Action against Crime

² https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c1b60

³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cee51

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

Table of Contents

Foreword.....	3
Executive summary.....	7
1. Introduction.....	15
2. A human rights perspective on community-based applications for gTLDs.....	17
Freedom of expression.....	18
Freedom of association and assembly.....	21
Due process.....	23
Discrimination.....	26
3. The definition of community.....	28
The GNSO policy recommendations.....	28
The Applicant Guidebook.....	28
CPE Guidelines.....	30
Conclusion.....	30
4. The concepts of priority and public interest.....	33
5. Community Objections.....	37
The objector’s standing.....	38
Costs.....	39
Inconsistent decisions.....	39
Appeal mechanisms.....	41
Independent, transparent and accountable decision-making.....	41
Qualifications of delegated decision-makers.....	43
6. Community Priority Evaluation.....	45
Costs.....	46
Time.....	47
Conflicts of interest.....	47
Assistance and dialogue.....	48
Consistency.....	48
Transparency.....	53
EIU Guidance: timing and content.....	54
Scoring bar.....	54
Criteria.....	55
7. Accountability mechanisms.....	59
Reconsideration requests.....	59
Independent Review Process (IRP).....	61
Ombudsman.....	62
Legal process.....	63
Appeals.....	64

8. Concepts for the next gTLD application rounds.....	66
Consider community applications first	66
Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs.....	66
Have applications in staggered batches	66
‘Beauty parade’ for all applications	66
9. Conclusion	69
List of interviewees	71

Executive summary

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

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

Chapter 2: Human rights

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

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

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

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

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

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

Recommendations:

The definition of ‘community’

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

The concepts of priority and public interest

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

Chapter 5: Community Objections

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

Recommendations:

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

Chapter 6: Community Priority Evaluation

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

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

Recommendations:

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

Chapter 7: Accountability mechanisms

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

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

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

Recommendations:

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

Chapter 8: Concepts for the next gTLD application rounds

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

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

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

Recommendations:

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

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

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

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

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

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

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles⁸ refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the

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

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

⁷ GNSO 2007 Principles and Recommendations

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

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

Chapter 9: Conclusion

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

1. Introduction

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

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

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

⁹ ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

¹⁰ These are: .OSAKA; .RADIO; .HOTEL; .ECO; AND .SPA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Freedom of expression

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

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

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

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

¹⁹ See: Article 29(2) UDHR; Article 19 ICCPR; Article 10 ECHR.

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

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

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

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

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

²¹ Ibid.

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

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

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

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

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

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

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

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

Freedom of association and assembly

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

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

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

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

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

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

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

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

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

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

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

²⁸ Ibid.

²⁹ Article 18 UDHR, Article 18 ICCPR and Article 9 of the ECHR.

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

³¹ See: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805b1059 (accessed 26 July 2016).

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

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

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

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

Due process

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

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

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

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

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

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

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

³⁹ See also: Article 13 and 15 ICCPR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁹ *Ibid.*, p. 5/6.

⁵⁰ *Ibid.*

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

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

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

Discrimination

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

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

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

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

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

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

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

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

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

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

⁵⁹ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-13.

3. The definition of community

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

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

The GNSO policy recommendations

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

The Applicant Guidebook

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁵ ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

⁶⁶ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-11.

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

CPE Guidelines

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

Conclusion

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

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

⁶⁷ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-12.

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

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

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

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

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

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

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

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

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

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

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

In brief, we recommend ICANN to:

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

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

4. The concepts of priority and public interest

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

The concept of community priority stems from the GNSO’s policy recommendations on which the implementation of the New gTLD Program is based. It was expected that community-based TLDs would add value to the namespace in serving the needs of diverse user groups.⁷⁵ The benefits of a community-TLD put forward by ICANN are that it creates a rallying point for supporters of your cause, community or culture⁷⁶; it will help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members; it enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community’s standards and values; it will boost the trust and confidence of its members; the community may be recognized globally; members will be able to register a relevant, shorter and easy to remember domain name; and it will generate income from registration and annual renewal fees of domain names.⁷⁷ However, nowhere is it stated what the values are that community-based TLDs and community priority aim to protect. There is no doubt that the concept of community priority was supported by the ICANN community when the new gTLD program was initiated and developed. However, it is not clear what the goal is that is meant to be served by community-based applications, what sort of persons or organisations should benefit from the use of a community-based gTLDs to serve this goal and how these communities would actually benefit from having their own TLD. Before there are subsequent rounds of applications it is necessary to determine the public interest values that CBAs aim to protect. Below, we provide some input to serve these deliberations within the ICANN community.

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

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

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

⁷⁷ ICANNwiki, ‘Community TLD’ https://icannwiki.com/Community_TLD (accessed 27 July 2016).

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

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

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

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

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

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

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

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

broadcasting licenses, states have to be guided by the importance of pluralism.⁸⁴ The Court also expressed the view that the exercise of power by mighty financial groupings may form a threat to media pluralism⁸⁵ as well as far-reaching monopolisation in the press and media sector.⁸⁶ By using the concept of pluralism, ICANN can serve the protection of individual and associational fundamental rights.

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

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

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

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

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

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

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

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

In brief, we recommend ICANN to:

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

5. Community Objections

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

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

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

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

⁸⁸ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 3.

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

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

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

The objector's standing

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

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

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

⁹² ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-8.

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

Costs

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

Inconsistent decisions

Several actors within different ICANN constituencies have expressed unease about the variations in (Community) Objection determinations.⁹⁴ There appears to be inconsistency when it comes to the entities that did or did not have standing. Objectors prevailed and had standing for .ARCHITECT (The International Union of Architects), .BANK (International Banking Federation), .INSURANCE (The Financial Services Roundtable), .MOBILE (CTIA - The Wireless Association), .POLO (United States Polo Association), .RUGBY (International Rugby Board), .SKI (Fédération Internationale de Ski), and .SPORTS (SPORTACCORD).⁹⁵ However, objectors for .BASKETBALL (Fédération Internationale de Basketball), .GAME (Entertainment Software Association), .GAY (The International Lesbian Gay Bisexual Trans and Intersex Association), .GOLD (World Gold Council), .INSURE (American Insurance Association), .KOSHER (Union of Orthodox Jewish Congregations of Americas), .LGBT (The International Lesbian Gay Bisexual Trans and Intersex Association), .MAIL (Universal Postal Union), .MUSIC (American Association of Independent Music or International Federation of Art Councils and Council Agencies) and .HOTELS (HOTREC, Hotels, Restaurants & Cafés in Europe) did not qualify⁹⁶, while there appears to be little difference with those that did qualify when it comes to fulfilling the requirement of being an “established institution associated with a clearly delineated community”.

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

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

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

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

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

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

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

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

Appeal mechanisms

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

Independent, transparent and accountable decision-making

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

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

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

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

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

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

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

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

¹⁰¹ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-17.

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

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

Qualifications of delegated decision-makers

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

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

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

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

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

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

In brief, we recommend ICANN to:

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

6. Community Priority Evaluation

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

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

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

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

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

¹⁰⁵ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 4.

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

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

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

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

Costs

A regular complaint from CBAs was the cost of seeing through an application, particularly when the applicant was involved in objection and/or accountability mechanisms. The cost of applying for the CPE process had been \$22,000¹⁰⁹, although they had been originally estimated in the AGB to cost \$10,000¹¹⁰. It was unclear why the cost had more than doubled. The EBU which had been successful in CPE for their application for the .RADIO string, estimates that the total amount they paid for ICANN processes during their entire application process was in the region of \$250k, (plus substantial legal, consultancy and communication costs). Some applicants we spoke to claim to have already spent a total well over \$1m for applications that to date have not prevailed. There were widespread claims of well-funded commercial competitors prolonging the contention process in order to wage a “war of attrition”, with claims that 60-70% of all objection procedures were undertaken by the “Big Four” registry companies. We were also told stories of competitors trying to negotiate with CBAs to pay them to drop their contention.

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

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

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

¹¹⁰ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-46.

Time

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

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

Conflicts of interest

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

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

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

Assistance and dialogue

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

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

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

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

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

Consistency

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

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

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

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

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

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

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

As an example, the .MUSIC CPE evaluation says:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We found that although the Statement of Works (SOW) between ICANN and the EIU¹¹⁷ refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done. Indeed, a number of CBAs complained about the lack of quality control. Proper quality control, as alluded to in the SOW, should entail an independent party looking at a number of CPE reports to ensure consistency and quality control between them. A mere assessment of consistency and alignment with the AGB and CPE Guidelines does not suffice.¹¹⁸ Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law).

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

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

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

Transparency

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

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

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

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

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

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

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

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

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

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

EIU Guidance: timing and content

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

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

Scoring bar

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

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

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

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

¹²¹ Final Issue Report on New gTLD Subsequent Procedures, 4 December 2015

¹²² AGB 4.2

Criteria

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Explanations should clearly state:

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

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

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

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

Criterion 4 covers "Community Endorsement".

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

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

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

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

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

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

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

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

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

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

In brief, we recommend ICANN to:

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

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

7. Accountability mechanisms

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

Reconsideration requests

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

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

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

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

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

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

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

¹²⁵ ICANN, ‘BGC’s Comments on Recent Reconsideration Request, <<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>> (accessed 13 July 2016).

¹²⁶ See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

Independent Review Process (IRP)

Another accountability mechanism that has been used to obtain some sort of review of decisions made with regard to CBAs is the independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws.¹²⁷ The Panel compares contested actions of the Board to the Articles of Incorporation and Bylaws, and declares whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must focus on issues of conflict of interest, due diligence/care and whether the Board members exercise independent judgment.¹²⁸ The Panel is not asked to, nor allowed to, substitute its judgment for that of the Board.¹²⁹ The Panel does not have the mandate to review the actions or inactions of ICANN staff or third parties, such as objection experts or the CPE Panel, who provide services to ICANN.¹³⁰ The only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN Articles or Bylaws in acting or failing to act with respect to that conduct.¹³¹ The IRP is considered the last resort and is decided upon by the International Centre for Dispute Resolution.

Prior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP.¹³² Cooperative engagement is expected to be among ICANN and the requesting party, without reference to outside counsel.¹³³ Again, if the cooperative engagement involves a contender for a string which has been subject to a successful CPE process, the CBA is not permitted to participate or make written submissions. This lack of transparency has caused some IRP cases to take as long as 2 years (including the Cooperative Engagement Process) to resolve, where the intention of the complainant was apparently to delay the gTLD launch of potential competitors. This “gaming” of the rules by some of the stronger actors in the market, has been also noted by the Ombudsman in its own motion report on CBA.¹³⁴

Under the current system, the applicant chooses one IRP panel member, ICANN chooses one, and they jointly appoint a third. The process is costly for the applicant. Under the new

¹²⁷ [ICANN, Bylaws, Article IV, Section 3.](#)

¹²⁸ ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

¹²⁹ See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

¹³⁰ ICANN, Approved Board Resolutions - Regular Meeting of the ICANN Board (25 June 2016), Consideration of Independent Review Panel's Final Declaration in the Donuts Inc. v. ICANN IRP, <<https://www.icann.org/resources/board-material/resolutions-2016-06-25-en#2.d>> (accessed 14 July 2016).

¹³¹ See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

¹³² ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

¹³³ ICANN, Cooperative Engagement Process – Requests for Independent Review 11 April 2013, <<https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>> (accessed 13 July 2016).

¹³⁴ <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>

Bylaws, this is proposed to change to create a cheaper mechanism for the applicant: ICANN will select seven individuals to be standing members of the IRP and the applicant will select individuals to sit on any specific review.

The ICANN Board adopted New Bylaws on 27 May 2016. These New ICANN Bylaws will be deemed effective upon the expiration the IANA Functions Contract between ICANN and NTIA. Under the new process the scope of IRP will broaden. The new Bylaws prescribe that ICANN needs to act in compliance with its Articles of Incorporation and Bylaws as well as its Mission. The actions that are covered by IRP is extended and includes the actions and inactions of ICANN staff members more explicitly as well as action or inaction that resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws. Under the new Bylaws, each IRP Panel shall conduct an objective, de novo examination of the Dispute, which will lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction. Under the new process and for Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.¹³⁵

This new process is a major improvement in term of human rights and due process in particular. However, in principle, and similar to the Reconsideration Request, the Panel does not have the mandate to affirm, reverse or vacate the decision. The Panel can only assess whether ICANN acts in accordance with its mission, Bylaws and Articles of Incorporation. This means that there is no adequate mechanism of checks and balances in place, which is a foundational aspect of accountability. Under the new Bylaws, the IRP Panel conducts de novo review, thus, the Panel acts if it were considering the question for the first time. The extent to which this 'de novo' review includes the capacity to do its own fact finding is not clear. As it stands, the outcomes of a Reconsideration Request and of an IRP are solely recommendations to the Board as to whether the mission, Bylaws and Articles of Incorporation have been respected. As such, the Board has the capacity to judge on the merits of the case. There is no reason to believe that the Board is better positioned than an Independent Review Panel that relies for its verdict solely on ICANN's mission, Bylaws and Articles of Incorporation to judge upon the substance of the case.

Ombudsman

In addition to these accountability mechanisms ICANN has its own independent and impartial Ombudsman. The Ombudsman's function is to act as an Alternative Dispute Resolution office for the ICANN community who may wish to lodge a complaint about an ICANN staff, board or supporting organization decision, action or inaction. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly.¹³⁶ The Ombudsman has been asked to look at decisions of the ICANN Board in Reconsideration Requests and received many complaints concerning the CPE process. Both Chris LaHatte and Herb Waye (Ombudsmen) indicate their role is not to conduct a first

¹³⁵ ICANN, Bylaws adopted by ICANN Board on 27 May 2016, section 4.3,

<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> accessed 25 August 2016.

¹³⁶ ICANN, What the Ombudsman Can Do for You, <<https://www.icann.org/resources/pages/contact-2012-02-25-en>> (accessed 13 July 2016).

level review; their role is to provide recommendations (not binding) concerning the fairness of the process.¹³⁷ The Ombudsman perceives informality to be the strength of the ICANN Ombudsman, the Ombudsman does not prescribe to change policy, but helps to solve problems by talking to the parties.¹³⁸

Although lodging a complaint with the ICANN Ombudsman is not strictly an accountability mechanism, it operates in a similar way insofar as it works to block the progress of an application. Complaints arise about how long an application can be blocked by the Ombudsman's own process and the lack of transparency. Moreover, when a third party makes a complaint to the Ombudsman the other parties in contention, including CBAs, are not specifically informed, even though the complaint blocks the furthering of the process. There is no communication between the Ombudsman and these other parties in contention, including CBAs, on grounds of 'confidentiality'.

The somewhat informal manner in which the ICANN Ombudsman operates does not seem to fulfil a clear purpose when extremely valuable gTLDs are in contention. It seems highly unlikely that a disgruntled applicant will accept a view from the Ombudsman that ICANN did act fairly without resorting to more formal accountability mechanisms. As such, complaining to the Ombudsman is too easily used as just another obstructing mechanism.

Based on a number of different complaints about the CPE process, the Ombudsman undertook his "own motion investigation" into the issues raised in these complaints as well as the overall CPE process.¹³⁹ The Ombudsman criticised an element of the CPE process, such as anonymity of the EIU Panel members, but has not found issues sufficiently serious to recommend any action other than recommendations about changes for the next round.

Legal process

The contracts that applicants sign with ICANN on submitting their application commits them against bringing legal action against ICANN.¹⁴⁰ However, the US District Court in Central California rejected the validity of that prohibition when it issued an injunction against ICANN in favour of one of the applicants for the .AFRICA string. On 12 April 2016 the same court granted a preliminary injunction to prevent ICANN delegating the string to another applicant who, in ICANN's view, had successfully gone through the evaluation process for a geographic name. The Court held that the circumstances of the case raised serious questions about the enforceability of the Release against bringing litigation on the grounds of it being contrary to California Civil Code § 1668 which says that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud,

¹³⁷ Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki.

¹³⁸ Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki. See also: Office of the Ombudsman, Case 16-00177, In a matter of a Complaint by dotgay LLC, 27 July 2016, <http://www.lahatte.co.nz/> (accessed 29 July 2016).

¹³⁹ Office of the ICANN Ombudsman, Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman (13 October 2015).

¹⁴⁰ See Module 6, AGB, para. 6 "Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed in court or any other judicial for a on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application."

or wilful injury to the person or property or another, or violation of law, whether wilful or negligent, are against the policy of the law.”

It is particularly interesting that this case was brought by the applicant on First Amendment (freedom of speech) grounds and successfully persuaded the Court that once the string was delegated, the applicant’s rights would be abrogated. Furthermore, the Court considered the public interest in granting an injunction: “Here, the public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today’s society. A full hearing on the merits of the case has not been set, but it does set a precedent to suggest that applicants who have gone through ICANN’s own accountability processes may still have recourse to a court of law.

Appeals

ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN.¹⁴¹ This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a “decision” which it will not question.

Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.

The GAC has expressed its concerns about the consistency of the CPE process and asked the ICANN Board to consider implementing an appeal mechanism in the current round of the new gTLD Program. In a letter from the ICANN Board to the GAC Chair¹⁴², the Board declined to do so for the current round. The New gTLD Programme Committee (“NGPC”), “determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. The NGPC recommended that the development of rules and processes for future rounds of the New gTLD Program should explore whether there is a need for a formal review process with respect to Expert Determinations more broadly, including CPE determinations.”

¹⁴¹ *Ibid* (emphasis added) “Applicant acknowledges and accepts that applicant’s nonentitlement to pursue any rights, remedies, or legal claims against ICANN or the ICANN affiliated parties in court or any other judicial fora with respect to the application shall mean that applicant will forego any recovery of any application fees, monies invested in business infrastructure or other startup costs and any and all profits that applicant may expect to realize from the operation of a registry for the TLD; **provided, that applicant may utilize any accountability mechanism set forth in iCANN’s bylaws for purposes of challenging any final decision made by ICANN with respect to the application.**”

¹⁴² Dated 28 April 2015

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

In brief, we recommend ICANN to:

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

8. Concepts for the next gTLD application rounds

The following are some ideas that arose through our research and discussions which we propose for further consideration by the ICANN community. It may be that a combination of proposals would create a fair and transparent process which meets both GNSO and human rights principles.

Consider community applications first

ICANN staff who have been involved with the current new gTLD round have suggested that in any new round, community applications should be considered first. If, after evaluation, an applicant is deemed to be “community” (in ICANN terms), then no other applications for the applied-for string should be considered.

Consider whether the model applied for geo-names TLDs could offer possibilities for CBA

In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).

Have applications in staggered batches

ICANN could invite “expressions of interest” in applying, asking potential applicants to submit an interest in a string of their choice. ICANN could then advertise the strings in batches, requiring all competing applications to be submitted simultaneously. At the same time, they could ask for any community objections. This would help ICANN manage the workload and make keeping to deadlines feasible. Publishing a timetable for future string batches would also help potential applicants manage their application workload and business expectations. This would also comply neatly with GNSO Principle 9: “There must be a clear and pre-published application process using objective and measurable criteria. “

‘Beauty parade’ for all applications

Rather than having a high bar for priority, ICANN could consider all applications for a particular string together. Retaining the principle of preference for bona fide communities, all applications from self-declared CBAs should be looked at together to determine which one best meets the selection criteria. The criteria would be similar to those in the AGB for CPE.

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

Have a different community track

Most countries around the world have systems in place for the licensing and regulation of community media.¹⁴³ Useful precedents can be borrowed from these existing regimes. For example, in the UK the telecoms and broadcasting regulator Ofcom requires community media, “Not be provided in order to make a financial profit, and uses any profit produced wholly and exclusively to secure or improve the future provision of the service or for the delivery of social gain to members of the public or the target community.”¹⁴⁴ Furthermore, community media must be accountable to the target community.

ICANN already sets more stringent registry conditions for strings delegated to CBAs, so there is a precedent for treating community applicants differently. Setting tougher criteria which would effectively deter any commercial applicant from “gaming” as a CBA would make it much easier to assume that a self-declared CBA actually is one. In effect, it could make the practical application of GNSO Guideline IG H much simpler: claims that an application is in support of a community will be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application.”¹⁴⁵

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

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

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles¹⁴⁶ refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the CBA applicant and

¹⁴³In the US, the FCC licenses non-profit stations but these are meant to be exclusively granted to “educational organizations”, so not of particular relevance to ICANN. In fact, most are licenced to either NPR or religious organisations.

¹⁴⁴See Para 2.2 at <http://licensing.ofcom.org.uk/binaries/radio/community/thirdround/notesofguidance.pdf>

¹⁴⁵ GNSO 2007 Principles and Recommendations

¹⁴⁶ GNSO Principles E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN’s Registry agreement.” Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.” Principle 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to could lead to contract termination. “

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

8. Conclusion

ICANN's remit is to look after the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN's function as a global governance body that develops Internet policy has the capacity to impact on human rights such as the rights to freedom of expression, freedom of association, due process and non-discrimination. This report has reviewed the range of problems encountered by community applicants and sought to identify how such problems could be avoided in future gTLD application rounds. This study aims to catalyse discussion on CBAs and human rights and to contribute to the GNSO Policy Development Process (PDP) on this issue. The findings of the study stem from in-depth analysis of ICANN's policies and procedures, international human rights law and interviews with community-based applicants, ICANN staff and other relevant actors within the ICANN community. This report intends to assist ICANN in implementing its commitment to the global public interest and international human rights law.

The ICANN community went to considerable lengths to prepare the new gTLD program and the Applicant Guidebook as the user manual for the process. It is inevitable that there would be problems with the process as a whole and community-based applications; the process was brand new and it was expected that situations would arise that could not have been anticipated. The first round of applications provides the ICANN community with a wealth of information based on which ICANN's policies and procedures can be re-evaluated to improve ICANN's policies and procedures for the subsequent round of gTLD applications.

Our study reveals that the intended goal of the concept of prioritising communities is insufficiently developed. It is insufficiently clear which public interest values are served by CBAs and which types of individuals or groups should be regarded as communities to fulfil this goal. The ICANN community should invest time in fundamentally re-assessing the purpose of CBA to be able to provide a clear insight into the values it is meant to serve. This will provide the necessary guidance on the definition of communities to provide delegated decision-makers, such as the ICC and EIU, with the contextual background required for them to decide on objections and CPE in the light of the public interest purpose of community priority. The current assessment by delegated decision-makers based on strict metrics alone as set out in the AGB and CPE Guidelines is insufficient to live up to due process standards.

In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.¹⁴⁷ Here, he took to task the fact that the BGC has “a very narrow view of its own jurisdiction in considering reconsideration requests.” He points out that “it has always been open to ICANN to reject an EIU recommendation, especially when public interest considerations are involved.” As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it “has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency”. We endorse his view and hope that our report will strengthen the argument

¹⁴⁷ Available at <http://www.lahatte.co.nz/>.

behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.

In delegating global top level domains, ICANN is allocating scarce and valuable resources in a competitive market, much the way governments and regulators allocate spectrum. Just as spectrum is allocated through a combination of: auctions (typically for telecommunications use where only light touch obligations are placed on the use of spectrum), specific allocation for government and defence need, and special licensing (for broadcasting with particular obligations on use), ICANN delegates domain names for generic purposes, specific geographic country use, and special community use. The process for special delegations is still in its infancy and, as demonstrated in this report, is in need of considerable re-evaluation and development. The opportunities for ICANN as an exemplar for global governance are enormous as it builds on its multi-stakeholder model to become a truly international and inter-state body. But just as regulators have learned to be “principles-based”, ICANN must learn to take decisions that are not simply binary ones developed from “box ticking” assessments. ICANN must develop confidence in taking judgements based on its core values and principles.

List of interviewees

- Mark Carvell, member GAC, UK
- Dr Olga Cavalli, member GAC, Argentina
- Avri Doria, member GNSO, Community TLD Applicant Group
- Christine Willett, ICANN staff
- Chris LaHatte, ICANN Ombudsman
- Herb Waye, ICANN Ombudsman
- Representative from CORE Registry: Werner Straub
- Representatives from Decherts LLP: Erica Franzetti, Harsh Sancheti and Erin Yates.
- Representative from dotgay LLC/.Gay application: Jamie Baxter
- Representatives from DotMusic/.MUSIC application: Constantine Roussos, Tina Dam, Paul Zamek, Jason Schaffer
- Representatives from EBU/.RADIO application: Alain Artero and Giacomo Mazzone

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

Exhibit 20

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben – Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

On October 8, 2015, ICANN published the Economist Intelligence Unit's ("EIU") second Community Priority Evaluation Panel's New gTLD Program Community Priority Evaluation Report for the .GAY gTLD application submitted by the Requester. Reference is made to <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> (hereinafter: the "Second CPE Report").

According to this Second CPE Report, the Community Priority Evaluation Panel concluded that:

"After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation."

Although the Disclaimer contained in the Second CPE Report states that "[...] these Community Priority Evaluation results do not necessarily determine the final result of the application", ICANN has changed the "Contention Resolution Result" into "Into Contention", apparently following the publication of the Second CPE Report.

This action by ICANN is hereinafter referred to as the "Determination", which Requester is seeking to have reconsidered.¹

¹ See Requester's Application Status Page at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>.

Following receipt of the Determination, Requester has also submitted a detailed Request for Information to ICANN under the latter's Documentary Information Disclosure Policy (DIDP).

4. Date of action/inaction:

October 8, 2015, in relation to the publication of the Second CPE Report and the Determination.

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

October 9, 2015.

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

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the "Application").

Requester has elected to participate in the Community Priority Evaluation ("CPE") in accordance with the provisions set out in the Applicant Guidebook.

On October 8, 2015 ICANN published the Second CPE Report that has been drawn up by the EIU, which states that the Requester's application for the .GAY gTLD *"did not prevail in Community Priority Evaluation"*.

Having experienced:

- (a) the process carried out by ICANN in approving the Application following Initial Evaluation;
- (b) the publication of the first CPE Report and the corresponding Determination on October 6, 2014 ("First CPE Report"), in which ICANN determined that Requester's Application did not prevail in Community Priority Evaluation;
- (c) not responding to Requester's Request for Information nor its allegations regarding spurious activity shortly after;
- (d) the Board Governance Committee's Determination in connection with Requester's Request for Reconsideration #14-44 of January 20, 2015,

in which the First CPE Report has been set aside, and a new evaluation by new evaluators has been decided;²

- (e) the publication of the Second CPE Report and the corresponding Determination on October 8, 2015, in which ICANN determined that Requester's Application did – again – not prevail in Community Priority Evaluation;

it has become clear to Requester that:

- (i) the EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook;
- (ii) the EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Second CPE Report and the corresponding Determination;
- (iii) the EIU has not taken into account prior Expert Determinations regarding the .GAY gTLD and Requester's supporters;
- (iv) the EIU has not taken into account relevant information provided to ICANN by Requester prior to and after the commencement of the second CPE process;
- (v) the CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU;
- (vi) the EIU has wilfully and knowingly disregarded the decision of the BGC to appoint two new evaluators in order to perform CPE, which demonstrates (a) that the EIU has a clear bias towards Requester's Application and (b) the EIU has treated Requester and Requester's Application unfairly when performing CPE.

Bearing in mind the above elements, Requester is convinced that the approach taken by ICANN in allowing the latter to define processes and criteria different from those reflected in the Applicant Guidebook, applying scores and scoring criteria that are flawed, in particular by not having conducted a "careful and extensive review" as they have stated in the CPE Report, and this based on the information, arguments and evidence provided herein.

Therefore, the Requester is now facing contention resolution with three other applicants for the same string "*through the other methods as described in Module 4 of the Applicant Guidebook*", requiring Requester to – ultimately – resolve such

² <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>.

contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the Determination had been developed in accordance with ICANN's standards, in particular those set out in the Applicant Guidebook.

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

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and not necessarily having the best interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group by the United Nations, the EU, the USA and in many other countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the self-awareness of this community and its members.

The fact that the gay community is affected by the CPE Report and the Determination is substantiated by the various letters of support for this Reconsideration Request that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce, which have all been communicated to ICANN.

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

According to the Requester, the EIU and ICANN has not acted in compliance with a wide variety of processes, procedures, and rules, in particular ICANN's own By-Laws as well as the Applicant Guidebook at various stages of the CPE process and thereafter, which has materially affected Requester's Application for the .GAY gTLD and more in particular Requester's position for operating such new gTLD in favor of the gay community.

Requester refers to the claims made in its response to the requirements set out in §6 hereof.

8.2. Summary

As will be outlined in further detail below, Requester has identified the following issues:

- (1) ICANN having allowed the EIU to develop processes and criteria outside of ICANN's policy development process and the Applicant Guidebook without providing the Requester with an opportunity to amend its Application, and hence discriminate community-based applicants in general, and Requester in particular (§8.3 below);
- (2) Various process errors in identifying, assessing, verifying and evaluating Requester's Application as well as information provided by third parties against the criteria set out in the Applicant Guidebook (§§8.4 – 8.8 below);
- (3) Various inconsistencies in the CPE evaluation processes when comparing the CPE Report with other reports developed by the EIU in the context of the CPE process (§8.9); and
- (4) Clear violations of ICANN's By-Laws, in particular in relation to ICANN's transparency and accountability mechanisms, by not providing clear answers to Requester's Request for Information under ICANN's Documentary Information Disclosure Policy (§8.10);
- (5) The fact that the EIU appointed the same evaluator during the second CPE as the one who has performed the first CPE, notwithstanding the clear and unambiguous instruction to the EIU to appoint new evaluators for performing the CPE after having set aside the First CPE Report.

8.3. The EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook

Following ICANN's announcement that the EIU would be the sole evaluator for community-based applications having selected CPE, the EIU promulgated its own criteria for conducting such reviews, which included requirements in addition to those in the AGB.

According to the first Recommendation of the GNSO, which formed the basis of the New gTLD Program:

"ICANN must implement a process that allows the introduction of new top-level domains.

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the

*applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.*³

The EIU has published four documents in the timeframe September 2013 – September 2014, being more than one and a half years, respectively two and a half years *after* the publication of the final version of the Applicant Guidebook, and more than a year / two years following the closing of the application window for new gTLDs, which are available on ICANN's website:

- *CPE Panel Process Document*, published on August 6, 2014;
- *CPE Guidelines*, published on September 27, 2013;
- *Updated Frequently Asked Questions (FAQs)*, published on September 10, 2014; and
- *CPE Processing Timeline*, published on September 10, 2014 (jointly referred to as the "CPE Documents").

Notwithstanding the fact that the BGC has confirmed that the latter documents are to be considered policy documents, Requester has not been invited to amend their applications bearing in mind these new or additional requirements when they submitted them in the beginning of 2012 ...⁴

In order to deal with similar situations – for instance in order to respond to concerns expressed by the Governmental Advisory Committee ("GAC") or brand owners – ICANN has also created additional criteria or interpretations thereof, but these processes have been implemented by allowing affected applicants to clarify their position on an individual basis, or even make changes to their applications.

Requester points out in this respect to the policy development process that led to Specification 13 to the Registry Agreement.⁵ In the context of this process, applicants of so-called brand-TLDs have had the opportunity to indicate in a separate document whether they complied with such new rules, processes and criteria, and have even been given the possibility to draft specific terms and conditions for the registration of domain names in their gTLDs.

Also, applicants for TLDs that have been earmarked by the GAC in 2013 as "Category 2 – Exclusive Access" gTLDs have been given the express opportunity to clarify their positions in relation to such qualification and have been given the opportunity to amend their applications accordingly. Specific response forms

³ This was in fact the first GNSO Recommendation, contained in its Principles, Recommendations & Implementation Guidelines, see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

⁴ Requester points out to the fact that the final version of the Applicant Guidebook dates from June 2012, i.e. after the closing of the application window.

⁵ Reference is made to <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>.

have been developed by ICANN to this end, which have been published on the ICANN website.

For community-based gTLDs, however, requests for dialogue expressed by the cTAG went ignored, no such outreach has taken place, no specific clarifying questions have been issued, and no opportunities were presented to clarify – on an individual basis – their position in relation to the CPE Documents that have been used by the EIU in order to prepare their CPE reports.

In Requester's view, ICANN has therefore clearly discriminated community-based gTLDs by changing or "interpreting" the processes and criteria set out in the Applicant Guidebook more than a year and a half after the closing of the application window, without providing applicants with the opportunity to amend their applications accordingly.

Therefore, Requester is of the opinion that:

- ICANN has not acted in compliance with the requirement set out by the GNSO and the ICANN community at large that applicants had to be evaluated against transparent and predictable criteria, since the processes and criteria contained in the CPE Documents are to be considered *"additional selection criteria used in the selection process"* that have not been made *"fully available to the applicants prior to the initiation of the process"*.
- ICANN has obviously discriminated community-based applicants by not providing each applicant, and Requester in particular, on an individual basis with the opportunity to clarify its position in relation thereto.

8.4. The EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination

According to the Applicant Guidebook: *"As part of the evaluation process, evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators."*

In the context of the Second CPE, the EIU has submitted Clarifying Questions to Requester, specifically in relation to Criterion #1 – Community Establishment.

As was the case in the First CPE, Requester received a full score of 4 out of 4 points on this Criterion.

However, Requester did not receive a Clarifying Question in relation to the Criteria where Requester did not receive a passing score, such as the "Nexus"

criterion.

Indeed, according to the EIU's own CPE Panel Process Document, they clearly had this option:

"If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified."⁶

According to the Frequently Asked Questions page relating to ICANN's Clarifying Questions process, it is clear that such questions may be sent from the following panels:

- Background screening
- Geographic name
- String similarity
- DNS stability
- Registry services
- Technical/Operational
- Financial
- Community priority evaluation (if applicable)

ICANN has consistently been sending clarifying questions throughout the Initial Evaluation phase if – according to the evaluation panels' – the applicant's answers to the evaluation questions did not qualify for a passing score. For instance, Requester received a clarifying question in relation to its response to Question 44.

When ICANN forwarded such clarifying question to Requester on March 4 of 2013, ICANN indicated that *"The evaluators will complete the evaluation based on the most current application information, which will include any new information you submit. If the new information introduces inconsistencies in the application, creates new issues, or is still insufficient for the evaluators to award a passing score, the application will be scored and results posted without further notice."* (emphasis added)

Requester did not receive any further questions relating to its answers to community-related Questions 20 *et seq.*, it rightfully assumed that ICANN had no further questions with respect to the answers provided by Requester to such

⁶ CPE Panel Process Document, page 3.

community-related questions.⁷

Since ICANN has nowhere and never indicated that Requester's answers to Questions 20 *et seq.* posed issues to the evaluators, ICANN has misguided and misled Requester by creating the impression that the answers to Questions 20 *et seq.* were sufficient for the evaluators to award a passing score.

8.5. ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE

According to the CPE Panel Process Document, the EIU's "core team" may carry out additional research *"to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures"*.⁸

Referring to the CPE Report, it is clear that such additional research has been carried out by the EIU. For instance, the EIU has referred to an organization within the communities explicitly addressed by the application, which has opposed to Requester's Application, however without disclosing who this organization was, making it impossible for Requester to verify whether the EIU's evaluation was accurate.

Requester is therefore of the opinion that:

- the EIU has not followed its own process, which enabled the EIU to issue clarifying questions to Requester when performing additional research;
- the EIU has not acted in a transparent way by not reaching out to Requester when analyzing additional information outside the context of Requester's Application;
- the EIU deliberately acted in an intransparent way in developing the CPE Report, which does not allow Requester to verify whether the CPE Report in general and the information relied upon by the EIU in particular meet the standards set out in the Applicant Guidebook; and
- ICANN has deliberately not provided access to the information relied upon by the EIU following Requester's Request for Information, which made it impossible for Requester to verify whether the Determination was founded.

8.6. The EIU has not taken into account relevant information provided to ICANN by Requester during the CPE process

⁷ Reference is made to ICANN Case #00022186, where ICANN has asked for additional information in relation to Requester's response to Question 44.

⁸ CPE Panel Process Document, page 3.

Bearing in mind the fact that various incorrect allegations have been made with respect to Requester's Application (on public fora, in the context of objections that have been initiated against Requester's Application, etc.), Requester has reached out to ICANN on various occasions, providing proof of the fact that such allegations were false. Such information included clear and irrefutable evidence of the fact that Q Center, a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based – provided ICANN with false information with respect to Requester's intentions.

However, ICANN allowed misleading and untruthful documents to be presented by at least one other applicant for the .GAY gTLD to be used as evidence, without allowing Requester to provide for any context or challenge.⁹

On April 1st, 2015 Requester provided a letter from Q Center whereby Ms Antoinette Edwards, in her capacity of Q Center's Board of Directors, has provided notice of their "request to void the opposition letter bearing the Q Center name".¹⁰

The Request for Reconsideration process is a mechanism provided by Article IV, Section 2 of the ICANN Bylaws, "by which any person or entity materially affected by an action (or inaction) of ICANN may request review or reconsideration of that action by the Board. According to the criteria developed for this process, "any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that the person or entity has been adversely affected by:

- one or more staff actions or inactions that contradict established ICANN policy(ies); or
- one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information."

11

For these reasons alone, Requester is of the opinion that the EIU has relied on incorrect, at least biased, material information, considering the fact that the EIU has considered this letter of opposition to be sufficient to deduct one point in scoring Requester's Application in relation to the Opposition criterion.

Furthermore, Requester points out to the fact that Q Center is a member of

⁹ More in general, ICANN staff refused to hear comments from cTAG and multiple community applicants concerning vulnerability to spurious activity faced by community applicants when opposed by standard applicants.

¹⁰ <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-14apr15-en.pdf>.

¹¹ <https://www.icann.org/resources/pages/mechanisms-2014-03-20-en>.

CenterLink, as is shown on the latter's website:

<http://www.lgbtcenters.org/Centers/Oregon/482/Q-Center.aspx>.

CenterLink, as a membership and support organization, has provided various letters of support for Requester's Application.¹²

As CenterLink stated in its endorsement letter that has been submitted to ICANN in connection with Requester's Application, "[its] goal is to develop and harness the power of over 200 LGBT community centers in small towns and big cities throughout the United States and abroad".

Requester therefore does not understand how the EIU could have determined that one letter – which has been declared void by the organization itself – from one LGBT community center can be considered "relevant" if the overarching membership organization of which Q Center forms part has repeatedly and consistently expressed support for Requester's Application. Furthermore, Requester does not understand how the EIU could consider a ratio of 1 to more than 200 would be "non negligible".

When reviewing other CPE reports prepared by the EIU, it is clear that the approach taken by the latter is inconsistent, bearing in mind the fact that – by way of example – the letter of opposition provided by the International Radio Emergency Support Coalition against the .RADIO community-based gTLD application has been disregarded by the EIU, notwithstanding the fact that this organization is internationally recognized and even has a Special Consultative Status with the Economic and Social Council of the United Nations (ECOSOC) ...

The EIU (and ICANN) have therefore in Requester's view not complied with their standards of due diligence and transparency, which makes Requester believe that there was a clear bias against Requester's Application. Hence, Requester's Application has been treated unfairly by the EIU.

On the basis of these arguments alone, Requester believes that it is entitled to request reconsideration of the Second CPE Report.

8.7. The EIU has not taken into account relevant expert opinions provided to and decisions taken by ICANN in relation to Requester's Application

It is obvious that the EIU has not taken into account the various decisions taken in the context of Community Objections.¹³

¹² See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>; <https://gtdresult.icann.org/applicationstatus/applicationdetails:downloadattachment/138830?t:ac=444>;

¹³ See ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*; ICDR Case No. EXP/394/ICANN/11, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. United TLD Holdco Ltd*; ICDR Case No.

Requester hereby particularly refers to §22 of the Decision rendered by Prof. Dr. Bernhard Schlink, who was the Expert appointed by the International Chamber for Expertise of the International Chamber of Commerce *in re: The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited* (sic), and many other objections concerning applications relating to the “.gay” and “.lgbt” gTLDs. Indeed, Dr. Schlink recognized in multiple Expert Determinations, after having carefully examined the more stringent criteria and conditions required to initiate Community Objection proceedings that:

“[t]he legitimate interests of the gay community can only legitimize a claim to a gTLD that is exclusively linked to the gay community. A community that represents the legitimate interests of its members can claim a safe and secure position in the society and on the market, and this holds particularly for a community that represents the legitimate interests of a minority. Its claim to a safe and secure position on the society and on the market includes a safe and secure position in the internet. Therefore, while the gay community cannot exclude competition, it could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay’s community application for the string .gay.”¹⁴

And although Requester respects the fact that CPE and Community Objections are distinct processes, it does not understand the reasons why the EIU has simply and entirely disregarded any of these elements in developing the CPE Report, nor has it provided for any reasons why it did not agree with these unambiguous and unilateral decisions to the contrary. Indeed, not a single reference has been made to these Expert Determinations throughout the CPE Report.

Requester is therefore of the opinion that the EIU obviously did not rely on essential information publicly available to ICANN and the EIU that was directly relevant for Requester’s Application. Hence, the EIU (and ICANN) did not act in an open and transparent manner in rendering the CPE Report and the Determination, the outcome whereof is diametrically opposed to previous Expert Determinations endorsed by ICANN.

8.8. The CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU

EXP/392/ICANN/9, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Design, LLC*; and ICDR Case No. EXP/393/ICANN/10, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Domain Holdings Limited*.

¹⁴ See: ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*.

According to the EIU, “consistency of approach in scoring applications is of particular importance”.¹⁵ This has also been a key criterion in selecting independent evaluators for performing Community Priority Evaluations, and has been an essential obligation in the context of the agreement that has been entered into by and between ICANN and the EIU.¹⁶

In order to verify whether the EIU has been consistent, a comparison needs to be made between the elements and arguments used by the EIU in this particular CPE with other CPE results.

8.8.1. The EIU is using different standards than the ones set out in the AGB

According to the criteria for Community Priority Evaluation set out by the Applicant Guidebook, as well as the Community Priority Evaluation (CPE) Guidelines, the following question must be scored when evaluating the application:

“Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.”

“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.” “Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.

“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community. “Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’. “Identify” does not simply mean ‘describe’, but means ‘closely describes the community’. “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has”.

As indicated above and set out in previous submissions, Requester has performed an Internet search, as suggested by the CPE Guidelines, and has found substantial evidence that proves that in common language, the words “gay”, “LGBT” and “LGBTQIA” are used as synonyms. Requester refers to

¹⁵ Community Priority Evaluation Panel Process, page 1.

¹⁶ References to be included.

various references in quality press, including the Economist¹⁷ and the New York Times,¹⁸ where the word “gay” is being used as a “catch-all term”, synonym or *pars pro toto* term for LGBTQIAs.

Requester has not only obtained the official endorsement and support for its application for the .GAY gTLD from the Complainant in the case referred to above, namely the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA),¹⁹ but is also recognized by the ICDR and ICANN as an established institution associated with a clearly delineated community.²⁰

Considering the above, Requester does not understand why, on the one hand, ICANN recognizes the fact that Requester and one of its key supporters “*could file and have filed its own application for a gTLD that is designed to service the gay community and to operate accordingly*” as expressly confirmed by the ICDR, whilst, ICANN and the CPE Panel determining on the other hand that “*the string does not identify or match the name of the community as defined in the application*”.

Furthermore, Requester does not understand that although the ILGA has obtained the recognition from the ICDR – and hence also from ICANN – to be “*clearly recognized by the community members as representative of the community*” as required by the AGB in order to qualify for a score of 2 out of 2 points on the CPE criterion “Support”, the EIU has countered such argument without even having reached out to the ILGA nor the Requester in the context of the CPE process ...

Therefore, it is undisputedly so that the evaluation processes and procedures designed and followed by the EIU is flawed, at least has generated outcomes that are inconsistent with previous determinations made by or on behalf of ICANN.

8.8.2. Community definition not to include non-community members

As regards the definition of the community contained in the various community-based applications, the EIU has considered whether or not the applicant has attempted to include certain “non-community members”. Rightfully so, registries of community-based gTLDs should restrict the registration of domain names to members of their respective community. Therefore, the EIU should indeed assess whether or not a particular applicant is basically not imposing any restrictions or requirements upon registrants of domain names in the proposed

¹⁷ <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;

<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;

¹⁸ http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&_r=0.

¹⁹ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>;

²⁰ See ICDR Case No. EXP/390/ICANN/7, §13.

community-based gTLDs.

In the case of Requester's Application, the EIU has determined that:

"The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus."

The CPE Panel emphasizes the fact that Requester has included "allies" in its community definition, and appears to have found therein an argument for determining that Requester's community definition has been "overreaching substantially" beyond the "gay" concept.

According to Requester:

- the EIU has not taken into account Requester's specific arguments for including "allies" into its community definition;
- the EIU has in this context not considered the Requester's requirement for an "ally" to be verified by Authentication Partners prior to being eligible to register a domain name in the .GAY gTLD and, in general, has ignored endorsing organizations with defined roles for allies;
- the EIU has accepted in other CPE Reports similar concepts as eligibility requirement for a "community-based gTLD"; and
- no clarifying questions have been issued in this respect.

LGBTQIA stands for "Lesbian", "Gay", "Bisexual", "Transgender", "Queer", "Intersex", and "Allies" and is one of the commonly used terms to emphasize a diversity of sexuality and gender identity-based cultures.

As Requester has demonstrated throughout its Application, it has obtained the support from more than 240 organizations and companies from all over the world for its .gay gTLD application, all of which are supporting at least one of the cultures set out above. Given their membership, posture and outreach, it goes without saying that these sponsors will play an important moral, and – for Authentication Partners – even an operational role in the establishment and management of the .gay gTLD.

Now, since an organization or company in itself can impossibly be "lesbian" or "gay", Requester has been seeking for a way to also position these companies and organizations in this community definition. For this reason, Requester has referred to these organizations as "allies" in the context of the LGBTQIA definition.

Furthermore, as stated in the Application, LGBTQIAs are a vulnerable group in many countries and societies, and too often still the subject of prosecution for who they are. In order to put in place safeguards for those gay community members who do not wish to be directly associated with a domain name

registration, organizations and companies who in essence cannot be “non-heterosexual” should have the possibility to act as a proxy service, which is common practice in the domain name industry.

In any case, any such “ally” must be approved by an Authentication Partner in order to be able to register a domain name in its own name or in the name or on behalf of a third party who meets the LGBTQI requirements.

Irrespective of the fact that the EIU has clearly misunderstood the concept of “allies” in Requester’s Application, it is obvious that they have attempted to find herein an argument that Requester is over-reaching substantially beyond the community. Requester points out to the fact that the EIU does not seem to have issues with similar concepts in other CPE reports, which clearly shows that the EIU has not been consistently applying the policy requirements for community-based applications:

- the community definition contained in the .OSAKA gTLD application # 1-901-9391 states: *[m]embers of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following: [...] Entities, including natural persons who have a legitimate purpose in addressing the community.*” (emphasis added);²¹
- the community definition contained in the .HOTEL gTLD application #1-1032-95136 includes: *“Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2”*;

Request does not understand why, on the one hand, an “ally” who assumes a supporting role for a vulnerable individual or group of individuals and, on the other hand, “other organizations representing hotels” are treated differently in view of community membership criteria. Nor does it understand why someone who “self-identifies as having a tie to [the community]” or “entities or natural persons who have a legitimate purpose in addressing the community” can possibly be considered as have a closer connection to a community than an “ally”, especially when in the latter case such connection is verified by an independent Authentication Partner, and in the former case a self-identified “tie” to the community suffices ...

It is therefore clear to Requester that the EIU has used double standards in preparing the various CPE reports, and is discriminating between the various community-based applicants, since they have been evaluating similar definitions and criteria in a different way.

²¹ See the .OSAKA CPE Report, page 2.

8.8.3. The EIU has taken different approaches in other CPE reports, which clearly indicates that they have not applied the evaluation criteria in a consistent way

As referred to above, the EIU has treated similar situations in dissimilar ways, for instance by:

- on the one hand, recognizing the letter of objection submitted by Q Center of Portland, Oregon as “relevant”, notwithstanding the fact that the organization notified that this letter was voided; and
- on the other hand, disregarding the letter of objection of an international organization that has a Special Consultative Status with the ECOSOC and is a member of the “radio” community as “not relevant” in the determination regarding the .RADIO gTLD application submitted by the European Broadcasting Union.

8.9. Support

In relation to the criterion “Support”, the EIU concludes in the CPE Report that

“There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”

It does not appear to Requester that there is one single organization recognized by the “radio” community²² or the “hotel” community²³, who have both obtained a score of 2 out of 2 points on this criterion. Based on these CPE reports, it is clear that also these community-based applicants appear to have sought (and found) support from a number of national and international endorsers in a similar way than Requester, who only scored 1 out of 2 points.

8.10. The EIU has engaged the same evaluator, notwithstanding the BGCs clear instruction to appoint two different evaluators to perform the new CPE

²² <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

²³ <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

In its Determination of January 20, 2015 regarding Requester's Request for Reconsideration 14-44, the BGC determined:

*"[...] that the CPE Panel Report shall be set aside, and that the EIU shall identify two different evaluators to perform a new CPE for the Application. Further, the BGC recommends that the EIU include new members of the core team that assesses the evaluation results."*²⁴

However, according to the verification emails that have been sent by the EIU, it appears that both during the first and the second CPE, the EIU appointed the same evaluator for performing the new CPE. Indeed, according to the evidence attached hereto (containing verification emails sent by the EIU during the first and the second CPE), Mr Benjamin Parisi of the EIU was responsible for performing the CPE, which is a clear violation of the BGC Determination.

For this reason alone, the Second CPE Report should be set aside by ICANN.

8.11. Conclusion

Requester has paid USD 22,000 in order to participate to the CPE Process, which is an amount that is far higher than the USD 10,000 estimate that has been referred to in the AGB. One would expect that for such an amount, ICANN and the CPE firm, under the delegated authority of ICANN, would act diligently when applying the standards set out in the AGB, follow the processes defined prior to the establishment of the New gTLD Program.

During the development of both CPE Reports and both EIU Determinations, it is clear that:

- criteria and standards have been used that have been developed outside of ICANN's policy development processes more than two years after the closing of the application window in May of 2012, without having given Requester the opportunity to amend its application;
- additional research has been performed without verifying and validating the outcome thereof with the Requester;
- undisputable process errors have been made by the EIU when verifying the identity and statements made by Requester's supporters, including but not limited to performing the CPE by the same evaluators, which shows that there is a clear bias against Requester's Application and that the latter has been treated unfairly;
- information that has been provided by Requester to ICANN in order to counter and put into context certain false information has been

²⁴ See BGC Determination, pages 2 and 31-32.

disregarded despite multiple attempts to clarify any issues that have arisen;

- inconsistent standards have been used by the EIU in actually performing the evaluation, especially when comparing the arguments and information relied upon by the EIU in other CPEs.

Therefore, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester's Application in a discriminatory manner.

9. What are you asking ICANN to do now?

Considering the information and arguments included in this Reconsideration Request, Requester requests ICANN to:

- (i) acknowledge receipt of this initial Reconsideration Request;
- (ii) suspend this initial Reconsideration Request until ICANN has provided clear and detailed answers to Requester's new Request for Information, submitted in the context of ICANN's Documentary Information Disclosure Policy, on October 22, 2015 and allow Requester to submit a final Reconsideration Request within a 15-day timeframe following receipt of the requested information;
- (iii) review the Requester's requests referred to in §§8.2 to 8.11 above, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN, and hence to set aside the Determination as set out below;
- (iv) in the meantime, suspend the process for string contention resolution in relation to the .GAY gTLD;
- (v) set aside and disregard the Second CPE Report;
- (vi) request a third party other than the EIU to perform a new determination at ICANN's cost in view of the CPE criteria set out in the Applicant Guidebook;
- (vii) within a mutually to be agreed upon timeframe following the appointment of such third party evaluator, allow Requester to submit a written statement to such third party;
- (viii) following that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue;

(ix) if ICANN would decide not to award the remedies sought by Requester set out in (i) to (viii) above, Requester respectfully requests ICANN to determine that the Application meets the required criteria for eligibility under the Community Priority Evaluation criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application:

- a score of 4 out of 4 points in relation to Criterion #2: Nexus between Proposed String and Community; and
- a score of 4 out of 4 points in relation to Criterion #4: Community Endorsement,

whilst keeping the scores on the other criteria reflected in the CPE Report.

(x) In any case, given the issues encountered by Requester in the context of CPE, provide Requester with a full refund of the CPE fees paid by the latter to ICANN.

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

As stated above, ICANN published on October 8, 2015 its Determination on the basis of the Second CPE Report, stating that Requester's application for the .GAY gTLD did not meet the criteria for community-based applications, as defined in the Applicant Guidebook.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

N/A

Do you have any documents you want to provide to ICANN?

Additional evidence will be provided in the context of the final Reconsideration Request that will be submitted following ICANN's determination in the context of Requester's Request for Information under ICANN's Documentary Information Disclosure Policy.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

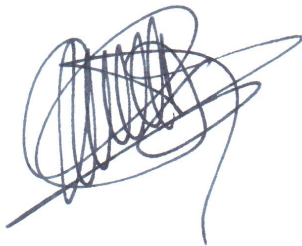
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be 'Bart Lieben', with a stylized, scribbled appearance.

October 22, 2015

Bart Lieben

Date

Attorney-at-Law

Exhibit 21

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-21
1 FEBRUARY 2016**

The Requester, Dotgay LLC, seeks reconsideration of: (1) the second Community Priority Evaluation (CPE) panel's report finding that the Requester did not prevail in CPE for the .GAY string (Second CPE Report), and ICANN's acceptance of that report; and (2) ICANN staff's response to the Requester's request pursuant to ICANN's Documentary Information Disclosure Policy (DIDP) for documents relating to the Second CPE Report.

I. Brief Summary.

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community based, the Requester was invited to and did participate in CPE for .GAY. The Requester's Application did not prevail in the first CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that it had not prevailed (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application, which contradicted an established CPE procedure. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE. As a result, the Application remains in contention with the other applications for .GAY. The contention set can be resolved by ICANN's last resort auction or by some other arrangement among the involved applicants. The Requester now seeks reconsideration of the Second CPE Report and ICANN's acceptance of it.

The Requester also filed a request pursuant to ICANN's DIDP (Second DIDP Request), seeking documents relating to the Second CPE Report. In its response (Second DIDP Response), ICANN staff identified and provided links to all publicly available responsive documents, and further noted that many of the requested documents did not exist or were not in ICANN's possession. With respect to those requested documents that were in ICANN's possession and not already publicly available, ICANN produced a number of documents to the Requester, and further explained that certain other documents would not be produced because they were subject to one or more of the Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the DIDP. The Requester also seeks reconsideration of the Second DIDP Response.

As for its challenge to the Second CPE Report, the Requester makes several claims as to why it contends reconsideration is warranted, including the Requester's assertions that:

- (i) the EIU imposed additional criteria or procedural requirements beyond those set forth in the Applicant Guidebook (Guidebook);
- (ii) the Second CPE Panel failed to comply with certain established ICANN policies and procedures because, in the Requester's view, the Second CPE Panel: (1) posed an insufficient number of clarifying questions; (2) is obligated to, but did not, disclose the identity of the objector to the Application; (3) wrongly concluded that an opposition letter was relevant; (4) should have considered certain unrelated community objection determinations; (5) did not adhere to the Guidebook in scoring element 2-A, nexus; (6) scored element 2-A, nexus, in a manner that is inconsistent with other CPE reports; and (7) scored element 4-A, support, in a manner that is inconsistent with other CPE reports; and

(iii) the EIU did not comply with the BGC's directives in its determination on Request 14-44.

The Requester seeks reconsideration of ICANN's Second DIDP Response on the grounds that ICANN staff improperly determined that some of the documents sought by the Requester were subject to the DIDP Nondisclosure Conditions and/or are not in ICANN's possession.

The Requester's claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the Second CPE Panel or ICANN staff. Rather, the Requester simply disagrees with the Second CPE Panel's determination and scoring of the Application, and with ICANN staff's application of the DIDP Nondisclosure Conditions. Substantive disagreements with the Second CPE Report and the Second DIDP Response, however, are not proper bases for reconsideration. Because the Requester has failed to show that either the Second CPE Panel or ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 15-21 be denied.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.¹

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.² Those applications were placed in a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in section 4.2 of the Guidebook. It

¹ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

² See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.³

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).⁴ The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in CPE.⁵

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.

On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).⁶ ICANN identified and provided links to all publicly available documents responsive to the First DIDP Request, including comments regarding the Application, which were posted on ICANN's website and considered by the First CPE Panel.⁷ ICANN noted that any additional documents responsive to the requests were either: (1) already public; (2) not in ICANN's possession; or (3) not appropriate for public disclosure because they were subject to certain Nondisclosure Conditions and that the public interest in disclosing the information did not outweigh the harm that may be caused by such disclosure.⁸

³ See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

⁴ *Id.*

⁵ See CPE Report, available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁶ See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

⁷ See *id.*, Pgs. 3-4.

⁸ See generally *id.*

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44).⁹ Revised Request 14-44 set forth different arguments than those raised in the original Request 14-44, but still sought reconsideration of the First CPE Report and ICANN's acceptance of it, and also sought reconsideration of the First DIDP Response.

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.¹⁰ The BGC specified that "new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel's Report."¹¹

In accordance with the BGC's determination, the EIU administered the Second CPE, appointing two new evaluators and one new core team member.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.¹²

On 22 October 2015, the Requester submitted Reconsideration Request 15-21 (Request 15-21), seeking reconsideration of the Second CPE Report and ICANN's acceptance of it.

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN's DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.

On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).¹³ ICANN produced some documents in response to the Second DIDP Request, and

⁹ See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁰ Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>.

¹¹ *Id.* at Pgs. 31-32.

¹² Second CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

also identified and provided links to all publicly available documents responsive to the Second DIDP Request. ICANN noted that any additional documents responsive to the requests were either: (1) already public; (2) not in ICANN’s possession; or (3) not appropriate for public disclosure because they were subject to certain Nondisclosure Conditions and that the public interest in disclosing the information did not outweigh the harm that may be caused by such disclosure.¹⁴

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Revised Request 15-21), which still seeks reconsideration of the Second CPE Report and ICANN’s acceptance of it, and also seeks reconsideration of the Second DIDP Response.¹⁵

On 12 January 2016, the President of UN-GLOBE sent a letter to ICANN regarding dotgay LLC’s Application and Reconsideration Request 15-21, which ICANN reviewed and considered.

On 13 January 2016, the Requester sent a letter to ICANN regarding its Application and Reconsideration Request 15-21, which ICANN reviewed and considered.

B. Relief Requested.

The Requester asks that ICANN:

1. “[S]uspend the process for string contention resolution in relation to the .GAY gTLD;”
2. “[R]eview the Requester’s above requests, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN[.]”

(continued...)

¹³ DIDP Response, *available at* <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁴ *Id.*

¹⁵ *See generally* <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

3. “[S]et aside the Second CPE Report and the resulting Determination;”
4. “[R]equest a third party other than the EIU to perform a new determination at ICANN’s cost in view of the CPE criteria set out in the Applicant Guidebook;”
5. “[W]ithin a timeframe of one month following the appointment of such third party evaluator, allow Requester to submit a written statement to such third party;” and
6. “[F]ollowing that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue[.]”
7. In the alternative, the “Requester respectfully requests ICANN to reconsider the Determination and determine that the Application meets the required thresholds for eligibility under the [CPE] criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application” a score of four out of four points with respect to the nexus and community endorsement criteria.
8. “In any case, given the issues encountered by Requester, provide Requester with a full refund of the CPE fees[.]”¹⁶

III. The Relevant Standards For Reconsideration Requests, CPE, and DIDP.

A. Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁷ The Requester challenges staff action. Dismissal of a

¹⁶ Request, § 9, Pgs. 24-25.

¹⁷ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or

request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.¹⁸

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the Second CPE Panel violated any established policy or procedure.

B. Community Priority Evaluation.

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – has published supplementary guidelines (CPE Guidelines) that provide more detailed scoring guidance, including scoring rubrics, definitions of

(continued...)

(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

¹⁸ See BGC Recommendation on Reconsideration Request 13-5, *available at* <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.

key terms, and specific questions to be scored.¹⁹

CPE will occur only if a community based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.²⁰ CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.²¹ A CPE panel's role is to determine whether the community based applicant fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

C. Documentary Information Disclosure Policy.

ICANN considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN's operational activities. In that regard, ICANN has identified many categories of documents that are made public as a matter of due course.²² In addition to ICANN's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN make public documentary information "concerning

¹⁹ CPE Guidelines available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

²⁰ Guidebook, § 4.2.

²¹ *Id.* at § 4.2.2.

²² See ICANN Documentary Information Disclosure Policy, *available at* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.²³

In responding to a request for documents submitted pursuant to ICANN’s DIDP, ICANN adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).²⁴ The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN’s website].”²⁵

Per the DIDP, ICANN reserves the right to withhold documents if they fall within any of the DIDP Nondisclosure Conditions, which include, among others: (i) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...]”; (ii) “[i]nformation provided to ICANN by a party that...[could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...]”; and (iii) “[c]onfidential business information and/or internal policies and procedures.”²⁶ Notwithstanding the above, information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.²⁷

IV. Analysis And Rationale.

²³ *Id.*

²⁴ See DIDP Response Process, available at <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

²⁵ *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁶ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁷ *Id.*

The Requester seeks reconsideration of the Second CPE Report finding that the Application did not prevail in the Second CPE, as well as reconsideration of ICANN staff's Second DIDP Response. As discussed below, the Requester's claims do not identify any conduct by the EIU or ICANN staff that contradicted an established policy or procedure, which is required to support reconsideration.

A. The EIU Did Not Improperly Impose Any Additional Criteria Or Procedural Requirements.

The Requester claims that the EIU promulgated four documents after the publication of the final version of the Guidebook that the Requester contends impose "new or additional requirements": (1) the EIU's CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN's CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline) (collectively, CPE Materials).²⁸ The Requester contends that the EIU's reliance upon these documents constitutes discrimination against community based applications because such applicants were not permitted to amend their applications after these documents were published.²⁹ The Requester also argues that the EIU's use of these documents violates the policy recommendations or guidelines issued by the Generic Names Supporting Organization (GNSO) relating to the introduction of new gTLDs.³⁰

As a threshold issue, any challenge to the CPE Materials is time-barred. The last of the CPE Materials was published on 10 September 2014. Reconsideration requests challenging ICANN staff action must be submitted within 15 days of "the date on which the party submitting the request became aware of, or reasonably should have become aware of, the

²⁸ Request, § 8.3, Pgs. 6-8. The CPE Materials are the Requester's Annexes 4A-4D.

²⁹ *Id.* at Pg. 7.

³⁰ *Id.*

challenged staff action.”³¹ The proper time to challenge the development of the CPE Materials has long since passed.

Moreover, none of the CPE Materials comprise an addition or change to the terms of the Guidebook:

- The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook’s provisions concerning CPE³² and summarizing those provisions.³³ The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements. The Requester has identified no specific aspect of the CPE Panel Process Document that imposes obligations greater than or different from those set forth in the Guidebook.³⁴
- The CPE Guidelines expressly state that they do “not modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook].”³⁵ Rather, the Guidelines are “an accompanying document to the [Guidebook] and are meant to provide additional clarity around the scoring principles outlined in the [Guidebook] . . . [and to] increase transparency, fairness, and predictability around

³¹ Bylaws, Art. IV, § 2.5

³² The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues was selected as the CPE panel firm through ICANN’s public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

³³ CPE Panel Process Document, available at <https://newgtlds.icann.org/en/applicants/cpe>.

³⁴ The CPE Panel Process Document provides that letters submitted in support of or in opposition to an application that the EIU deems relevant are forwarded to the CPE evaluators, who verify them. *Id.* at Pg. 5. The Requester cites a blog post written by the ICANN Ombudsman where he refers to an EIU comment that reiterates its adherence to this policy. The Requester argues that because the EIU (accurately) states that “verification is not required by the [Guidebook,]” this confirms “that the EIU has not applied the [Guidebook’s] criteria and procedures, but rather its own processes.” (See Request, § 8.3, Pg. 8 (citing <https://omblog.icann.org/>)). However, the CPE Materials are entirely consistent with the Guidebook, for the reasons discussed above. Indeed, reconsideration was previously granted with respect to Request 14-44 based upon the EIU’s inadvertent failure to verify certain letters submitted in support of the Application; that the EIU has complied with those same verification procedures in the Second CPE cannot now support reconsideration.

³⁵ CPE Guidelines, available at <https://newgtlds.icann.org/en/applicants/cpe>, Pg. 2.

the assessment process.”³⁶ In addition, the CPE Guidelines were published after extensive input from the Internet community,³⁷ and are “intended to increase transparency, fairness and predictability around the assessment process.”³⁸ Indeed, the final version of the CPE Guidelines “takes into account all feedback from the community.”³⁹ The Requester does not provide any examples of a requirement set forth in the CPE Guidelines that contravenes the Guidebook.

- The FAQ Page does not impose any CPE requirements.⁴⁰ Rather, the FAQ Page summarizes requirements in the Guidebook and accompanying CPE documents, and provides information such as the estimated duration of a CPE and applicable fees. The FAQ Page makes clear that all CPE procedures must be consistent with the Guidebook: “The CPE guidelines are an accompanying document to the [Guidebook] and are intended to provide additional clarity around process and scoring principles as defined in the [Guidebook]. The CPE guidelines do not change the [Guidebook] framework or change the intent or standards established in the [Guidebook].”⁴¹
- The CPE Timeline does not impose any requirements, but instead summarizes the timeframes typical for the CPE process.⁴² The Guidebook does not impose any deadlines upon either CPE participants or the EIU, thus there is no conflict between the CPE Timeline and any applicable policy or procedure.

³⁶ *Id.*

³⁷ See Community Priority Evaluation (CPE), *available at* <http://newgtlds.icann.org/en/applicants/cpe>.

³⁸ CPE Guidelines, Pg. 2.

³⁹ See Final Community Priority Evaluation Guidelines Published, *available at* newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

⁴⁰ Updated CPE Frequently Asked Questions (FAQs), *available at* <https://newgtlds.icann.org/en/applicants/cpe>.

⁴¹ *Id.* at Pg. 4.

⁴² CPE Processing Timeline, *available at* <https://newgtlds.icann.org/en/applicants/cpe>.

The Requester claims ICANN should have permitted applicants to amend their community based applications after the promulgation of the CPE Materials.⁴³ However, as set forth above, the CPE Materials did not effectuate any amendment to the Guidebook, or render more stringent any requirement set forth therein.

Further, nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested. On 8 August 2007, the GNSO published the Final Report on the Introduction of New Generic Top-Level Domains (GNSO Final Report), which sets forth the principles and implementation guidelines for the introduction of new gTLDs.⁴⁴ On 28 June 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs as set forth in the GNSO Final Report.⁴⁵ After approval of the 19 policy recommendations, ICANN undertook an open and transparent implementation process, culminating in the Board's approval of the Guidebook. Actions taken pursuant to the Guidebook – such as the development of the CPE Materials – are not inconsistent with the relevant GNSO recommendations.

In sum, no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit.

B. No Reconsideration Is Warranted With Respect to the Second CPE Report.

The Requester raises seven arguments as to why reconsideration is warranted with respect to the Second CPE Report. The Requester contends that the Second CPE Panel: (1) posed an insufficient number of clarifying questions; (2) is obligated to, but did not, disclose the identity of the objector to the Application; (3) wrongly concluded that an opposition letter was

⁴³ Request, § 8.3, Pgs. 6-7.

⁴⁴ See <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

⁴⁵ See http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm#_Toc76113171.

relevant; (4) should have considered certain unrelated community objection determinations; (5) did not adhere to the Guidebook in scoring element 2-A, nexus; (6) scored element 2-A, nexus, in a manner that is inconsistent with other CPE reports; and (7) scored element 4-A, support, in a manner that is inconsistent with other CPE reports. The Requester's claims do not support reconsideration because none identify any policy or procedure violation.

1. No Policy Or Process Requires The EIU To Ask Clarifying Questions.

The Requester claims reconsideration is warranted because the EIU “misguided and misled” the Requester into thinking it had garnered a passing score as to each CPE criteria because the Second CPE Panel did not pose any clarifying questions (CQs) regarding the Application’s responses to “community-related questions.”⁴⁶ The Requester further asserts that, because the Second CPE Report noted that the Requester’s responses to certain CQs proved useful to the analysis, the Second CPE Panel had an obligation to pose CQs with respect to each element for which the Application did not garner the full score.⁴⁷ The Requester’s argument is based upon the process for CQs that applied during Initial Evaluation (IE) but that process does not apply in CPE. That is, while it is the case during IE that the issuance of a CQ signals that “additional information is needed before a passing score can be given,”⁴⁸ in CPE, the fact that no CQs were issued with respect to a given element does not necessarily mean full points will be awarded, but instead simply that the CPE panel has not requested any further information regarding it. ICANN has never stated that the CQ process for IE extends to CPE. In fact, the CPE Panel Process Document provides that: “*If* the core team so decides, the EIU *may* provide a

⁴⁶ Request, § 8.4, Pgs. 8-9.

⁴⁷ *Id.* at Pg. 9.

⁴⁸ See <http://newgtlds.icann.org/en/applicants/clarification-questions/faqs>.

clarifying question (CQ) to be issued via ICANN to the applicant”⁴⁹ Indeed, the Requester acknowledges that there is no established policy or procedure *requiring* CPE panels to pose CQs to applicants and that the decision to ask CQs is optional.⁵⁰ In any event, the Requester has not identified any material information that was not available to the Second CPE Panel based on the number of CQs posed. Absent any indication of what information was not available (and which required clarification), or a specific policy or procedure requiring CPE panels to pose CQs, no reconsideration is warranted based on the fact that the Second CPE Panel only posed CQs with respect to some of the elements for which it did not award the Application full points.

2. No Policy Or Process Required The Second CPE Panel To Identify The Objector To The Application.

The fourth CPE criterion, community endorsement, evaluates community support for and/or opposition to an application through the scoring of two elements—4-A, “support” (worth two points), and 4-B, “opposition” (worth two points).⁵¹ Pursuant to the Guidebook, to receive a maximum score for the opposition element, there must be “no opposition of relevance” to the application, and a score of one point is appropriate where there is “[r]elevant opposition from one group of non-negligible size.”⁵² Here, the Second CPE Panel awarded the Requester one out of two points, because it:

determined that there is opposition to the application from one group of non-negligible size. The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason

⁴⁹ CPE Panel Process Document, Pg. 3 (emphasis added).

⁵⁰ Request, § 8.4, Pg. 8.

⁵¹ Guidebook, § 4.2.3.

⁵² *Id.*

forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.⁵³

The Requester contends that reconsideration is warranted because the Second CPE Panel did not identify *which* opponent to the Application the Second CPE Panel refers to in the above-quoted analysis.⁵⁴ While the Requester objects that it is “impossible to . . . verify” whether the opposing entity is relevant and of non-negligible size,⁵⁵ the Requester points to no Guidebook, CPE Guideline, or other policy or procedure requiring a CPE panel to provide the Requester with the name of the opposing entity. Indeed, no such policy exists.⁵⁶ The CPE Guidelines explicitly set forth the evaluation process with respect to the “opposition” element, and do not include any disclosure requirements regarding the identity of the opposition.⁵⁷ No reconsideration is warranted by virtue of the Second CPE Panel’s decision not to identify the objector.

3. Established Policy Requires The CPE Panel—Not Applicants—To Determine The Relevance Of Letters Sent In Opposition To Or In Support Of Applications.

The Requester claims reconsideration is warranted because, according to the Requester, the opposition letter submitted by an entity called Q Center (which is located in Portland, “the city where one of the other applicants for the .GAY gTLD is based”) was subsequently withdrawn by Q Center and should not have been deemed relevant in the first instance.⁵⁸ This argument is factually inaccurate and does not support reconsideration.

⁵³ Second CPE Report, Pg. 11.

⁵⁴ Request, § 8.5, Pg. 9.

⁵⁵ *Id.*

⁵⁶ Moreover, all opposition and support letters evaluated by the CPE Panel are publicly available.

⁵⁷ CPE Guidelines, Pgs. 19-20.

⁵⁸ Request, § 8.6, Pg. 11-12. While the Second CPE Report does not disclose whether the Panel deemed this particular opposition letter relevant, the Second CPE Panel noted that it “has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application.” Second CPE Report at 11.

First, the Requester fails to mention the fact following the retraction of its opposition letter, the Q Center then retracted its withdrawal of the opposition letter and reaffirmed its opposition to the Requester’s Application.⁵⁹ On 8 January 2014, Q Center submitted a letter in opposition to the Application.⁶⁰ On 1 April 2015, Q Center purported to retract that letter of opposition.⁶¹ But on 25 July 2015, prior to the Second CPE, Q Center *withdrew* its letter disavowing its original opposition.⁶² In the 25 July 2015 letter, Q Center specifically states that it “stand[s] by the original letter”—which had opposed the Application—and that the letter withdrawing its opposition to the Application was sent at a time when “Q Center was in a period of major transition and the board could not prioritize [the Requester’s] concerns[.]”⁶³ In other words, Q Center retracted its withdrawal of its opposition letter and *reiterated its original opposition* to the Application. As such, no reconsideration is warranted based on Second CPE Panel’s consideration of the original opposition letter.

Second, there is no policy or procedural violation in the EIU’s consideration of the original opposition letter. The Requester argues that reconsideration is warranted because, in the Requester’s view, the EIU is inconsistent in the manner in which it treats opposition letters. In particular, the Requester claims that the EIU wrongly deemed the Q Center opposition letter relevant while a different CPE panel “disregard[ed] the letter of opposition of an international organization . . . as ‘not relevant’ in the determination regarding the .RADIO gTLD application[.]”⁶⁴ The Requester, however, has identified no procedural violation inherent in

⁵⁹ See <https://www.icann.org/en/system/files/correspondence/oshea-to-chalaby-et-al-25jun15-en.pdf>.

⁶⁰ See <https://www.icann.org/en/system/files/correspondence/mccullough-jones-to-chalaby-et-al-08jan14-en.pdf>.

⁶¹ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-14apr15-en.pdf>.

⁶² See <https://www.icann.org/en/system/files/correspondence/oshea-to-chalaby-et-al-25jun15-en.pdf>.

⁶³ *Id.*

⁶⁴ Request, § 8.8.3, Pg. 17.

these differing results, which were reached with respect to different opposition letters in different cases concerning different strings with different factual scenarios.

Specifically, the Second CPE Panel determined that the opposition letter was relevant because it was sent by an entity of “non-negligible size, as required by the [Guidebook]” and “[t]he grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community.”⁶⁵ Meanwhile, the CPE panel assessing the .RADIO application found that the opposition letters received were not relevant because they were sent “(1) from individuals or groups of negligible size, or (2) were not from communities either explicitly mentioned in the application nor from those with an implicit association to such communities.”⁶⁶ Different outcomes by different independent experts related to different gTLD applications involving different facts and circumstances is to be expected, and does not comprise evidence of any policy or procedure violation. Further, the Requester cites no policy or procedure permitting applicants to supplant CPE panels’ views as to the relevance of letters of support or opposition, which the Requester recognizes is a matter the Guidebook requires CPE panels (and not applicants) to evaluate.⁶⁷

As such, the Requester’s argument that its Application was handled differently than an application for .RADIO fails to support reconsideration, as the Second CPE Panel’s (and ICANN’s) handling of the Q Center correspondence adhered to all applicable policies and procedures.

4. No Policy Or Procedure Required The Second CPE Panel To Consider Determinations Rendered In Community Objection Proceedings.

⁶⁵ Second CPE Report , Pg. 11.

⁶⁶ See .RADIO CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

⁶⁷ Request, § 8.6, Pg. 13; Guidebook § 4.2.3.

The Requester claims reconsideration is warranted because the Second CPE Report did not take into account statements made in expert determinations overruling community objections to applications for the strings .GAY and .LGBT.⁶⁸ This argument fails to support reconsideration because the Guidebook sets forth no requirement that CPE panels consider community objection determinations, and also because here the Second CPE Panel was aware of the statements made in the expert determinations overruling the community objections to the applications for the .GAY and .LGBT strings.

As to the first point, the New gTLD Program's dispute resolution processes, which include the community objection process, provide parties with the opportunity to object to an application and have their concerns considered by an independent panel of experts. In contrast, CPE is a method of resolving string contention and is intended to resolve cases where two or more applicants for an identical or confusingly similar string *successfully complete* all previous stages of the evaluation and dispute resolution processes. The dispute resolution and string contention procedures were developed independently of each other with their distinct purposes in mind. The Guidebook contains no instruction or even suggestion that CPE panels must consider statements made in objection proceedings or determinations, especially those made in objection proceedings regarding a different applied-for string. Given that no established policy or procedure requires CPE panels to consider expert determinations issued to resolve community objections, no reconsideration would be warranted if the Second CPE Panel had not done so.

In any event, this argument is based on a flawed factual premise because the EIU was aware of the community expert determinations relating to the .GAY and .LGBT gTLDs ICANN ensured that the EIU was aware of Request 14-44 when it conducted the Second CPE by

⁶⁸ Request, § 8.7, Pgs. 13-14.

providing the EIU with all materials related to Request 14-44 provided the EIU with all materials related to Request 14-44 and the following instructions:

Our intention was to impress upon the panel and evaluators the reconsideration request materials should be used to inform the evaluation, but it should not be part of the application. The materials should merely be considered relevant, much in the same way that an objection determination may also be considered relevant and inform the panel's understanding of the community. Here the materials may also inform the panel on the "landscape" of the proposed TLD, community, and the applicant.⁶⁹

Request 14-44 makes the same verbatim argument regarding the relevance of the community expert determinations relating to the .GAY and .LGBT gTLDs that are asserted in this Request 15-21, including quoting the paragraph the Requester now argues was most critical for the Second CPE Panel to consider, and also attached those expert determinations as exhibits to Request 14-44, all of which were provided to the EIU for the Second CPE.⁷⁰

In sum, no reconsideration would be warranted had the Second CPE Panel not considered community objection determinations in rendering its report because no policy or procedure requires it to do so, but it did consider pertinent information regarding the relevant objections here in any event.

5. The Second CPE Panel Complied With All Applicable Procedures In Evaluating Element 2-A (Nexus).

The Requester contends that the Second CPE Panel erred in its analysis of the nexus element because it did not take into account the specific statements raised in the Application

⁶⁹ See Email from ICANN staff to EIU, dated 25 February 2015, produced in response to the Requester's DIDP Request, and available at <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

⁷⁰ See 21 October 2015 DIDP Response at Pg. 10, available at <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>; Request 14-44 at Pg. 13, available at <https://www.icann.org/en/system/files/files/request-dotgay-redacted-29nov14-en.pdf>; Request, § 8.7, Pg. 14.

relating to the definition of the gay community.⁷¹ The Requester, however, does not identify any policy or procedure violation, but instead only offers substantive disagreement with the Second CPE Panel’s determination that zero points were warranted with respect to the nexus element.

In awarding zero points for element 2-A (nexus), the Second CPE Panel accurately described and applied the Guidebook scoring guidelines. Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the nexus element, the applied-for string must “match[] the name of the community or [be] a well-known short-form or abbreviation of the community name.”⁷² The Application describes the gay community as including:

individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. . . .

The membership criterion to join the Gay Community is the process of “coming out”. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).⁷³

The Second CPE Panel determined that the Application did not merit any points on the nexus criteria because the string does not “identify” the community. As the Second CPE Panel noted, according to the Guidebook, “identify” in this context “means that the applied for string closely describes the community or the community members, *without over-reaching substantially beyond the community.*”⁷⁴ The Second CPE Panel “determined that more than a

⁷¹ Request, § 8.8.2, Pgs. 16-18.

⁷² Guidebook, § 4.2.3.

⁷³ See Response to Question 20(a), .GAY Application Details, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁷⁴ Second CPE Report, Pg. 5.

small part of the applicant’s defined community is not identified by the applied-for string . . . and that it therefore does not meet the requirements for Nexus.”⁷⁵

The Second CPE Panel concluded that the string did not match the Application’s definition of the community because the “application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals.”⁷⁶ In other words, the Second CPE Panel held that the community definition proposed in the Application was over-inclusive in comparison to the string, because “‘gay’ is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.”⁷⁷ The Second CPE Panel complied with all policies and procedures in reaching this conclusion.

The Requester, however, claims that the EIU “has not taken into account Requester’s specific arguments for including ‘allies’ in its community definition.”⁷⁸ More generally, the Requester argues that reconsideration is warranted because the Second CPE Panel purportedly “has not taken into account arguments provided by Requester in its application, in additional submissions to ICANN, as well as in the context of Clarifying Questions that was issued during the second CPE[.]”⁷⁹ However, the Requester offers no evidence that the Second CPE Panel improperly excluded any document or information from its consideration in rendering the Second CPE Report. In fact, the Second CPE Panel expressly noted that it “has evaluated”

⁷⁵ *Id.* at Pg. 5.

⁷⁶ *Id.*

⁷⁷ *Id.* at Pg. 6.

⁷⁸ Request, § 8.8.2, Pg. 17.

⁷⁹ *Id.* at Pg. 19.

evidence the Requester submitted “both prior to and since its initial evaluation,” and that it also conducted independent research.⁸⁰

In sum, the Requester does not identify any policy or procedure that the Second CPE Panel misapplied in scoring element 2-A, and the Requester’s substantive disagreement with the Second CPE Panel’s conclusion does not support reconsideration.

6. The Second CPE Panel’s Analysis Of Element 2-A (Nexus) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

With respect to the nexus element, the Requester next contends that the EIU has “used double standards in preparing the various CPE panel reports, and is discriminating between the various community-based applicants[.]”⁸¹ Specifically, the Requester notes that the Second CPE Panel found that the Application lacked a nexus to the gay community because the Application’s community definition was over-inclusive insofar as the string .GAY does not identify “transgender, intersex, and ally individuals” yet they are included in the Application’s community definition.⁸² The Requester then cites two CPE panel reports that purportedly show that “the EIU does not seem to have issues with similar concepts” with respect to other applications.⁸³

First, the Requester cites the CPE panel evaluating an application for the string .OSAKA, which awarded full points in the nexus category even though the community definition included not just those living in Osaka but also “those who self identify as having a tie to Osaka.”⁸⁴

Second, the Requester cites the CPE panel evaluating an application for the string .HOTEL,

⁸⁰ Second CPE Report, Pg. 5.

⁸¹ Request, § 8.8.2, Pg. 18.

⁸² Second CPE Report, Pg. 5.

⁸³ Request, § 8.8.2, Pg. 18.

⁸⁴ Annex C-13 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pgs. 1, 4; Request, Annex 8.

which awarded partial points in the nexus category even though it noted there was an insubstantial amount of overreach inherent to the community definition, which includes some entities that are merely “related to hotels.”⁸⁵ Comparing these reports to the Second CPE Report here discloses no inconsistency that could comprise a policy or procedure violation.

As explained above, different outcomes by different independent experts related to different gTLD applications are to be expected, and do not constitute evidence of any policy or procedure violation. For instance, the .OSAKA string has been designated a geographic name string, unlike .GAY.⁸⁶ As such, a host of distinct considerations come into play with respect to each step of the evaluation and, in addressing the nexus component, the CPE panel evaluating .OSAKA specifically referred to the governmental support the applicant had demonstrated.⁸⁷ As for .HOTEL, the CPE panel awarded partial credit to the applicant, finding the string “closely describes the community” and “identifies the name of the community” and noted only one potential deficiency, namely the possibility that a “small part of the community” identified in the application might not match the string name.⁸⁸ Here, in contrast, the Second CPE Report found that the proposed community was significantly over-inclusive.⁸⁹ There is no policy or procedure violation because there is simply no inconsistency: the .HOTEL report found only mild problems with the proposed community definition and awarded a partial nexus score; whereas the Second CPE Report here identified multiple mismatches between the proposed community and the string name, and awarded no points for the nexus element.

⁸⁵ Annex C-14 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pg. 4.

⁸⁶ *See* Initial Evaluation for Interlink Co., Ltd.’s Application for .OSAKA, *available at* <http://newgtlds.icann.org/sites/default/files/ier/viun4exoaqie2hl0qojm7uvi/ie-1-901-9391-en.pdf>.

⁸⁷ Annex C-13 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pg. 4.

⁸⁸ Annex C-14 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pg. 4.

⁸⁹ Second CPE Report, Pgs. 5-6.

In essence, the Requester complains that it lost whereas other applicants prevailed in scoring nexus points, but no reconsideration is warranted on this ground given that the Requester has failed to show that any policy or procedure violation led to the award of zero points.

7. The Second CPE Panel’s Analysis of Element 4-A (Support) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

The Requester contends that reconsideration is warranted because it claims two other CPE panels awarded the full two points with respect to the support criterion (element 4-A) even while finding there was no single organization representative of the entire community, whereas the Second CPE Panel awarded the Requester only one point because no such organization exists.⁹⁰ As explained above, it is to be expected that different panels will come to different conclusions with respect to different applications evaluating different information. Moreover, there is no inconsistency. Those other CPE panels determined that the applicant had provided documented support from a “recognized” community institution, as defined in the Guidebook to mean one “representative of the community.”⁹¹ The Requester was unable to provide documented support from any such group, and for that reason the Second CPE Panel did not award it two points with respect to the support criterion (element 4-A), in accordance with the Guidebook.

The CPE Guidelines provide that an Application will be awarded one point for element 4-A if it demonstrates “[d]ocumented support from at least one group with relevance.”⁹² The Second CPE Panel found that the Application met this one-point standard because at least one

⁹⁰ Request, § 8.9, Pgs. 19-20.

⁹¹ See Guidebook § 4.2.3; See .RADIO CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>; .HOTEL CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

⁹² CPE Guidelines, Pg. 16.

relevant group supported the Application.⁹³ To warrant an award of *two* points, though, it must be the case that the “Applicant is, or has documented support from, *the* recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community[.]”⁹⁴ Here, the Second CPE Panel concluded that the Requester was ineligible for a two-point award given that it is “not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s)” in part because “[t]here is no single such organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.”⁹⁵

The Requester claims reconsideration is warranted because in so concluding, the Second CPE Panel did not consider “decisions that have been taken in the context of Community Objections,” which purportedly suggest that the International Lesbian, Gay, Bisexual, Trans and Intersex Association” is “*the* organization to represent the targeted community.”⁹⁶ This does not warrant reconsideration. For the reasons discussed above in Section B.4, no policy or procedure requires CPE panels to take into account documents submitted or determinations rendered in community objection proceedings.

The Requester also argues that reconsideration is warranted because two other CPE panels (those evaluating .RADIO and .HOTEL) awarded the full two points as to the support element.⁹⁷ Yet there is no inconsistency between those reports and the Second CPE Report here: neither of the previous reports *expressly* found that *no* single organization represents the

⁹³ Second CPE Report, Pgs. 10-11.

⁹⁴ CPE Guidelines, Pg. 16 (emphasis added).

⁹⁵ Second CPE Report, Pg. 11.

⁹⁶ Request, § 8.9, Pg. 20 (emphasis in original).

⁹⁷ Request, § 8.9, Pg. 17.

community.⁹⁸ Here, in contrast, the Second CPE Panel explicitly found that no such organization exists with respect to the gay community. The Second CPE Panel thereafter followed the Guidebook, which does not permit a two-point award in the absence of support from a “recognized” organization, defined as one that is “clearly recognized by the community members as representative of the community.”⁹⁹

As such, there was no procedural irregularity with respect to the “support” prong of the community endorsement element. The Second CPE Panel adhered to the applicable rules and policies and no reconsideration is warranted.

C. The EIU Complied With All Applicable Policies And Procedures In Administering The Second CPE, Including The BGC’s Determination On Request 14-44.

The Requester contends that reconsideration is warranted because “it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,” in contravention of the BGC’s Determination on Request 14-44.¹⁰⁰ However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE,¹⁰¹ the fact is that the author of the emails submitted by the Requester conducted *neither* CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the

⁹⁸ See .RADIO CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, .HOTEL CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

⁹⁹ See Guidebook § 4.2.3.

¹⁰⁰ Request, § 8.11, Pg. 22.

¹⁰¹ See Request, Annexes 9-A, 9-B.

ordinary course of his work for the EIU.¹⁰² Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE.

D. ICANN Staff Adhered To Applicable Policies And Procedures In Responding To The Second DIDP Request.

The Requester does not identify any policy or procedure that ICANN staff violated in responding to the Second DIDP Request. Rather, the Requester merely disagrees with ICANN staff's determination that certain documents requested in the Second DIDP Request were subject to DIDP Nondisclosure Conditions, as well as ICANN's determination that, on balance, the potential harm from the release of the documents subject to the Nondisclosure Conditions outweighs the public interest in disclosure.¹⁰³ As such, reconsideration is not appropriate.

1. ICANN Staff Adhered to the DIDP and DIDP Response Process in Finding Certain Requested Documents Subject to DIDP Nondisclosure Conditions.

The DIDP identifies a number of "conditions for the nondisclosure of information," such as documents containing "information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constitutes, and/or other entities" and "drafts of all correspondence, reports, documents . . . or any other forms of communication."¹⁰⁴ It is ICANN staff's responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP Response Process, "a review is

¹⁰² The Requester notes that the CPE Panel Process Document indicates that one of the "two evaluators assigned to assess the same string verifies the letters of support and opposition." (CPE Panel Process Document at Pg. 5; Request, § 8.11, Pg. 22.) However, that process does not necessarily mean that one of the CPE Panel members must actually send the verification emails from his or her own email account; one of the two evaluators must only be "responsible for the letter verification process." (*Id.*) No policy or procedure precludes the CPE Panel members from delegating the physical sending of the verification emails to the authors of letters submitted in support or opposition to the Application, as occurred here; in fact, the CPE Panel Process Document requires only that authors of letters "send an email *to the EIU* acknowledging that the letter is authentic." (*Id.* (emphasis added).)

¹⁰³ Request, § 8.10, Pg. 21.

¹⁰⁴ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN’s website].”¹⁰⁵ Here, the Second DIDP Request sought 24 categories of documents. In response to all but three, ICANN responded by providing documents and/or links to responsive publicly available documents. With respect to the others—*i.e.*, those numbered 2, 3 and 4 in the Second DIDP Request—ICANN determined that the requested documents were subject to Nondisclosure Conditions. In so determining, ICANN adhered to the DIDP Response Process.

As to items 2, 3 and 4, ICANN staff analyzed the Requester’s request in view of the DIDP Nondisclosure Conditions, determined that to the extent that those documents existed in ICANN’s possession and had not already been made public, those documents were subject to several Nondisclosure Conditions, namely:

Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; and (iii) complying with which is not feasible.

Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors’ Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

¹⁰⁵ See “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Information subject to the attorney client privilege, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.¹⁰⁶

ICANN must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply. In conformance with the publicly posted DIDP Response Process, ICANN undertook such analysis, as noted above, and articulated its conclusions in the Second DIDP Response. While the Requester may not agree with ICANN's determination that certain Nondisclosure Conditions apply to three out of 24 of its requests, ICANN has the discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure.¹⁰⁷ The Requester identifies no policy or procedure that ICANN staff violated in making its determination, and the Requester's substantive disagreement with that determination is not a basis for reconsideration.

2. ICANN Staff Adhered to the DIDP in Finding that Certain Requested Documents Were Not in ICANN's Possession.

The Requester also appears to object to ICANN's representation that certain of the requested documents could not be made publicly available because they were not within ICANN's possession.¹⁰⁸ This argument does not support reconsideration of the Second DIDP Response.

¹⁰⁶ DIDP Response, Pg. 7.

¹⁰⁷ *Id.*

¹⁰⁸ Request, § 8.10, Pg. 21.

The Requester claims that, due to certain provisions found in the contract between ICANN and the EIU, “ICANN has the opportunity to have insight in materials that have been prepared by the EIU in the context of Community Priority Evaluation; however, it has deliberately chosen not to request access to such information[.]”¹⁰⁹ However, the DIDP is more limited in nature. ICANN’s DIDP process is designed to “ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”¹¹⁰ Moreover, the DIDP does not impose any duty on ICANN to compile or create documents, or to gather documents from third parties.¹¹¹ For these reasons, ICANN staff acted in accordance with established policy and procedure in responding to the Second DIDP Request, and in noting that ICANN is not able to make public documents that are not within its possession, custody, or control, including those in the possession of the EIU.¹¹²

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 15-21. If the Requester believes that it has somehow been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board consideration is required. As discussed above, Request 15-21 seeks reconsideration of a staff

¹⁰⁹ *Id.*

¹¹⁰ <https://www.icann.org/resources/pages/didp-2012-02-25-en> (emphasis added).

¹¹¹ *See id.*

¹¹² DIDP Response, Pgs. 9-10.

action or inaction. As such, after consideration of Request 15-21, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 21 November 2015. However, the first practical opportunity for the BGC to fully consider Request 15-21 was at its meetings on 13 January and 1 February 2016, because the Requester asked that Request 15-21 be suspended until ICANN responded to the Requester's Second DIDP Request and the Requester was provided with an opportunity to submit any additional arguments. ICANN agreed, and the Requester was provided fourteen days within which to amend Request 15-21 after receiving the Second DIDP Response on 21 November 2015. The Requester submitted Revised Request 15-21 on 4 December 2015.

Exhibit 22

DotMusic Reconsideration Request (“RR”)

1. Requester Information

Name: DotMusic Limited (“DotMusic”)¹

Address: Contact Information Redacted

Email: Constantine Roussos, Contact Information Redacted

Counsel: Jason Schaeffer, Contact Information Redacted

Name: International Federation of Musicians² (“FIM”)

Email: Benoît Machuel, Contact Information Redacted

Name: International Federation of Arts Councils and Culture Agencies³ (“IFACCA”)

Email: Sarah Gardner, Contact Information Redacted

Name: Worldwide Independent Network⁴ (“WIN”)

Email: Alison Wenham, Contact Information Redacted

Name: Merlin Network⁵ (“Merlin”)

Email: Charles Caldas, Contact Information Redacted

Name: Independent Music Companies Association⁶ (“IMPALA”)

Email: Helen Smith, Contact Information Redacted

Name: American Association of Independent Music⁷ (“A2IM”)

Email: Dr. Richard James Burgess, Contact Information Redacted

Name: Association of Independent Music⁸ (“AIM”)

Email: Charlie Phillips, Contact Information Redacted

Name: Content Creators Coalition⁹ (“C3”)

Email: Jeffrey Boxer, Contact Information Redacted

Name: Nashville Songwriters Association International¹⁰ (“NSAI”)

Email: Barton Herbison, Contact Information Redacted

Name: ReverbNation¹¹

Email: Jean Michel, Contact Information Redacted

2. Request for Reconsideration of: X Board action/inaction

¹ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

² <http://fim-musicians.org/about-fim/history>

³ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁴ <http://winformusic.org/win-members>

⁵ <http://merlinnetwork.org/what-we-do>

⁶ <http://impalamusic.org/node/16>

⁷ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

⁸ <http://musicindie.com/about/aimmembers>

⁹ <http://c3action.org>

¹⁰ <https://nashvillesongwriters.com/about-nsai>

¹¹ <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

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

The above-referenced requesters request to have the .MUSIC Community Priority Evaluation (“CPE”) Report for Application ID. 1-1115-14110 (“Report”)¹² corrected and properly graded to accurately reflect the true nature of DotMusic’s *community establishment, community definition, support* and *nexus* based on established Applicant Guidebook (“AGB”) policies and processes.¹³

The Report provided a total score of ten (10) points, resulting in a failing grade for the Application’s request for Community Status. The result unfairly denied Music Community recognition and necessary intellectual property protection. A review of the Report evidences multiple prejudicial errors that ICANN, both directly and as extension of the Economist Intelligence Unit (“EIU”) Panel, either incorrectly applied ICANN-approved processes and policies, or completely failed to apply ICANN established processes and policies. Such material errors resulted in the incorrect evaluation of the Application, an improper scoring of points when compared to over forty-three (43) independent expert testimony letters (*See* Expert Chart, Exhibit A40)¹⁴ and inconsistent, disparate treatment when compared to prevailing CPE Applicants (*See* CPE Comparison Chart, Exhibit A41).¹⁵ Each error, when corrected and overturned, would result to a total Application score of sixteen (16) points. Despite a materially improper evaluation by the EIU, and the disclaimer contained in the Report that “[...] *these Community Priority Evaluation results do not necessarily determine the final result of the application,*” ICANN accepted the Report’s inaccurate results and changed the “*Contention Resolution Result*” to “*Into Contention.*”¹⁶ Accordingly, DotMusic and other affected global organizations identified above (collectively referenced as the “Requesters”) seek to overturn the “*Contention Resolution Result*” to “*Prevailed Contention.*”

4. Date of action/inaction: February 10th, 2016 PST

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

February 10th, 2016 PST

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

¹² DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, Ex.A1

¹³ *See* AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, §4.2.3

¹⁴ *See* Independent Expert Testimony Letters Scoring Chart, Ex.A40

¹⁵ *See* linear CPE Comparison Chart, Ex.A41

¹⁶ DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; *See* <https://gtdresult.icann.org/applicationstatus/applicationdetails/1392>, Ex. A2

DotMusic is adversely affected by ICANN's actions and inactions. If DotMusic is not awarded .MUSIC, DotMusic, will suffer material brand dilution¹⁷ and be subject to expensive auctions which (as agreed upon by the EU¹⁸) were designed to favor deep pocketed Applicants - such as Amazon and Google (who also have a prior history with the piracy of music: Google as a provider of ad networks to pirate sites and Amazon as a leading advertiser on pirate sites).¹⁹ As set forth in the Application, DotMusic has an all-inclusive tent that is united by its core principles consistent with its articulated community-based purpose:

- Creating a trusted, safe online haven for music consumption and licensing
- Establishing a safe home on the Internet for Music Community ("Community") members regardless of locale or size
- Protecting intellectual property & fighting piracy
- Supporting Musicians' welfare, rights & fair compensation
- Promoting music and the arts, cultural diversity & music education
- Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community's best interest. The global Music Community includes both reaching commercial and non-commercial stakeholders.²⁰

Per DotMusic's Application and Public Interest Commitments ("PIC"),²¹ .MUSIC will be launched as a safe haven for legal music consumption that ensures that .MUSIC domains are trusted and authenticated to benefit the interests of the Internet community and the global music community. DotMusic, its current and future music members and supporters will be adversely affected if the Report stands and DotMusic is awarded to any of the competing non-community applicants²² (which will also be a disservice to the Internet user community in general) because competing applicants either: (i) lack the music community multi-stakeholder governance model to represent the community's interests; and/or (ii) lack the extensive music-tailored safeguard policies that DotMusic has.²³

Allowing the Report to stand would turn .MUSIC into an unsafe, unreliable and untrusted string governed by non-community interests that will create material harm to the legitimate interests

¹⁷ DotMusic holds the European community trademarks for "*DotMusic*" and "*MUSIC*." Ex.A35, A37 and A38

¹⁸ <http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html>

¹⁹ <http://billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars>, <http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc>

²⁰ Application, 18A. Also see 20C

²¹ PIC, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, Ex.A3

²² All of the competing non-community applicants in DotMusic's contention set are existing gTLD portfolio registries (Google, Amazon, Donuts/Rightside, Radix, Minds & Machines and Famous Four Media).

²³ See Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27; Also see .MUSIC Applicant Comparison Chart, <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>, Appendix C, pp.43-45, Ex.A32

of the Music Community by increasing intellectual property infringement and other types of malicious abuse. Music is a sensitive string driven by content and copyright protection that must be operated responsibly within its regulated sector as outlined in the Application. The Music Community is one of the Internet's most vulnerable communities given the adverse effects of mass piracy, intellectual property infringement and malicious abuse on the web and the inefficiencies of the outdated 1998 DMCA Law to provide adequate music copyright protection online.²⁴ By not awarding .MUSIC to DotMusic, the Music Community will lose the only opportunity to offer assurance to Internet users that all .MUSIC sites are indeed trusted, safe and licensed, which will also help search engines provide a better user experience by replacing unsafe, insecure pirate sites (that dominate music-themed web search results today) with relevant and higher quality .MUSIC sites.²⁵

By virtue of ICANN's actions and inactions, the public interest is harmed and the multi-stakeholder music community will not be able to ensure trust and reliability in the DNS for Internet users because the music community will not be able to govern the last remaining music-themed gTLD,²⁶ in violation of ICANN's "*key responsibilities is introducing and promoting competition*"²⁷ in the registration of domain names, while ensuring the security and stability of the domain name system (DNS)."²⁸ Further, ICANN disregards its own 2007 Recommendations and Principles that stated "*where an applicant lays any claim that the TLD is intended to support a particular community...that claim will be taken on trust*."²⁹

Without a reserved, safe and reliable zone on the Internet dedicated to the Music Community, the community and the public will be harmed because the music community will be unable to promote a trusted and secure sector through enhanced safeguards. The Music Community (the

²⁴ <https://www.google.com/transparencyreport/removals/copyright/?hl=en> e.g. One single DotMusic supporter, BPI, filed over 2 million URL takedown requests to Google for the week of February 15, 2016, *see*

<https://google.com/transparencyreport/removals/copyright/reporters/1847/BPI-British-Recorded-Music-Industry-Ltd>
²⁵ *See* <http://theverge.com/2015/11/23/9781752/google-takedown-requests-2015> and <http://billboard.com/biz/articles/news/1083146/business-matters-legal-mp3-sites-are-still-buried-by-google-search-results>

²⁶ No community applicant has been awarded a music-themed string in the New gTLD Program.

²⁷ ICANN has awarded Amazon the .SONG and .TUNES music-themed strings. Amazon is also a competing applicant for .MUSIC. Allowing Amazon to possibly be awarded the three most relevant music-themed strings violates ICANN's Bylaws with respect to "promoting competition."

²⁸ <https://newgtlds.icann.org/en/about/program>

²⁹ <http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6, Ex.A4; Also *see* <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>. Ex.A5

defined “*logical alliance*” with members representing over 95% of music consumed globally) has been negatively affected by the Report.

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

See Answer to Question 6 above.

8. Detail of Board Action/Inaction – Required Information

In this section, DotMusic presents the evidence required for ICANN to approve the request in this RR: **(8.1)** The relationship and contractual obligations between ICANN and the Economist with respect to the CPE process; **(8.2)** the AGB process and relevance of ICANN-approved GAC Category 1 and 2 Advice; **(8.3)** Comparisons to other CPE-prevailing community applications, demonstrating quality control deficiencies, unpredictability, inconsistencies, process failures, fairness issues and disparate treatment; and **(8.4)** Facts and procedural violations demonstrating that ICANN did not follow established processes in the evaluation of the Application in its grading as set forth in the .MUSIC Report, including material errors and omissions in determining the critical areas of *community establishment, nexus and support*. As a result of the material process, procedural errors and omissions set forth below, the Application was prevented from scoring the full 16 points and improperly did not receive a passing CPE grade.

(8.1) The relationship and contractual obligations between ICANN and the EIU.

Ultimately, ICANN makes the final decision on CPE results. The ICANN Board is responsible for the acts of its Staff and the EIU with respect to the CPE process because it is within ICANN’s sole discretion whether an applicant passes or fails. Pursuant to its contract with ICANN, the EIU provides “*recommended scores to ICANN for final review and approval*” and ICANN is “*free in its complete discretion to decide whether to follow [the EIU]’s determination and to issue a decision on that basis or not.*”³⁰ ICANN and the EIU specifically acknowledge that: “*each decision and all associated materials must be issued by ICANN in its own name only;*” that CPE results are “*ICANN’s final decision;*” and that “*ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue.*”³¹ In a declaration, the EIU confirmed that:

³⁰ <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b) (ii) (12 Mar. 2012) [Ex. C-40]), Ex.A7

³¹ *Id.*, § 10(b) (iii)-(iv), (vii)

[t]he EIU is a privately held company working as a vendor to ICANN. We are not a gTLD decision-maker but simply a consultant to ICANN.³²

Moreover, ICANN is the gatekeeper of all information exchanged between applicants and the EIU, including alerting the EIU of relevant GAC Advice pertaining to the existence of a “*cohesive*” regulated sector for the string evaluated to ensure scoring predictability and scoring consistency. ICANN and the EIU “*agreed that [the] EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.*”³³ Furthermore, the Report includes a disclaimer representing that ICANN is ultimately responsible for determining whether or not to implement the EIU evaluators’ conclusions.³⁴ While the Board may not be responsible for its Staff’s day-to-day operations, the Board is responsible for final CPE determinations, process, evaluations, and acceptance or rejection of the .MUSIC Report.

(8.2) The AGB process and the relevance of ICANN-approved GAC Category 1 and 2 Advice.

Per the AGB, Board decisions on certain strings are not merely a “box-ticking” administrative exercise by staff or consultants. The Board has accepted GAC Advice on many occasions to determine the fate of certain strings (e.g. .AMAZON and .AFRICA); and even superseding the determinations of Panels if deemed necessary by ICANN to serve the public interest (e.g. the Community Objections for .ISLAM and .HALAL). In relation to .MUSIC, the ICANN Board accepted GAC Advice with respect to Category 1 and Category 2 Safeguards,³⁵ but the Board took no action pertaining to GAC’s Advice to give “*preferential treatment for all applications which have demonstrable community support*” such as DotMusic’s. At the Singapore ICANN meeting in

³² EIU Declaration <https://icann.org/en/system/files/files/eiu-declaration-13apr15-en.pdf>, Pg.2, Ex.A8

³³ New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b)(ii) (12 Mar. 2012) [<https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-40].), § 10(b)(iii)-(iv), (vii), Ex.A7

³⁴ See Report, p.9. Each CPE report states that “these Community Priority Evaluation results do not necessarily determine the final result of the application. *In limited cases the results might be subject to change.*” New gTLD Program, Report; see also New gTLD Program Consulting Agreement, p. 2 (26 July 2011) (“ICANN retains the right to inspect, to stop work, to prescribe alterations, and generally supervise the Contractor’s work to insure its conformity with the . . . Statement of Work”) [<https://www.icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-41], Ex.A9

³⁵ DotMusic’s Application was a community application with music-tailored enhanced safeguards that extended beyond the minimum GAC Advice requirements. To serve the public interest, the Internet community and the entire global music community, DotMusic also filed a PIC to reflect its accountability and to clarify its Application’s specifications, which also pertained to its *community definition, community establishment, nexus, registration policies* and *support*. See PIC

March 2014, GAC reiterated that advice to ICANN “to protect the public interest and improve outcomes for communities”³⁶ and to take “better account of community views and improving outcomes for communities”³⁷ (i.e. giving community applicants the benefit of the doubt). Throughout the process, ICANN has allowed non-community applicants to materially alter their applications to follow GAC Advice to either remain in contention or be awarded sensitive strings (such as .GMBH³⁸). Because such change requests for non-community applicants were allowed and accepted (in response to GAC Advice), it is equally and reasonably fair to allow DotMusic to be awarded .MUSIC based on trust, GAC’s Advice favoring community applicants with demonstrable support and ICANN’s own acceptance that the music string has cohesion under an ICANN-approved regulated sector. It is also reasonable to award DotMusic this sensitive string, because the Application responsibly and conscientiously already had the requisite music-tailored enhanced safeguards that served a higher purpose when it filed its Application in 2012 (notably, DotMusic’s safeguards exceed GAC Category 1 Safeguard Advice). Further, it should have been clear to ICANN and the EIU that the Application exceeds the CPE criteria and serves the public interest, Internet community and music community, as outlined in the Application and confirmed in more detail throughout its PIC. For these reasons alone the .MUSIC Report should be overturned and a passing grade awarded to Applicant.

(8.3) Comparisons to other CPE-prevailing community applications, demonstrate inconsistencies, unpredictability, process failures, fairness issues and disparate treatment.

ICANN did not follow established procedures in the *community establishment, nexus* and *support* evaluation process, which resulted in a failing CPE grade. For example, the criterion concerning “*organization*” (that relates to having support from a “*recognized*” organization), the Report specifically failed to consider many globally-recognized organizations that are *mainly* dedicated to the music community addressed (“*logical alliance of communities that relate to music*”).

³⁶ <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, 1a, p.4, ExA10

³⁷ <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #18, Ex.A11

³⁸ Donuts was allowed to make material changes to their application to proceed with the delegation of .GMBH based on GAC advice and Donuts’ Public Interest Commitments (PIC), *See* <https://www.icann.org/en/system/files/correspondence/willett-to-metzger-28jan16-en.pdf>. ICANN rejected a similar change request by the .CPA community applicants. ICANN “deferred consideration of AICPA’s December 2014 Change Request, including changes made to reflect the principles of the Beijing Communiqué,” *See* <https://www.icann.org/en/system/files/files/reconsideration-request-15-17-aicpa-redacted-19sep15-en.pdf>, p.4

The FIM, an “*international federation of national communities of similar nature*”³⁹ representing the “*voice of musicians worldwide*” (musicians represent the overwhelming majority of the Music Community). This is contrary to the unsubstantiated, indefensible and undocumented opinion of ICANN that the FIM is not a “*recognized community institution(s)/member organization(s)*.”⁴⁰

The IFPI, another globally recognized supporting organization, also exceeds the same criteria under *community establishment* and *support*. The IFPI is only associated with music and it is the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.⁴¹ The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured⁴² and “well established, widely accepted internationally”⁴³ Furthermore, it relates to the addressed music community defined by DotMusic, an “*organized and delineated logical alliance of communities that relate to music*.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global music community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial:

Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership⁴⁴ (or not) with any industry association.⁴⁵

³⁹ CPE Guidelines: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of...a logical alliance of communities,” <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.4, Ex.A12-1; Also see AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, 4-12, Ex.A13 and “Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,” Notes, 20A, A-14, Ex.A13

⁴⁰ The FIM is a globally-recognized music community organization with documented official relations with the United Nations Economic and Social Council (“ECOSOC”) (Ros C); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).

⁴¹ http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401

⁴² <http://isrc.ifpi.org/en/isrc-standard/structure>

⁴³ <http://isrc.ifpi.org/en/why-use/benefits>

⁴⁴ DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

In fact, without the IFPI's ISRC codes there would not be legal music consumption because there would be no way to appropriately and efficiently attribute music to music community members.⁴⁶

In the case of .HOTEL's CPE Report, the prevailing applicant received a full grade for "Organization" **because** the Panel found "*recognized community institution(s)/member organization(s)*,"⁴⁷ the International Hotel & Restaurant Association (IH&RA) and HOTREC:

the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)...⁴⁸

...The applicant possesses documented support from the recognized community institution(s)/member organization(s).⁴⁹

In awarding .HOTEL the full two (2) points for *support*, the Panel concluded that the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines):

[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.⁵⁰

The .HOTEL community applicant passed with full scores for *community establishment* and *support* where several entities were found to be *mainly dedicated to the community* and *recognized*, despite those organizations also representing other interests or sectors such as "restaurants" (or some being geographically focused like the AH&LA and the CHA). Conversely, the .MUSIC Report failed to provide full scoring to DotMusic stating that "[t]here is no single such organization recognized by all of the defined community's members as representative of the defined community in its entirety."⁵¹ This finding is improper because there is no policy or rule that requires an organization to represent a community *in its entirety* in order to score the full two points under *support*. While there is an option requiring the "*authority to represent the community*," the Guidelines provided other alternative options available to score the full two points under "*support*." The CPE Guidelines define

⁴⁵ <http://isrc.ifpi.org/en/using-isrc>

⁴⁶ Without the IFPI's ISRC codes, YouTube Music (which is consumed by over 1 billion YouTube users) would be unable to effectively credit the corresponding music copyright owner related to each music video, see <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes⁴⁶ (the world's largest music retailer with over 43 million music tracks⁴⁶, see <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>

⁴⁷ .HOTEL CPE, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6, Ex.A14

⁴⁸ Ibid, *community establishment*, p.2

⁴⁹ Ibid, *support*, p.6

⁵⁰ Ibid

⁵¹ Report, p.3 and p.8

“recognized” as “*institution(s)/organization(s) that are clearly recognized by the community members as representative of that community*” i.e. not in their “*entirety*” but merely “*representative*.” According to the Oxford dictionary, the primary definition of “*recognize*” is to “identify.”⁵² According to the Oxford dictionary, the definition of the adjective “*representative*” is “typical of a class, group, or body of opinion” or “containing typical examples of many or all types” or “to act and speak on behalf of a wider group.”⁵³

Even if an “*entirety*” criterion (not specifically mentioned in the AGB or CPE Guidelines) is assessed, both the International Federation of Arts Councils and Culture Agencies (“IFACCA”) (the only international federation representing government culture agencies and arts councils globally covering all of the Application’s music categories and subsets in their entirety⁵⁴) and ReverbNation (the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries and across all of the Application’s music categories and subsets in their entirety⁵⁵) qualify because they represent all the music categories and music subsets delineated in their entirety without discrimination globally. Based on the foregoing, it is clear that both co-requesters IFACCA and ReverbNation are “typical of a group” that is representative of the “music” community defined in its entirety. Therefore, it is clear that the Application had demonstrable support from multiple globally-recognized organizations mainly dedicated to the Music Community. ICANN’s and the EIU’s failure to properly evaluate the application and find support for the community is apparent when the .MUSIC Report is compared to other prevailing CPE Determinations. Thus, the rationale ICANN used to find that the International Hotel & Restaurant Association (IH&RA) is representative of “hotel” community should apply to IFACCA and ReverbNation in the case of Music Community. That is, if the IH&RA is found to be “recognized” and “representative” entity of the “hotel” community, then the IFACCA and ReverbNation are “representative” [of the music community] too because they share similar characteristics as the IH&RA and other entities found to have satisfy CPE in other determinations. Per the Guidelines:

⁵² http://www.oxforddictionaries.com/us/definition/american_english/recognize

⁵³ http://www.oxforddictionaries.com/us/definition/american_english/representative

⁵⁴ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁵⁵ <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

*Consistency of approach in scoring Applications will be of particular importance...⁵⁶ and “[t]he panel must be able to exercise **consistent** and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible...⁵⁷*

According to the CPE Guidelines, the contextual interpretation of community particularities requires in-depth knowledge and expertise of the community.⁵⁸ All the Music Community categories and Music Community subsets that DotMusic delineated as members are essential for the global music sector to operate. Further, the “*logical alliance of communities that related to music*” (or “*alliance of groups*”) functions with cohesion as a whole in a regulated sector to protect music under agreed-upon structures governed by copyright law and international treaties. Without this cohesion, there would be no regulated music sector, and more importantly, music would not exist as we know it.

There are other clear examples of error relating to: consistency, fairness, predictability, equal treatment and procedural violations pertaining to DotMusic’s CPE process in comparison to community applicants that have prevailed CPE for whom ICANN applied the right threshold to pass. For example, ICANN’s scoring of the prevailing .RADIO applicant, in which ICANN assessed the “*majority*” support criterion (thereby granting .RADIO full points), while in contrast for DotMusic’s Application ICANN did not assess the “*majority*” criterion as outlined earlier in this RR:

However, the [.RADIO] applicant possesses documented support from institutions/organizations representing a majority of the community addressed.⁵⁹

The EIU also determined that all .RADIO, .HOTEL, .OSAKA, .ECO, .GAY and .SPA community applicants had “*cohesion*” for *community establishment*:

(i) The EIU established that the .RADIO had *cohesion* solely on the basis of being “*participants in this...[radio] industry*.”⁶⁰

(ii) The EIU awarded .HOTEL full points for *community establishment* for a “*cohesive*” community definition that is comprised of “*categories [that] are a logical alliance of members*.”⁶¹

Even though DotMusic similarly presents music community based on “*logical alliance*” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper;

⁵⁶ CPE Guidelines, p.22

⁵⁷ Ibid

⁵⁸ The CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...community plays an important role,” CPE Guidelines, p.22

⁵⁹ .RADIO CPE, <https://icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7, Ex.A15-1

⁶⁰ Ibid, p.2

⁶¹ .HOTEL CPE, p.2, Ex.A14

(iii) The EIU awarded full points to .OSAKA determining there was “*cohesion*” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;⁶² Similarly, DotMusic’s “*logical alliance*” is “*related to music*” (i.e. has a tie) but its Application was penalized;

(iv) The EIU awarded .ECO full points, stating that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities” which “may vary among member categories.”⁶³ Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities;*

(v) The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under *community establishment* establishing that there is stronger *cohesion* than DotMusic based on “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies*”⁶⁴ (emphasis added). In contradiction, the EIU determined DotMusic’s “*logical alliance*” operating under a regulated sector that is united by copyright lacked any “*cohesion*” of belonging to a community; and

(vi) The EIU awarded .SPA the full points under *community establishment* and *nexus*, while DotMusic scored zero points and three respectively. A perfunctory comparison between DotMusic’s application and the prevailing .SPA application reveals substantial bias and contradictions. Similarly, based on ICANN’s rationale for the .SPA CPE, it is evident that the .MUSIC application should have consistently and fairly received maximum points as well. According to the .SPA application:

The spa community primarily includes:

- Spa operators, professionals and practitioners
- Spa associations and their members around the world
- Spa products and services manufacturers and distributors

...The secondary community generally also includes holistic and personal wellness centers and organizations. While these secondary community organizations do not relate directly to the operation of spas, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.⁶⁵

Yet, the .MUSIC Report penalized the Application under *community establishment* to the fullest extent possible (grading zero points) for lacking “*cohesion*” while the .SPA community applicant

⁶² .OSAKA CPE, p.2, Ex.A18

⁶³ .ECO CPE, p.2, Ex.A17

⁶⁴ .GAY CPE, p.2, Ex.A15-2

⁶⁵ .SPA Community Application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, Ex.A16-2

was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for *community establishment*. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events:

Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.⁶⁶

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “*participate*” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s *majority* music (*logical alliance*) community support of organizations with members representing the overwhelming *majority* of music consumed globally.

Moreover, despite a general definition of the *spa community* that included entities with a non-essential, tangential relationship with the spa community and a *secondary community* that did *not relate directly* to the string, the .SPA applicant was also awarded a full score under *nexus*. In contrast DotMusic’s community *name*, the “*Music Community*,” which matches string, lost 1 point for *nexus*.

As illustrated, when compared to other CPE determinations (*See Exhibit A41*), had policies been followed and a consistent evaluation been applied, then the Application should have received maximum points that would have resulted in a passing CPE grade, a conclusion that is also supported by forty-three (43) separate independent experts (*See Exhibit A40*).

(8.4) Facts and procedural violations show that ICANN did not follow its own processes in the determination of the .MUSIC Report, including critical areas relating to *community establishment, nexus and support*. ICANN is the party responsible for ensuring quality control and a predictable, consistent and fair CPE process.

According to ICANN, “all applicants for a new gTLD registry should be evaluated against transparent and predictable criteria.”⁶⁷ There were multiple prejudicial errors and improper procedural issues with ICANN not following the AGB guidelines and requirements, including:

⁶⁶ .SPA CPE Report, Community Establishment, p.2, Ex.A16-1

⁶⁷ According to the Oxford dictionary, the word “fully” is defined as “completely or entirely; to the furthest extent” or “without lacking or omitting anything,” http://www.oxforddictionaries.com/us/definition/american_english/fully

(i) **Policy misapplication of ICANN-accepted GAC Advice adopted by ICANN before the CPE process began is a procedural error.** Contrary to the .MUSIC CPE Report, the ICANN Board accepted GAC Category 1 Advice that music is a cohesive “regulated sector.” This means that the ICANN Board also agrees that the music community has cohesion. By accepting GAC Advice and rendering a decision that music is: (i) a “*string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;*” and (ii) that it is a “*string that is linked to [a] regulated sector*” that “*should operate in a way that is consistent with applicable laws,*”⁶⁸ there is reasonable expectation that ICANN would apply this policy acceptance in all evaluations that are processed to ensure transparency, predictability and consistency. This misapplication of a policy adopted by ICANN before the CPE process began is a procedural error. As such, the New gTLD Program procedural process for DotMusic’s evaluation was unpredictable, lacking both transparency and consistency.

(ii) **Not properly identifying the community definition required in 20A** that was labeled as a defined term in the Application in reference to the AGB (“**Community**”):

The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“**Community**”)", that relate to music: the art of combining sounds rhythmically, melodically or harmonically (Application, 20A)

According to the AGB, the Question section for 20A explicitly states:

20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to **this** question.⁶⁹

ICANN not only disregarded DotMusic’s definition from 20A, the Report does not mention or properly reference DotMusic’s definition. Instead ICANN construed its own general definition from 20D contravening the AGB’s instructions that “*community priority evaluation*” for DotMusic “*will be scored based on the community identified in response to **this** question*” (i.e. the definition identified in the Application answer to 20A not 20D). According to the .MUSIC Report:

[T]he applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (**Application, 20D**).

⁶⁸ <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, An.5, p.8, Ex.A34

⁶⁹ AGB, Attachment to Module 2, Evaluation Questions and Criteria, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>, Question, 20A, A-14

In other words, ICANN scored DotMusic’s application relying on critically incorrect variables and parameters. In assessing DotMusic’s definition of the Music Community, ICANN misapplied material policy and permitted material procedural defects and inconsistencies in CPE evaluations to occur, resulting in an improper conclusion that DotMusic did not prevail CPE.

(iii) **Not properly identifying the name of the community to address nexus** that was labeled as a defined term in the Application in reference to the AGB (“Name”). While the *name* of the community “*Music Community*” was acknowledged by the EIU, it was not applied under its scoring for *nexus*:

The name of the community served is the “Music Community” (“**Community**”) ⁷⁰

*The “MUSIC” string matches the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.*⁷¹ (See Application 20)

According to the Report:

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents (Application, 20A)⁷²

As evidenced, under *nexus*, ICANN misapplied the wrong “*name*” definition by not applying the Application’s *established name* (the “*Music Community*”) inaccurately determining that the “*there is no “established name” for the applied-for string to match...for a full score on Nexus.*”⁷³ It is beyond shadow of a doubt that the established name that the Application defines and identifies, the “*Music Community,*” exactly matches the string .MUSIC.

(iv) **Not applying the alternate criterion to earn maximum points for support** that corresponds “*documented support...from institutions/organizations representing a majority of the overall community addressed.*”⁷⁴ CPE Guidelines provide that if an applicant lacks “documented authority to represent the community”⁷⁵ then the Panel should consider alternative options as follows: First, the Panel should decide whether the applicant has “documented support from the

⁷⁰ Application, 20A

⁷¹ Ibid

⁷² Report, p.4

⁷³ Report, *Nexus*, p.5

⁷⁴ AGB, *Support*, “Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2,” 4-18

⁷⁵ CPE Guidelines, pp.16-18

recognized community institution(s)/member organization(s) to represent the community?”⁷⁶ If the applicant meets this criterion then the full two (2) points are awarded. If not, the Panel should then consider whether:

[t]here are multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?⁷⁷

The Application meets this “*majority*” criterion, but this option was not applied to the .MUSIC CPE process. The Application is a global music community initiative supported by organizations with members representing over ninety-five percent (95%) of music consumed globally (an overwhelming majority),⁷⁸ yet the “majority” criterion was not assessed by ICANN in the grading of *Support*. If one excluded all the music related to DotMusic’s supporting organizations and their members, then music as we know it today would not exist. In fact the majority of music would not be available for consumption or enjoyment (**emphasis added**). The absurdity of the findings of the .MUSIC Report is further shown by another key supporter of DotMusic, NAMM, the trade association that represents nearly all the major music instrument and products’ manufacturers.⁷⁹ Without NAMM’s members’ instruments and music products, music cannot be created. Therefore, it is clear that the Application has the support of the “*majority*” of the community addressed.

In summary of (i), (ii), (iii) and (iv), the evidence supports that there is prejudicial pattern of behavior by ICANN not to follow established process and instructions. No other applicant in the New gTLD Program has provided more evidence, correspondence and research to assist ICANN with the CPE process than DotMusic has to ensure a consistent, predictable and fair evaluation in comparison to other community applicants that have prevailed. Judging from the Report’s inconsistent and contradictory rationale and ICANN’s failure to follow due process, it appears that the objective was to find ways to reject DotMusic’s Application by relying on inaccurate facts and not giving DotMusic the same benefit of the doubt given to the CPE applicants that prevailed. At ICANN’s request, DotMusic also provided detailed answers to Clarifying Questions⁸⁰ (“CQ Answers”), including significant credible and reputable evidence substantiating DotMusic’s

⁷⁶ CPE Guidelines, pp.17-18

⁷⁷ Ibid

⁷⁸ <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at Ex.A19-1, A19-2, A19-3, and A19-4; and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁷⁹ <https://www.namm.org/about>

⁸⁰ See Clarifying Questions (“CQ”), Ex.A20 and Answers to Clarifying Questions (“CQ Answers”), Ex.A21

Application's position with respect to the *community definition*, *community establishment* (including "cohesion"), *nexus* and *support*. A cursory review of the CQ Answers would find support to overturn all the points deducted from the Application.

If the EIU carefully reviewed the CQ Answers then it would be clear what the *community definition* (*community establishment*) and the *name* of the community (*nexus*) were because it was explicitly identified multiple times.⁸¹ As explicitly outlined in the CPE Guidelines, DotMusic's "logical alliance" community definition explicitly meets criteria: "*With respect to "Delineation" and "Extension," it should be noted that a community can consist of...a logical alliance of communities.*" This is also substantiated by the AGB, which explicitly states that in the case of a community of an "*alliance of groups*" (such as DotMusic's Application), "*details about the constituent parts are required.*"⁸² DotMusic's community definition is a "*strictly delineated and organized logical alliance of communities that relate to music*" (Application, 20A) which unequivocally meets this criterion. Contradicting established procedure, the EIU improperly found that the "logical alliance" definition has no cohesion. Moreover, while DotMusic followed the AGB and CPE Guidelines and provided details on each of the delineated music categories and music subsets (i.e. the *constituent parts*) demonstrating how they form the "logical alliance" community definition, the Application was penalized to the maximum extent under the Report's *community establishment* for doing so. Further, dictionary definitions for "logical"⁸³ and "alliance"⁸⁴ establish that these definitions require cohesion and the *requisite awareness*.

The degree of multitude of direct and indirect evidence make it beyond reasonable doubt that overlooking the Application's *community definition* and *name* of the community identified was

⁸¹ See CQ Answers: The *community definition* of "logical alliance" is referred to and explicitly defined in seven (7) separate pages of the CQ Answers provided to the EIU at p.6, p.8, p.9, p.12, p.14, p.16 and p.17. Also see CQ Answers, *Community Establishment & Definition Rationale and Methodology*, Annex A (pp-22-43) defining the community as "a delineated and organized logical alliance of communities of similar nature related to music" at p.22, p.25, p.38. Also see *Annexes'* table of contents (p.20), which include *Annex D Venn Diagram for Community Definition and Nexus* that explicitly defines and identifies the *community definition* relating to *community establishment* (See Application, 20A) and the *name* of the community "*music community*" relating to *nexus*.

⁸² AGB, Attachment to Module 2, Evaluation Questions and Criteria: "*Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,*" Notes, 20A, A-14

⁸³ Oxford Dictionaries "**logical**" definition: (i) *1. Of or according to the rules of logic or formal argument*; (ii) *1.1 Characterized by or capable of clear, sound reasoning*; (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances, see http://oxforddictionaries.com/us/definition/american_english/logical*

⁸⁴ Oxford Dictionaries "**alliance**" definition: (i) *1. A union or association formed for mutual benefit, especially between organizations*; (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities*; (iii) *1.2 A state of being joined or associated, see http://oxforddictionaries.com/us/definition/american_english/alliance*

grossly negligent resulting in a failing grade for the Application. The omission of the Application's *community definition* and *name* from the .MUSIC Report was a gross error because it would have been impossible to ignore them given that they were explicitly mentioned and identified a significantly number of times as evidenced in:

1. The Application, Q20A;
2. The Public Interest Commitments;
3. Nearly *two-thousand correspondence letters* to ICANN and the EIU;⁸⁵
4. Public comments from supporters in ICANN's microsite relating to the Application;
5. Answers to Clarifying Questions that the EIU requested (emphasis added);
6. Testimonies from over 40 independent experts submitted to ICANN and the EIU;
7. An independent Nielsen poll identifying the *community definition*;

As set forth above, ICANN and the EIU contravened the established vital CPE Guidelines and EIU Panel Process procedures.

(v) ICANN and the EIU contravened established CPE Guidelines and EIU Panel Process procedures.

As the Board should be aware, CPE requires:

Consistency of approach in scoring Applications will be of particular importance...^{86 87}

The EIU will fully cooperate with ICANN's quality control process...⁸⁸

The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.⁸⁹

Furthermore, ICANN affirmed in correspondence with DotMusic that "*in accordance with the CPE Panel's process document to help assure independence of the process, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team.*"⁹⁰ Contrary to this correspondence and the procedures outlined in the ICANN's EIU Panel Process document, ICANN also appears to play a critical role in instructing and subjectively guiding the EIU to reach certain determinations by providing the EIU

⁸⁵ See Ex.A.19-4

⁸⁶ CPE Guidelines, p.22

⁸⁷ In an email exchange between ICANN and the EIU, there is evidence of a "quality control process" for "consistency of approach in scoring across applications" (in this case the CPE process for .LLP, .LLC and GMBH), comparing them for consistency purposes with the .MLS CPE Report: "*Can we have an example (such as was provided in MLS) as to what other meanings might exist?*" See C44, ICANN_DR-00458, p.3, Ex.A27

⁸⁸ Ibid, pp.22-23

⁸⁹ EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3, Ex.A12-2

⁹⁰ See Ex.A23

with rationale, subjective redline edits, comments, presentations and other forms of communication before the final CPE determinations are released publicly.

Public documents disclosed to Dot Registry (the community applicant for .INC, .LLC, and .LLP) and its legal counsel Arif Ali, in an Independent Review Proceeding (“IRP”) against ICANN, present clear evidence that ICANN edited and materially redlined the CPE draft Determinations for .INC, .GMBH, .LLC and .LLC on the EIU’s behalf before their final release, providing substantive and subjective rationale, making substantive redlines as well as suggested edits, which is a serious violation of established procedure and puts ICANN Staff at the heart of CPE decision-making in violation of CPE established procedure.⁹¹ For example, in an email from EIU to ICANN on June 2, 2014 the EIU makes ICANN suggested changes and even asks permission from ICANN to make the same changes to a different application:

From: EIU to ICANN
Email Subject: Re: Updated draft results (4)

...I've made the suggested changes... Quick question: is there a reason why you didn't send back .INC? Should we make the same changes for that evaluation?⁹²

On June 3rd, 2014, the most revealing email shows that ICANN is involved in the decision-making process for determining CPE results, including providing subjective feedback, discussing rationale and providing presentations to the EIU:

From: ICANN to EIU
Email Subject: Re: Updated draft results (4)

...On my initial review they looked really good. We will discuss the rationale in the presentation tomorrow. I would ask we make one change to all of the reports prior to final version...⁹³

Aside from the procedural, policy and quality control process violations by both ICANN and the EIU, it appears from the hands-on instructions, discussions, guidance and more importantly subjective decision-making rationale provided by ICANN to the EIU, that the EIU clearly lacked the necessary training and expertise to make consistent judgment even though the EIU Panel Process document required that:⁹⁴

All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process

⁹¹ See <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, C042 – C044; Also see Ex.A25, Ex.A26 and Ex.A27

⁹² See Ex.27, C044, ICANN_DR_00457, p. 2

⁹³ Ibid, C044, p. ICANN_DR_00456, p.1

⁹⁴ EIU Panel Process, p.2

included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.

EIU evaluators are highly qualified... and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.

ICANN and the EIU relied on false and inaccurate material information and refused to take the clearly identified and relevant information into consideration in their rationale and decision-making process, which contradicted established ICANN policies. ICANN's and the EIU's disregard of the *community definition, name* of the community and failure to apply the majority *support* criterion is quite worrisome given the time allotted to determine the Report (July 27, 2015 to February 10, 2016). In an IRP final declaration concerning the .ECO and .HOTEL community applications,⁹⁵ the IRP Panelists agreed and also echoed DotMusic's serious concerns and glaring problems with the CPE Process in general:

[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.⁹⁶ ...[T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.⁹⁷ ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure...ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.⁹⁸ The combination of these statements gives cause for concern to the Panel.⁹⁹ The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.¹⁰⁰ In conclusion,...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.¹⁰¹

⁹⁵ Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.HOTEL/.ECO IRP”) <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>

⁹⁶ .HOTEL/.ECO IRP, ¶ 146, p.37, Ex.A28

⁹⁷ Ibid, ¶ 147, pp.37-38

⁹⁸ Ibid, ¶ 148, p.38

⁹⁹ Ibid, ¶ 149, p.38

¹⁰⁰ Ibid, ¶ 150, p.38

¹⁰¹ Ibid, ¶ 158, p.39

(vi) **Google conflict of interest.** Finally, it bears noting that the multiple process violations evidenced in this RR are further exacerbated by the conflict of interest with Google, another .MUSIC applicant.¹⁰² According to ICANN’s Panel Process document,¹⁰³ “*the following principles characterize the EIU evaluation process for gTLD applications: All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.” However, Eric Schmidt, the chairman of Google, was a spokesperson,¹⁰⁴ a trustee¹⁰⁵ and on the board of Economist from November, 2013¹⁰⁶ to December, 2015.¹⁰⁷ DotMusic’s CPE process for .MUSIC conducted by the Economist began in July, 2015.¹⁰⁸ That means for about 5 months during DotMusic’s CPE evaluation the EIU had conflict of interest in its role of managing the CPE Process on behalf of ICANN. This potential conflict of interest supported by what appears to be a strong correlation in success and failure rates in CPE based on whether a community applicant was in Google’s contention set or not. As of February 10th, 2016, there were 22 community applicants that have gone through CPE.¹⁰⁹ Out of the 22 community applicants, 10 were in a contention set with Google. **None of the applicants in contention with Google prevailed CPE. The success rate to prevail CPE without Google in the contention set was approximately 42%** (i.e. 5 out of 12 applications). The EIU passed nearly half the community applications if they were not in a contention set with Google, while failing all applicants competing with Google (including DotMusic). This statistically significant difference is a substantial discrepancy following a strong correlative pattern. ICANN CEO Fadi Chehade and the Board acknowledged the significance and sensitivity of this conflict of interest at the Singapore ICANN Meeting *Public Forum* in February 2015,¹¹⁰ yet nothing was done to ensure the Economist had no conflict of interest when CPE began in July 2015.*

¹⁰² This is not the first time DotMusic reports a conflict of issue relating to .MUSIC. Doug Isenberg represented .MUSIC competitor Amazon in Community Objections (“CO”) filed by DotMusic, while also serving as a New gTLD Program Legal Rights Objection (“LRO”) panelist.

¹⁰³ EIU Panel Process, p.2

¹⁰⁴ <https://www.youtube.com/watch?v=kHSwRHeeCqg>, see Ex.A29, p.1; Also see Ex.A29, p.2

¹⁰⁵ See http://www.economistgroup.com/pdfs/Annual_Report_2015_FINAL.pdf, p.18, Ex.A30-2

¹⁰⁶ Ibid, p.29; Also see The Economist Board retrieved on September 30, 2015:

https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results_and_governance/board.html

¹⁰⁷ See <http://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>, Ex.A31

¹⁰⁸ See <https://newgtlds.icann.org/en/applicants/cpe#invitations>

¹⁰⁹ See, <https://newgtlds.icann.org/en/applicants/cpe#invitations>

¹¹⁰ See <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, February 12th, 2015, p.61, Ex.A30-1

9. What are you asking ICANN to do now?

Requesters ask that the result of the .MUSIC Report be overturned by ICANN, by awarding DotMusic an additional six (6) points (or a passing grade). These are the total points that were deducted by ICANN as a result of ICANN not consistently following the CPE process and not applying the proper scoring guidelines to DotMusic’s Application in accordance with the policies and procedures defined in the AGB. In fact, ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to substantial flaws in its rationale methodology and scoring process. Additionally a linear comparative analysis between DotMusic’s application and the prevailing CPE applications for .SPA, .RADIO, .ECO, .OSAKA, and .HOTEL leads to the conclusion ICANN contravened the CPE Process and did not employ “consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, document[ing] the way in which it has done so in each of the above mentioned community application cases.”¹¹¹

DotMusic’s community Application clearly meets the **trust** claim (*See* ICANN’s 2007 Recommendations and Principles to launch the New gTLD Program, IGH CV-10) given its demonstrable global music community majority support, multi-stakeholder governance structure and music-tailored policies that serve a higher purpose, as outlined in its Application that .MUSIC:

1. Is exclusive only to legitimate members of the entire global music community;
2. Is governed and controlled by the global music community. Each music constituent community type has a governance seat on the multi-stakeholder .MUSIC Board (PAB);¹¹²
3. Is supported by organizations with members representing over 95% of music consumed globally (i.e. a majority);
4. Has enhanced safeguards to protect intellectual property, prevent cybersquatting and eliminate copyright infringement;
5. Has incorporated all IFPI intellectual property protection provisions that include policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates and trusted sender complaint policies amongst others;
6. Requires registrant validation via a mandatory two-step phone/email authentication process;
7. Protects names of famous music artists and brands by giving registration priority to those entities during a priority-based launch phase. .MUSIC also gives registration priority to community members belonging to legitimate Music Community Member Organizations to spur adoption, trust and safety;
8. Has domain naming conditions that eliminate cybersquatting and famous music brand trademark infringement. Registrants are only allowed to register their own name, acronym or “Doing Business As;”
9. Only allows legal music content and legal music usage; and
10. Will take down any domain infringing on any of its enhanced safeguards.

¹¹¹ EIU Panel Process, p.3

¹¹² *See* Expanding multi-stakeholder Board at <http://music.us/board>

Aligned with its community-based mission, policies and PIC,¹¹³ DotMusic's Application is the only applicant with music-tailored enhanced copyright protection safeguards that include:

- **Stopping Domain Hopping**: All domains that trusted senders...have sent over 10K notices against will be on the block domain list, which will continually be updated, unless there is evidence that the domain has been authorized by most of the applicable rights holders to use the content in question...
- **Take Down Policies**: DotMusic will require all registrants on music to have and implement policies that include the following: (i) upon receipt of a facially valid copyright take down notice, the registrant must search for all copies or links to access the noticed content on the site, and remove all such copies or links from its site; and (ii) it must implement a strong repeat infringer policy.... DotMusic will suspend the domain if the registrant fails to have or enforce such policies.
- **Stay Down and Repeat Offender**: DotMusic will suspend the domain if the registrant fails to have or enforce DotMusic takedown policies.Repeat offenders will be disallowed from registering.
- **Authorization**: Confirmation that "content that they otherwise have the right to post" means that the poster has express authorization to post the content.
- **Permanent Block**: Blocked domains will not be made available for registration by any third party unless there is a two third (2/3) vote by the Advisory Committee...
- **Privacy / Proxy**: Requirement that privacy/proxy services will be compliant with DotMusic's Name Selection policy (mandating that the domain is the name of the registrant, their acronym, "doing business as," description of their mission or activities) and discloses the beneficial registrant as per DotMusic's Registration Policies. If such disclosure is not made then the registrant will not be allowed to proceed with registration.
- **True name and address**: If a .MUSIC domain makes available any music owned or posted by a third party...(directly or indirectly), the domain must prominently post on the site the true name of the website operator, a contact person...phone number, physical address, and email address at which the contact person may be contacted.
- **Trusted Sender Complaint**: If .MUSIC receives a complaint from a trusted sender...then DotMusic will investigate the complaint and suspend the domain, giving the registrant reasonable time to fix compliance matter. The domain will be terminated if registrant does not fix the compliance matter or fails to respond to the complaint.¹¹⁴

The Board should note the level of support for DotMusic's Application and the Application's maximum score under its *Registration Policies* that are aligned with its community-based purpose (*Eligibility, Name Selection, Content and Use and Enforcement*¹¹⁵) as evidence that it is "in the best interest of the Internet community" for DotMusic to be awarded .MUSIC. ICANN Board/NGPC member George Sadowsky¹¹⁶ hit the nail on the head on the *only* goal that matters: "*ensuring user trust in using the DNS*" and "*to strengthen user trust*:"

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process...it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the...community and/or Internet users in general."...We are

¹¹³ Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

¹¹⁴ Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

¹¹⁵ Report, *Registration Policies*, pp.6-7

¹¹⁶ <https://www.icann.org/profiles/george-sadowsky>, <https://www.icann.org/resources/pages/board-of-directors> and <https://www.icann.org/resources/pages/new-gtld-program-committee-2014-03-21-en>

unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.¹¹⁷

In a statement the week after the release of the .MUSIC Report, ICANN CEO Fadi Chehade agreed that with respect to intellectual property infringement (which is at the heart of the Application’s enhanced safeguards), “*ICANN, where necessary and appropriate, shape the discussion and commit to be part of a solution. [ICANN] cannot simply put [its] head in the sand and say these issues are not of [ICANN’s] concern:*”

As issues such as intellectual property infringement...are addressed in other fora, ICANN ...where necessary and appropriate, shape the discussion and debate and commit to be part of a solution in keeping with our values and mission. We cannot simply put our head in the sand and say that these issues are outside of the logical infrastructure layer in which we operate and thus not of our concern. Some solutions within the economic and societal layers of digital governance require distributed, innovative and collaborative issue-specific networks, of which the technical community depending on the issue sometimes must be a key part. We must remain part of the global conversations on digital governance, aware and ready to act when necessary.¹¹⁸

Aligned with ICANN’s CEO’s own statements to protect the public interest and the music community’s intellectual property rights, **we request ICANN to overturn the .MUSIC CPE Report and approve DotMusic’s community application** because (i) of the preponderance of evidence and support that DotMusic’s application exceeds the criteria established for community priority evaluation in comparison to other prevailing CPE applicants;¹¹⁹ (ii) ICANN inaction led to multiple CPE process violations, prejudicial errors and an unfair and inconsistent quality control process when evaluating DotMusic’s application (in itself and in comparison to others); and (iii) more importantly “it would be in the best interest of the Internet community” for ICANN to do so given the community application’s demonstrable support that represents over 95% of music consumed globally and DotMusic’s Public Interest Commitments and music-tailored *Registration Policies* (taken from a “holistic perspective” as required by ICANN Guidelines¹²⁰) that scored

¹¹⁷ Booking.com B.V. v. ICANN, ICDR Case No. 50-2014-000247 (March 3, 2015) Final Declaration at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>, ¶ 119, Ex.A6

¹¹⁸ Fadi Chehade (ICANN CEO), <https://icann.org/en/system/files/correspondence/chehade-to-icann-board-19feb16-en.pdf>, p.6, February 19, 2016, Ex.A33

¹¹⁹ ICANN ignored DotMusic’s answers to Clarifying Questions, over 40 testimonies filed by independent experts (See Appendix A, p.36, Ex.A32), an independent Nielsen poll conducted with over 2,000 participants (See Appendix B, p.38, Ex.A32), and nearly 2,000 letters of support (See Ex.A19-1, A19-2, A19-3, A19-4 and A-19-5 and <https://gtldcomment.icann.org/applicationcomment/viewcomments>), which provide clear evidence that substantiates scoring maximum points under *Community Establishment, Nexus and Support*.

¹²⁰ The scoring of the *Registration Policies* section related to *Name Selection, Content and Use and Enforcement* is the only criterion to be graded from a “holistic perspective.” See CPE Guidelines, pp.12-14

maximum points. DotMusic also requests: (i) to meet with individual Board members; (ii) a meeting with the ICANN Board; and (iii) a hearing to clarify the positions expressed in this RR.

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

DotMusic is a community applicant for .MUSIC. The justifications under which DotMusic has standing and the right to assert this RR are:

- i) Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.¹²¹
- ii) Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;¹²²
- iii) Conflict of Interest Issues;
- iv) Failure to Consider Evidence filed; and
- v) Violation of ICANN Articles of Incorporation/Bylaws:
 1. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.¹²³
 2. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.¹²⁴
 3. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.¹²⁵
 4. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.¹²⁶
 5. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.¹²⁷
 6. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.¹²⁸
 7. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy [e.g. copyright law and setting certain royalty rates for music's regulated sector] and duly taking into account governments' or public authorities' recommendations.¹²⁹

¹²¹ Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

¹²² JAS established that “*the existence of a visible and well-publicized proactive quality program properly incented all evaluation panel vendors to be appropriately cognizant of evaluation consistency, accuracy, and process fidelity, and perform accordingly.*” The .MUSIC CPE lacked a “*proactive quality control process*” deficient of the Initial Evaluation “*unified approach,*” which “*substantially mitigated the risk of isolation and inconsistent or divergent evaluations,*” ICANN Initial Evaluation Quality Control Program Report, <https://newgtlds.icann.org/en/program-status/application-results/ie-quality-program-26aug14-en.pdf>, p.16. Also see Ex.A38 and Ex.A39

¹²³ ICANN Bylaws, Art. I, § 2.6

¹²⁴ ICANN Bylaws, Art. I, § 2.1

¹²⁵ ICANN Bylaws, Art. I, § 2.7

¹²⁶ ICANN Bylaws, Art. I, § 2.8

¹²⁷ ICANN Bylaws, Art. I, § 2.9

¹²⁸ ICANN Bylaws, Art. I, § 2.10

¹²⁹ ICANN Bylaws, Art. I, § 2.11

8. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.¹³⁰
9. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.¹³¹

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

Yes

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.

Do you have any documents you want to provide to ICANN? Yes, see Exhibits

Terms and Conditions for Submission of Reconsideration Requests:

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

Respectfully Submitted,

Constantinos Roussos
DotMusic Founder

Tina Dam
DotMusic Chief Operating Officer

Cc: Jason Schaeffer
DotMusic Legal Counsel

February 24, 2016

DotMusic Website: <http://music.us>

DotMusic Board: <http://music.us/board>

DotMusic Supporting Organizations: <http://music.us/supporters>

¹³⁰ ICANN Bylaws, Art. II, § 3

¹³¹ ICANN Bylaws, Art. III, § 1

Exhibit 23

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: CPA Australia Ltd

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

CPA Australia is seeking to have Criterion 2 of the CPE (Nexus between Proposed String & Community), conducted on 3 September 2015, re-reviewed in light of the Panel's failure or neglect to consider the endorsement of CPA Australia's application by AICPA. If the endorsement had been properly considered, the Panel should have awarded no less than 2 points for Criterion 2 of the CPE. See **Annexure 1 – CPE Report** and **Annexure 2 – Endorsement from AICPA**.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

3 September 2015, being the date of the CPE report.

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

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

On or about 4 September 2015.

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

As a result of the Panel's failure or neglect to properly consider AICPA's endorsement of the CPA Australia application, particularly with respect to the

definition of the CPA community, CPA Australia fell 2 points short of the 14 point CPE score required to be awarded delegation rights to .CPA on community grounds.

With both community applications purportedly failing to meet the community score threshold, delegation rights to .CPA will be determined by a public auction, putting CPA Australia at a significant disadvantage against the likes of Google and Donuts.

Both CPA Australia and AICPA have extensive intellectual property rights and reputation in the term 'CPA'. Despite being an acronym, the term 'CPA' almost exclusively refers to Certified Practising Accountants or Certified Public Accountants globally who number at approximately 800,000. CPA Australia and AICPA represent 70% of all CPAs globally. Trade mark owners have a right to exclusively use their trade marks, this extends to being able to reflect their trade marks in domain names. In an eligibility and dispute resolution context, it is often a requirement that a domain name registrant is the owner of a trade mark that is reflected in a domain name. For example under the Uniform Dispute Resolution Policy (UDRP), a complainant must be able to establish legal rights based on trade mark ownership / usage.

If ICANN issue the .CPA gTLD in favor of a commercial applicant (such as Google or Donuts), CPA Australia will incur a significant and substantial loss and damage associated with the enforcement of our IP rights vis-à-vis the unauthorized use of .CPA domain name and its variations. It is incongruous for ICANN to permit the mark to be delegated to an organization that does not have a registered trade mark associated with 'CPA' in the financial services sector. If ICANN were to do so, ICANN would create an environment conducive for trade mark infringement in multiple classes currently registered by CPA Australia and AICPA.

The protection of trade mark owners' rights under the current regime highlights the importance of similar protections, if not stronger protections, for gTLDs, particularly where they are community based.

The Auction process does not absolve ICANN of both the legal and moral responsibilities associated with ICANN's actions in releasing the .CPA gTLD to commercial applicants with no pre-existing intellectual property to the term CPA.

If delegation rights to .CPA are vested with a commercial applicant, such as Google or Donuts, .CPA domains will be opened up to anyone to register; this will facilitate the dilution and likely infringement of CPA Australia's and AICPA's intellectual property respectively. The objective of commercial applicants is to commercialize the new gTLDs on scale, independent of whether this is in the public interest or not. CPA and AICPA are uniquely placed to administer .CPA given their nexus with the CPA community. If .CPA is opened up to the public at large, .CPA will not be desirable to the CPA community which would make up the vast majority of the market for .CPA domains. CPA Australia, AICPA and CPAs will have no interest in taking up .CPA registrations unless this is an exclusive

designation for CPA qualified accountants.

The ongoing maintenance of trust and confidence in the accounting profession is a key deliverable of both CPA Australia and AICPA and is a significant public interest issue. The failure to award the .CPA domain to CPA Australia or AICPA will significantly impact on our respective abilities to carry out this key function and thereby adversely impact members of the broader community and our members. This is particularly important to CPA Australia as 'protecting the public interest' is the core element of our Corporate Plan (see **Annexure 3** – "CPA Australia's Corporate Plan").

Finally, the CPA designation has a legacy of 130 plus years. Over this period, CPA Australia has invested an inordinate amount of time and resources to credential the designation in the minds of both government and the broader community as a hallmark for premium accounting services and standards. A third party issuing .CPA domains without regard to our designation will significantly and irreparably undermine the veracity of the CPA designation.

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

ICANN itself will be adversely affected by the decision. If either one of the two respective community based applications by two of the world's largest professional member organizations do not pass ICANN's CPE, and the .CPA extension subsequently goes to public auction, other community based applicants will lose confidence in ICANN as an administrator.

The integrity of ICANN as an organization depends on its ability to balance public and commercial interests. ICANN's conduct, notably it's handling of the .CPA and .AFRICA gTLDs, is likely to seriously undermine ICANN's legitimacy as a public interest organization, which is contrary to the public interest.

As detailed above, there are broader implications of failing to award the .CPA domain to CPA Australia or AICPA. Members of the public must have a level of trust and confidence in the accounting profession – the CPA designation is the cornerstone of this confidence. In order to maintain the standards in the accounting profession it is imperative that the body that administers the designation in the real world also administers the designation (via the .CPA domain) in the digital world to ensure that the standards of the designation are upheld and are applied consistently. As previously stated, both CPA Australia and AICPA view the .CPA domain as the digital manifestation of the CPA designation.

In the event that there is a standards gap between the real world designation and the digital designation, members of the public may unwittingly believe that an accountant is a properly certified CPA, when in reality the accountant may be

misrepresenting themselves through the .CPA domain. This is a significant public risk which flies in the face of what CPA Australia and its members stand for – the protection of the public interest (as clearly evidenced in CPA Australia’s Corporate Plan). This is simply an untenable position and is one of the major reasons why CPA Australia will continue to exhaust every avenue in an effort to overturn ICANN’s current decision.

Only CPA or AICPA can properly administer .CPA with the public’s best interests at heart.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.’

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. “Material information” means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

As evident in the AGB, in particular 1.2.3 of the AGB, an endorsement is a prerequisite to a community based application. CPA Australia's application included an endorsement from AICPA. The Panel suggests that since CPA Australia's application does not expressly refer to Certified Public Accountants, its description of the CPA community '*overreaches substantially beyond the community named in the application*'. This reasoning is fundamentally flawed since the 'overreached community' identified by the Panel is the community of Certified Public Accountants, regulated by the AICPA, the endorsers of CPA Australia's application.

The endorsement of CPA Australia's application by AICPA clearly establishes that the .CPA extension will be operated jointly in the interests of both organizations' respective members and by extension the community at large. The endorsement makes the nexus between CPA Australia and the CPA community at large explicitly clear.

On the question of uniqueness, the Panel once again erred applying the same flawed reasoning to reach the conclusion that CPA Australia's definition of community did not refer to the community of Certified Public Accountants. As the endorsement and application are not mutually exclusive, it simply does not follow that CPA Australia's definition of community does not include the members of the AICPA community given the strong relationship between CPA Australia and AICPA.

As set out 1.2.3.1 of the AGB, an applicant for a community based GTLD is expected to:

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

Despite CPA Australia meeting all the above expectations required of an applicant for a community based application, the Panel awarded CPA Australia 0/4 points on Criterion 2. It is CPA Australia's view that the Panel's findings were not guided by adherence to the community nexus and uniqueness criterion, but were part of a strategy of obfuscation on ICANN's part to deny delegation rights to community applicants, in favor of a commercial applicant. Inevitably, the financial gains from a public auction would be far greater than the gains made from a community based award.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

CPA Australia requests that the Panel award CPA Australia at least 2 points for Criterion 2 of the CPE in light of AICPA's endorsement of CPA Australia's application and the nexus it creates between CPA Australia and the CPA community, inclusive of Certified Public Accountants.

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

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

As a community based applicant for the .CPA gTLD, CPA Australia is aggrieved by the Panel's failure or neglect to consider the endorsement by AICPA as sufficient to create a nexus between CPA Australia and the CPA community. The Panel's decision that the CPA Australia definition of the CPA community overreached the Certified Practising Accountants community was ultimately decisive to CPA Australia's application failing to meet the CPE score threshold.

CPA Australia and the CPA community are likely to suffer both financial and non-financial loss and damage if delegation rights to .CPA are awarded to a non-community based applicant. If delegation rights to .CPA are determined by a public auction, CPA Australia will have to pay significantly more for delegation rights vs. a successful community based application – CPA Australia is a not-for-profit organization.

The most significant issue facing both CPA Australia and AICPA would be the dilution of the CPA designation in the event that the .CPA domain is opened up for commercial use. It is difficult (but not impossible) to quantify this loss in a

monetary sense – but the loss would be substantial. In addition, the cost to society due to the uncertainty created in respect of the provision of accounting service by people who would not otherwise be able to access the CPA designation in the real world would be significant.

A final point to note is that we have not made any claim in respect of losses associated with not administering the domain. The reason – we see the .CPA domain as the digital manifestation of our treasured designation and the commercialization of the digital designation by CPA (and the income that we would derive) is far from the primary reason as to why we are seeking this reconsideration request.

By awarding CPA Australia at least 2 points in Criterion 2, CPA Australia would have the requisite score to succeed in the CPE.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Terms and Conditions for Submission of Reconsideration Requests

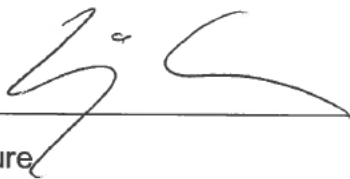
The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Signature

15/7/16

Date

ANNEXURE 1



New gTLD Program
Community Priority Evaluation Report
 Report Date: 3 September 2015

Application ID:	1-1744-1971
Applied-for String:	CPA
Applicant Name:	CPA Australia Ltd

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	12 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	4	4
Total	12	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as defined by the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application demonstrates sufficient delineation, organization, and pre-existence. The application received a score of 2 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the application) among its members.</p>	

According to the application, the

CPA Australia community consists of CPA Australia members, incorporating full CPA members, Associate members enrolled in a CPA professional program and students registered in the CPA Australia passport program, as well as reciprocal members who have applied, or are eligible to apply, for membership of CPA Australia...

The last category of “reciprocal members” are accountants associated with accounting bodies

with which CPA Australia has Mutual Recognition Agreements, comprising the following:

- Certified General Accountants and Certified Management Accountants in Canada
- Chartered Institute of Public Finance and Accountancy and Chartered Institute of Management Accountants in Europe
- Institute of Certified Public Accountants in Ireland
- Hong Kong Institute of Certified Public Accountants
- Institute of Chartered Accountants in India
- Malaysian Institute of Accountants
- Institute of Certified Public Accountants in Singapore

Individuals wishing to become reciprocal members of CPA Australia must in their application to CPA Australia verify their membership in one of the above organizations. According to the application, “A CPA is a finance, accounting and business professional with a specific qualification.” Elsewhere in its application, CPA is referred to as a “Certified Practicing Accountant”. Their organization also includes members of reciprocal organizations that define CPA as “Certified Public Accountant”.

According to the AGB, “Delineation relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.” As required by the AGB, the application shows a clear and straight-forward membership definition, given the clarity of CPA Australia’s own membership structure, used by the applicant for the purposes of defining the proposed community. The membership process for CPA Australia includes an application, verification of completion of educational and practical training requirements, as well as payment of fees for assessment of application and membership dues.¹ Thus, membership in the community as defined by the applicant can be clearly verified by way of organizational membership in CPA Australia.

According to the AGB’s second Delineation criterion, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application has awareness and recognition among its members. This is because the community as defined consists entirely of finance, accounting and business professionals who have opted to organize themselves by way of membership in CPA Australia. These members cohere by way of a shared organizational mission, professional status, and participation in the several events and training programs hosted by CPA Australia on a yearly basis in and outside of Australia².

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

According to the AGB, “*organized* implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” The applicant, CPA Australia Ltd, is itself an organization that is expressly dedicated to its membership, i.e., the community as defined in the application.

¹ See fee section of CPA Australia website: <https://www.cpaaustralia.com.au/member-services/fees/australia>

² See events section of CPA Australia website: <https://www.cpaaustralia.com.au/training-and-events/conferences>

CPA Australia Ltd has not organized itself or its members for the purposes of obtaining a TLD but has served the members of its defined community as a matter of its mission. Additionally, as required by the AGB, CPA Australia Ltd hosts regular activities serving its membership in Australia and elsewhere, both online and offline.³

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application, i.e., the CPA Australia membership, has been active prior to September 2007 as required by the AGB, section 4.2.3. The organization was founded in 1886 and has been increasingly active since then.⁴ As discussed above, CPA Australia's membership, in addition to being active prior to 2007, demonstrate the AGB's requirements for awareness and recognition.

The Panel determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension

2/2 Point(s)

The Panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application fulfilled the requirements for the size and longevity of the community. The application received a score of 2 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. According to the applicant's website, "CPA Australia is one of the world's largest accounting bodies with a global membership of more than 150,000 members working in 120 countries around the world."⁵ Additionally, as discussed above, the community defined by the application demonstrates the recognition and awareness required by the AGB.

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfil the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. CPA Australia's membership has continued to grow since its founding and the organization has established itself strongly within the finance, accounting, and business professions. Moreover, demand for individuals with the CPA qualification is likely to continue to be robust. According to the Australian Department of Employment, "Employers generally sought bachelor degree qualified accountants with most also requiring certification as a Chartered Accountant (CA) or Certified Practising Accountant (CPA)"⁶. In addition, the Australian Labour Force

³ See training and events: <https://www.cpaaustralia.com.au/training-and-events>

⁴ See CPA Australia History archive: <https://www.cpaaustralia.com.au/about-us/our-history/archives>

⁵ See <https://www.cpaaustralia.com.au/about-us>; note that below, in Nexus, the Panel cites the application's figures which, at the time of submission, were different than the website currently states.

⁶ See http://docs.employment.gov.au/system/files/doc/other/2211accountantaus_1.pdf

Survey figures show that employment of accountants increased by 9.4% year on year in May 2014 to 181,900⁷. Based on the above, the Panel has determined that the pursuits of the community are of a lasting, non-transient nature. Additionally, as discussed above, the community defined by the application demonstrates the recognition and awareness required by the AGB.

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community **0/4 Point(s)**

2-A Nexus

0/3 Point(s)

The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus (of 2 out of 3 points; 1 point is not possible), the applied-for string must identify the community. "Identify means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community."

According to the application, the applied for string .CPA is

an exact match to CPA Australia's globally recognised and respected "CPA" Program and "CPA" designation. The fast-growing CPA Australia community is one of the leading global accounting communities with nearly 140,000 CPA members in 114 countries and an international network of accountants and young professionals. The term "CPA" originates from CPA Australia and CPAs are globally recognised as belonging to the CPA Australia community...

As such, a CPA working in one of the world's leading business hubs, such as Sydney, Hong Kong, Shanghai, London and New York, is clearly identified as a member of the CPA Australia community. The new .cpa gTLD is synonymous with the CPA Australia community, the identification of members of CPA Australia community, and CPA Australia's globally recognised professional accountancy program and designation.

According to the AGB, "identify means that the applied for string closely describes the community or the community members, *without over-reaching substantially beyond the community*" (AGB, 4.2.3, emphasis added), and the applied-for string must at least identify the community for full or partial credit. Despite the applicant's claim above, "a CPA working in one of the world's leading business hubs" is not necessarily "identified as a member of the CPA Australia community". That is because, the term "CPA" in the context of accounting is often used to mean Certified Public Accountant and to identify an individual who has passed a CPA exam, often in reference to the Uniform CPA Examination used in the US and elsewhere. Indeed, there are estimated to be about 650,000 Certified Public Accountants (i.e., individuals who have passed the Uniform CPA Examination) in the United States⁸. The vast majority of these individuals are not included in the applicant's defined community (which has a size of about 150,000 individuals), but the applied-for string nevertheless refers to them.⁹ The Panel has determined, therefore, that the string is "over-reaching

⁷ Ibid.

⁸ <http://www.forbes.com/sites/peterjreilly/2013/06/26/enrolled-agents-deserve-more-respect/>, <http://nasba.org/blog/2010/01/07/january-2010-nasba-addresses-aicpa-sec-conference/>

⁹ The Panel acknowledges receipt of a letter from the American Institute of Certified Public Accountants (AICPA) in support of CPA Australia's application. The letter makes reference to how the two organizations will "jointly operate this extension" and that the AICPA's membership will be included in the community represented by the string. However, despite the letter, the substance of CPA Australia's application, in particular its sections on Delineation and

substantially beyond the community” (AGB) and cannot identify the community as required for credit on Nexus.

The Panel determined that the applied-for string does not match or identify the community or the community members as defined in the application. It therefore does not meet the requirements for Nexus.

2-B Uniqueness

0/1 Point(s)

The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel’s determination that the applied-for string “CPA” does not identify the community defined by the application according to AGB standards. Therefore, since the string does not identify the community, it cannot be said to “have no other significant meaning *beyond identifying the community*” (AGB, emphasis added). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies

4/4 Point(s)

3-A Eligibility

1/1 Point(s)

The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the application:

As a restricted gTLD, registration will only be open to members of the defined CPA Australia community who meet the eligibility requirements set out in the registration policy, and no other third parties will be able to register domain names under .cpa domain space.

The application therefore demonstrates adherence to the AGB’s requirement by restricting domain registration to entities who are members of the community defined by the application. The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection

1/1 Point(s)

The Panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 1 out of 1 point under criterion 3-B: Name Selection.

According to the application:

The types of domain names, which must be related to the CPA Australia community, permitted under the .cpa gTLD will include the following:

- Generic words including program.cpa, practice.cpa, congress.cpa, passport.cpa, member.cpa and associate.cpa
- Personalised names, for example, johnsmith.cpa
- Geographic names such as australia.cpa, uk.cpa and hongkong.cpa
- Combination of personalised and geographic names, for example, johnsmith.uk.cpa

Nexus, is unchanged. Moreover, the Panel cannot, per AGB guidelines, credit the letter in any way other than as support for the applicant.

Therefore, the Panel determined that the application did satisfy the conditions to fulfill the requirements for Name Selection rules that are consistent with the applicant's community-based purpose, which is to serve "the interests of CPA Australia's membership of accounting, finance and business advisory professionals across the world, as well as internet users more generally."

3-C Content and Use

1/1 Point(s)

The Panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the content and use rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:

Domain names under the .cpa gTLD must only provide content that is related to CPA profession and business and be used in a professional manner in accordance with CPA Australia's Code of Professional Conduct relevant to community members...

The Registrant must represent and warrant that:

- (i) it meets, and will continue to meet, the eligibility criteria at all times and must notify the Registrar if it ceases to meet such criteria;
- (ii) the Domain Name will only be used to provide content that relates to the CPA profession and business and will at all times be used in a professional manner in compliance with CPA Australia's Code of Professional Conduct and regulations relevant to community members...

The application therefore demonstrates adherence to the AGB's requirement of content and use rules that are consistent with the application's community-based purpose, which is to serve "the interests of CPA Australia's membership of accounting, finance and business advisory professionals across the world, as well as internet users more generally."

3-D Enforcement

1/1 Point(s)

The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and outlines a coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. According to the application:

The Registrant acknowledges that the Registry may suspend, transfer, cancel or revoke a Domain Name immediately at its sole discretion:

- (i) in the event that the Registrant breaches any Registry Rules;
- (ii) in the event that the Registrant breaches the terms and conditions of this registration policy;
- (iii) in the event that the Registrant breaches CPA Australia's Code of Professional Conduct or other applicable regulations;
- (iv) to comply with applicable law, court order, government rule or under any dispute resolution processes...

Upon receipt of a complaint or allegation of a breach by a CPA Australia Community member of the terms and conditions of this registration policy, CPA Australia's Constitution and By-Laws or other applicable rules and regulations in relation to the registration or use of a Domain Name, the Registry will undertake a rigorous and transparent enforcement process consisting of:

- (i) Investigation;
- (ii) Hearing;

- (iii) Evaluation & disciplinary action (where appropriate); and
- (iv) Right to appeal

The applicant outlined policies that include specific enforcement measures constituting a coherent set and an appeals mechanism. The Panel determined that the application satisfies both of the two conditions to fulfill the requirements for Enforcement and therefore scores 1 point.

Criterion #4: Community Endorsement

4/4 Point(s)

Support for or opposition to a CPE gTLD application may come by way of an application comment on ICANN's website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and as applicable attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support for and opposition to the CPA Australia Ltd. application for the string "CPA".

Summary of Review & Verification of Support/Opposition Materials as of 10 July 2015

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	0	0	0	0
Attachments to 20(f)	9	6	6	3
Correspondence	3	1	1	1
Grand Total	12	7	7	4

4-A Support

2/2 Point(s)

The Community Priority Evaluation panel determined that the application fully met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the applicant had documented support from the recognized community institution(s)/member organization(s).

The application received a maximum score of 2 points under criterion 4-A: Support. To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. "Recognized" means those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance.

Because the applicant, CPA Australia, is applying for a gTLD intended for use by the membership of CPA Australia, the Panel determined that the applicant was itself the recognized community institution/member organization. A recognized community institution or member organization is one which not only (1) represents the entirety of the community as defined by the application, but is also (2) recognized by the same community as its representative. CPA Australia's role in establishing educational and professional standards for certified public accountants in its membership means that both of these standards are met. The Community Priority Evaluation Panel determined that the applicant therefore satisfies the requirements for full credit for Support.

4-B Opposition	<i>2/2 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received no relevant opposition. The application received a score of 2 out of 2 points under criterion 4-B: Opposition.</p>	
<p>To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size. The Community Priority Evaluation panel has determined that there is no relevant opposition to the application. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.</p>	

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

ANNEXURE 2



Barry C. Melancon, President and CEO
American Institute of CPAs
1211 Avenue of the Americas
New York, NY 10036-8775

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA

New York, Tuesday, December 2, 2014

Dear Madam,
Dear Sir,

CPA Australia's application for the .CPA gTLD Letter of Endorsement

We are writing you this letter as one of the applicants for the .CPA new gTLD, and more in particular application numbers 1-1910-48133 and 1-1911-56672.

The American Institute for Certified Public Accountants (AICPA – see www.aicpa.org) represents the CPA profession nationally regarding rule-making and standard-setting, and serves as an advocate before legislative bodies, public interest groups and other professional organizations. We develop standards for audits of private companies and other services by CPAs, provide educational guidance materials to our members, develop and grade the Uniform CPA Examination, and monitor and enforce compliance with the profession's technical and ethical standards.

Together with CPA Australia, we have been submitting bids for the .CPA gTLD, in particular by expressly making reference to our regulated profession as Certified Public Accountants for the CPA membership community at large. We are therefore looking forward to jointly operate this extension, bearing in mind our respective members' interests in operating a recognizable extension that invokes a high degree of trust with the public at large.

As they have referred in its application for the .CPA gTLD, CPA Australia represents over 150,000 accounting, finance and business professionals across 121 countries and seeks to address and resolve the views and concerns of the accounting profession to governments, regulators, industry, academia and the general public. Serving the interests of AICPA's membership base of more than 400,000 individuals and firms, we strongly believe that both of our organizations are able to provide for a single and trustworthy identifier for our members as well as the members of our sister CPA member organizations all over the globe.

Therefore, we would hereby like to express our explicit endorsement for CPA Australia's application for the .CPA gTLD, with ID 1-1744-1971 which, when combined with the efforts we have put in developing and promoting our own applications for this extension, will provide CPAs all over the world with a unique reference point on the Internet.

Indeed, by way of this new gTLD, the AICPA and CPA Australia will be providing their members with a safe internet name space that will increase the visibility of the CPA profession in accordance with the official standards that regulate the profession of our members and increase the recognition of CPAs all over the world.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barry C. Melancon", written over a horizontal line.

Barry C. Melancon, CPA, CGMA
President and CEO
American Institute of Certified Public Accountants

CPA AUSTRALIA CORPORATE PLAN 2015–2019

BE HEARD.
BE RECOGNISED.



OUR VISION: CPA Australia is known for being the world's best member service organisation.
OUR GOAL: To maximise the share of people who want a career built on professional accounting skills.

PROTECTING THE PUBLIC INTEREST

To be a recognized and respected voice in the global business, accounting and leadership space. Ensuring the highest standards for all our members.



DRIVING WORLD'S BEST MEMBER ENGAGEMENT AND SERVICE

An engaged membership created through delivery of world class service and personalised communication.



DELIVERING A WORLD CLASS CPA PROGRAM AND CERTIFICATION

The highest quality CPA Program, whose flexibility of delivery meets the changing needs of candidates and their employers.



PROVIDING ACCESS TO KNOWLEDGE

Being a world class provider of business, accounting and leadership content for our members, potential members and the broader business community.



LEVERAGING OUR BRAND AND BROADENING THE AUDIENCE

Broadening the audience of those who take an interest in what CPA's do, and what CPA Australia does.
Adopting innovative new approaches to take the brand to a wider audience.



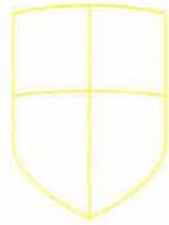
SECURING THE NEXT GENERATION OF TALENT

Being better at targeting and attracting students and young professionals than our competitors to ensure sustainable membership growth.

ENSURING A STABLE, CAPABLE AND SKILLED ORGANISATION

A high performance organisation that has the people, resources and skills base to deliver on our broader objectives.

PROTECTING THE PUBLIC INTEREST



GOAL

Protecting the public interest by:

- being a recognised and respected voice in the global business, accounting and leadership space; and
- ensuring the highest standards for all our members.

CPA Australia takes a leading role in influencing major issues, policies and regulations in order to protect the interests of the public and our members. We are opinion leaders with strong and enduring relationships with policymakers, regulators and the wider business community within Australia and overseas. Our government relations and advocacy activities directly contribute to positively positioning CPA Australia, and the CPA designation.

CPA Australia also promotes the highest standards for members. We do this by actively influencing government and regulatory policy positions and supporting members through a range of reforms. All CPA Australia members commit to upholding the reputation of the CPA designation by adhering to the obligations spelt out in CPA Australia's Constitution and By-Laws, the Code of Professional Conduct and applicable regulations.

FOCUS

- Continuing our focus on supporting and maintaining the professional conduct of our members through our quality review processes
- Being a leading commentator in the general media on issues of importance to the community
- Utilising the full suite of owned and earned media to communicate our policy positions to the right audiences
- Aggressively drive advocacy on key issues to influence policy, legislative and regulatory outcomes
- Continuing to provide high quality advocacy and representation on behalf of the profession and members at strategic forums and meetings
- Exhibiting leadership for the profession through our position on IFAC and other relevant bodies
- Exhibiting leadership with integrated reporting through our position on the IIRC, membership of the <IR> Business Network and the production of an annual integrated report

DRIVING WORLD'S BEST MEMBER ENGAGEMENT & SERVICE



GOAL

An engaged membership created through delivery of world class service and personalised communication.

As a member body, service is at the heart of what we do as an organization. We will continue to build our capability to deliver service that is world-class in standard. We also recognise that the way our members and stakeholders wish to interact with us is changing and we will continue to build our capability and our offer in the use of digital and social communications.

FOCUS

- Using our digital channels to facilitate transactions and engagement through more efficient targeting and service
- Continuing to deliver to our high service standard KPIs and service charter
- Integrating our systems to deliver more efficient communication through personalisation, content and user journeys
- Implementing a multi-channel communications management strategy and approach
- Streamlining our admissions process to ensure at all times that it is progressive, rigorous and commercial (including MEPA)
- Delivery of the Global Top Level Domain (gTLD) project

DELIVERING A WORLD CLASS CPA PROGRAM AND CERTIFICATION



GOAL

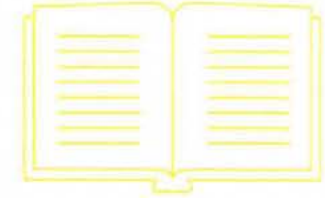
The highest quality CPA Program whose flexibility of delivery meets the changing needs of candidates and their employers.

Our members continue to tell us that they join and remain members of CPA Australia for the professional recognition that comes with carrying the CPA designation. To deliver this, we need to continue to deliver a world class education program that provides candidates with work-ready skills to meet the changing needs of employers.

FOCUS

- Building on our recognition for being leaders in Global Strategy and Leadership
- Using digital channels to support people through to certification
- Continuing to deliver the highest quality relevant content
- Continuing to invest in flexible delivery options
- Delivering a world class learning management platform

PROVIDING ACCESS TO KNOWLEDGE



GOAL

Being a world class provider of business, accounting and leadership content for our members, potential members and the broader business community.

Our members and customers have diverse careers and knowledge needs that extend beyond core accounting skills. As knowledge needs expand and as we increasingly have members located outside of Australia and in regional areas we need to look at new ways to deliver access to the knowledge our members and customers seek.

FOCUS

- Facilitate PD take up and engagement through our digital channels
- Delivering targeted knowledge and learning to support members and employers
- Delivering a world class learning management platform

LEVERAGING OUR BRAND AND BROADENING THE AUDIENCE



GOAL

To build the relevance of CPA Australia and our members through:

- **broadening the audience of those who take an interest in what CPAs do, and what CPA Australia does; and**
- **adopting innovative new approaches to take the brand to a wider audience.**

The size and influence of CPA Australia directly benefits our members by increasing the relevance and profile of their designation in the marketplace. We constantly seek to innovate and explore new ways of communicating with members and the broader community to promote the CPA Australia brand and create meaningful relationships through all our communication channels.

We will continue to use a diverse range of media to highlight the benefits of the CPA Australia designation to members, prospective members and to the broader community.

FOCUS

- Investing in social media and growing our digital presence for our key growth markets, and continuing to invest in these areas in our established markets
- Being the industry leader in digital communication and delivery innovation
- Developing and delivering a world class integrated content marketing strategy
- Continuing to deliver content rich products and services that engage our audience in a non-transactional manner in order to grow our brand and reputation and position us as leaders in our field
- Continuing to grow engagement through the delivery of innovative products
- Ensuring our brand is seen in the right places at the right time to attract new members and increase our recognition
- Ensuring our brand remains contemporary and spirited and is represented consistently in all our marketing activities

SECURING THE NEXT GENERATION OF TALENT



GOAL

Being better at targeting and attracting students and young professionals than our competitors to ensure sustainable membership growth.

As professional bodies consolidate and form strategic alliances, our scope of influence and scale will be important to ensure CPA Australia remains relevant in a global environment. We do not look to grow purely for growths sake but because our size and influence directly benefits our members by increasing the relevance of their designation in the marketplace.

FOCUS

- Make the process to become a member clear and compelling
- Increase our engagement and activity on campus, with both students and academics
- Greater investment in our existing emerging markets
- Integrated business development strategies and activities that enhance our value in our key market sectors
- Building on our network activities

ENSURING A STABLE, CAPABLE AND SKILLED ORGANISATION



GOAL

A high performance organisation that has the people, resources and skills base to deliver on our broader objectives.

The focus of our people and resources on the activity we need to undertake to reach our goals will be critical to our success. We are committed to the ongoing development of a skilled and capable workplace and continued investment in the core technologies that will enable us to deliver on our business objectives. We must also take a continuous improvement approach to all our processes to ensure ongoing efficiency.

FOCUS

- Delivery of a simplified technology environment with a focus on improving the user experience across major transactions
- Execution of an agreed program of work to provide CPA Australia with the technology capabilities to support achievement of its vision of being the world's best member service organisation
- Delivering on our employer brand to attract the right talent to CPA Australia
- Developing our employees to "Be their Best"
- Maintaining a high performance culture
- Systems and processes that support a flexible and creative workforce

Exhibit 24

Reconsideration Request Form

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: Merck KGaA

Representative: Dr. Torsten Bettinger

Address: Contact Information Redacted

Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

Merck KGaA (hereinafter "Requester") seeks reconsideration of ICANN's acceptance of the Community Priority Evaluation Report, Application ID 1-980-7217, published on 10 August 2016. The panel that evaluated the Requester's application for MERCK did not follow established policies in making its determination that Requester did not meet the requirements specified in the Applicant Guidebook.

The Requester therefore asks ICANN to reject the Community Priority Evaluation Report, and instruct a different appointed panel to make an expert determination that applies the standards defined by ICANN.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

The relevant report was published on 10 August, 2016 and notified to the Requester on that date. A copy of the decision is available at:

<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>

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

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

The relevant report was published on 10 August, 2016 and notified to the Requester on that date.

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

The Requester is materially affected by the Community Priority Evaluation Report, as ICANN will utilize the findings of the panel in making any assessment as to whether the parties should proceed to the auction process, or whether the Requester has sufficient

pre-existing rights as a community to warrant an alternative mechanism for awarding (or withholding) delegation of the contested .MERCK string.

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

Apart from the parties of the CPE procedures for .merck no other parties will be adversely affected by the action.

8. Detail of Board or Staff Action – Required Information

(Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board Action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that

information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision. If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act. Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.)

ICANN indicated that it will follow the Community Priority Evaluation Report, thus rendering this decision an "ICANN actions". As established in prior decisions of the Board of Governance Reconsideration Requests it has been noted that ICANN may review its decision to accept the decision of an expert panel in a Request for Reconsideration process where it may be shown that the panel failed to follow the

established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision.

In this case, the panel failed to take reasonable care in evaluating the Requester's evidence and misapplied standards and policies developed by ICANN in the Applicant Guidebook, resulting in a denial of due process to the Requester in the context of its Community Priority Application.

In particular, the panel failed to correctly apply the standards and policies developed by ICANN in the Applicant Guidebook with respect to evaluating the criteria for the Nexus between the Proposed String and Community. In addition and as a consequence of its failure to correctly apply the "Nexus" criterion the panel further failed to correctly apply the standards for the criterion for "Uniqueness".

The scoring criteria for the Nexus component is as follows: 3 points - The string matches the name of the community or is a well-known short form or abbreviation of the community. 2 points – String identifies the community, but does not qualify for a score of 3. 0 points – String nexus does not fulfill the requirements for a score of 2.

The term "Identify" means that the applied for string closely describes the community or the community members, without over reaching substantially beyond the community.

In evaluating the criteria, the panel must ask, "*Does the string match the name of the Community or is it a well-known short form or abbreviation of the community name?*"

The panel, while recognizing that the string MERCK was the well-known name of the Requestor – and therefore clearly matches the name of the Community, nevertheless awarded Requestor 0 points, on the basis that another entity was also known by this name.

The panel misapplied the policy by equating "over-reaching substantially beyond the community" with anything less than absolute world-wide exclusivity. This is not the definition in the Applicant Guidebook and the CPE guidelines take this fact into consideration as they state "*since the evaluation takes place to resolve contention there will obviously be other applications, community based and/or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone".*". The CPE is only done in cases where multiple applications for the identical string compete and it is the panel's task to identify whether the applied for string matches the name of the community. Under the panel's interpretation applied in the CPE for ".merck", it is likely that no string could ever be awarded more than zero points for this criterion, a result clearly inconsistent with the standards and policies developed by ICANN for this process.

The Requester's position is clearly supported by the underlying facts in the record. The parties involved in the dispute are the Requester, the world's oldest pharmaceutical

company, and Merck & Co. Inc., a US pharmaceuticals concern and former subsidiary of the Requester. The Requester was forced by the US government to divest its US subsidiary, along with its US trademark rights, based on the US "Trading With the Enemy Act", since Requester was and is based in Germany.

The two companies currently exercise their rights in the "Merck" trademark under a reciprocal use agreement, which has been in force (through various versions and revisions) since the 1930s. Merck & Co.'s rights are territorially limited to two countries within North America, whereas Requester retains those rights throughout the rest of the world. A copy of the currently-valid agreement, signed in 1970, is attached as **Annex 1**.

Merck & Co. is prohibited by contract and existing trademark and name rights from using the name "MERCK" on the internet and otherwise in almost all countries. The Requester has taken legal action against the infringing activities of Merck & Co Inc. before the District Court of Hamburg and Frankfurt, Germany, and in the courts of the United Kingdom and France. The courts in UK, France and Frankfurt confirmed that the use of Merck & Co. infringes the contractual and intellectual property rights of the Requester. The court in UK issued an order on 15/01/2016 preventing Merck & Co. from any use of MERCK standalone in UK online as well as offline (A copy of the Judgment of the High Court of Justice, is attached as **Annex 2**). The preliminary injunction of the Landgericht Frankfurt, issued on 29/01/2016 prevents a subsidiary of Merck & Co., the applicant for the gTLD ".merckmsd" to use the gTLD within the region of the European

Union. A translation of the preliminary injunction of the Landgericht Frankfurt is attached as **Annex 3**.

While the Requester explicitly stated in its application and in a Public Interest Commitment that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights, Merck & Co. has not done the same. Indeed, Merck & Co. has indicated in its applications not only that it intends to use the .MERCK space internationally (where it has no rights in the MERCK trademark whatsoever), but also that it intends to sell and license domain names to affiliates and other entities throughout the world, including territories where Requester has exclusive rights.

Trademark and name rights exclusively identify the commercial source or origin. As the Requester holds exclusive rights in the name and trademark MERCK in the vast majority of countries there cannot be any doubt that the applied for string identifies Requester's community.

Requester's community covers 99% of the world's jurisdictions, home to 95% of the world's population. The community has existed for 348 years (A history of the trademark development and use over the last 348 years is attached as **Annex 4**). The Requester has exclusive rights to use MERCK in 191 out of 193 UN countries. The string clearly identifies the Requestor. The exclusivity of the Requester is not only acknowledged and

granted by 191 UN countries globally in form of trademark and name rights but also by Merck & Co. in a territorial co-existence agreement.

The Requestor has, on the face of its application, eliminated "over-reaching," substantial or otherwise. The Requester has provided a public interest commitment not to use it in the two territories where Merck & Co. has rights, including restricting internet access.

Any "over-reaching" beyond the community is due to the current and proposed unlawful intrusion by MERCK & Co. into the Requester's territories. As a result of the unlawful intrusion, namely Merck & Co.'s use of MERCK on the internet, it is not surprising that the panel has been misled when undertaking the internet search to be utilized according to the CPE guidelines to help to understand whether the string identifies the community. Merck & Co.'s illegal use of MERCK in the Requestor's territories creates massive confusion about the source of the Requestor's community MERCK. No right can be obtained out of an illegal use, and the panel cannot contribute or consolidate such an illegal use.

As a result the Requester's application clearly and completely addressed the over-reaching issue, and the application of the policies and standards developed by ICANN to the Requester results in an award of 3 point for Nexus.

Further, as a consequence of the wrong evaluation by the panel it did not consider the criterion of "Uniqueness". The guidelines for the CPE state as follows:

*"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. **The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores 2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."***

It should be noted that "Uniqueness" is only about the meaning of the string since the evaluation takes place to resolve contention there will obviously be other applications, community based and/or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone".

As outlined above Requester's longstanding and sole use of its community name MERCK in 99% of global jurisdictions led to a single source indicator ensuring exclusivity in form of the existing trademark and name rights. The name MERCK has no other meaning than the name of the family owning the majority of Requester's community.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

As ICANN has now adopted the panel decisions as ICANN staff/Board actions, these procedural and judgment errors have become those of ICANN, and accordingly the Requester has been harmed by ICANN actions which contradict published ICANN policies (namely, the New gTLD Dispute Resolution Policy and procedure). The Requester asks ICANN to reject the advice set forth in the Decisions, and instruct a panel to make an expert determination that applies the standards defined by ICANN.

The requestor hereby request a hearing.

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

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC

must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

Under the language of the ICANN Bylaws, a Requester may bring a case if it has been affected by: - one or more staff actions or inactions that contradict established ICANN policy(ies); or - one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or - one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

These provisions are further modified by the Board of Governance's ruling in its Recommendation on Reconsideration Request No. 13-6, which indicates that the Reconsideration process can properly be invoked for challenges of the third-party decisions where it can be stated that the evaluating panel failed to follow the established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision.

In this case, the Requester submits that it has been harmed by the failure of the Community Priority Evaluation panel to follow the mandated ICANN procedure for the Community Priority Evaluation. The panel failed to decide the case on the basis of the correct and applicable policies and standards, and moreover has failed to decide the case on the basis of the true and accurate factual record which was presented to it. Accordingly, the Requester has been denied fundamental due process, as its pleadings were not meaningfully taken into account in the course of the panel's deliberations, and the panel elected to decide the case on inapplicable grounds.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

No

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

Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at

<http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Terms and Conditions for Submission of Reconsideration Requests

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



Martin Müller *for*
Dr. Torsten Bettinger
On behalf of Merck KGaA

August 25, 2016

List of Annexes

- Annex 1 Currently-valid agreement, signed in 1970

- Annex 2 Judgment of the High Court of Justice

- Annex 3 Translation of the preliminary injunction of the Landgericht Frankfurt

- Annex 4 Trademark history

Exhibit 25



OPERATING EUROVISION AND EURORADIO

DATE

06 March 2018

Mr. Jamie Baxter

DOT.gay LLC

Contact Information Redacted

BY EMAIL

Contact Information Redacted

COPY

ICANN-Board@icann.org

SUBJECT

Community Application

Dear Sir,

I am writing you today in my capacity as Head of Institutional Relations at EBU to share with you our disappointing experience with the Community Priority Evaluation (CPE) process.

At the time, I was in charge of following on behalf of my organization all the policy implications of the application we submitted as a community for the DOT.radio TLD. Together with Mr. Artero, TLD project manager, we went through the CPE process and our experience was that such process was far from being impartial and flawless. These considerations, as well as related concerns about the CPE, have already been directed to the ICANN Ombudsman and the Council of Europe (CoE) experts who prepared the report on TLD and Human Rights and are identical to those which affected the evaluation of the DOT.gay application.

The EBU was given 14 points out of the achievable 16 points on the rating scale, i.e., just enough points for DOT.radio to be recognized as a "community applicant" and granted community priority.

We obtained :

- 3 out of 4 points for Community Establishment
- 3 out of 4 points for Nexus between String and Community
- 4 out of 4 points on Registration Policies
- 4 out of 4 points for Community Endorsement

As we pointed out to the Ombudsman and the CoE experts, the criteria used by the EIU evaluators appeared completely unpredictable and unstable. No coherence could be found in the analyses carried out on various applications. As we have already stated publicly, there were frequent contradictions even within the same application, especially when compared to other parts of the ICANN's gTLD process.

EUROPEAN BROADCASTING UNION

L'Ancienne-Route 17A
PO Box 45
1218 Le Grand-Saconnex
Geneva, Switzerland

Tel. +41(0)22 717 21 11
Ext. +41(0)22 717 20 13
Email: mazzone@ebu.ch
www.ebu.ch

These inconsistencies, as well as others, were brought to the attention of the Ombudsman and the CoE experts, but for obvious reasons, the EBU at that time was not very vocal, as we were still in the middle of the attribution process for DOT.radio. Now that we have been granted the DOT.radio TLD, we feel more free to bring to light the numerous and evident inconsistencies of the evaluation process. We also believe that had the process adhered more consistently to ICANN's own evaluation principles, our application would have been awarded all 16 points.

Unfortunately this was not the case either in relation to your application for TLD DOT.gay. Similarly, such inconsistencies and incoherencies had a devastating impact and, as a final result, prevented DOT.gay from obtaining community priority and recognition.

My purpose here is to sum up what happened to us in a very similar case to yours, hoping that the ICANN Board will arrive at the recognition that DOT.gay was refused community priority because of evident failures in the CPE process and inconsistent attribution of points. In the case of DOT.gay (as our experience shows as well) the evaluation score was wrongly calculated, due to inconsistencies against the criteria set by ICANN and even other EIU evaluations.

We find it shocking that the FTI Consulting investigation has ignored these inconsistencies and incoherencies, in spite of ICANN's responsibility as an organization to adhere to its non-discriminatory commitments in carrying out CPE and to ensure that all community applicants are treated equally and fairly. We hope that the ICANN Board will achieve enough clarity to set aside the FTI reports when addressing the case of DOT.gay.

At your disposal to provide further evidence if requested, I remain,

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G. Mazzone', written in a cursive style.

Giacomo Mazzone
Head of Institutional Relations at EBU
(in charge of relations with ICANN)

EBU

OPERATING EUROVISION AND EURORADIO

Exhibit 26

Expert Legal Opinion

By Honorary Professor in International Copyright

Dr. Jørgen Blomqvist

June 17, 2016

Prepared for:

International Corporation of Assigned Names and Numbers (“ICANN”);

Alliance of Music Communities Representing over 95% of Global Music Consumed (“Music Community”); and

DotMusic Limited (“DotMusic”)

Expert Legal Opinion on ICANN’s .MUSIC Community Priority Evaluation Report for DotMusic’s Application with ID: 1-1115-14110 by:

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Table of Contents

About Honorary Professor Dr. Jørgen Blomqvist.....	3
Selected Publications by Honorary Professor Dr. Jørgen Blomqvist.....	4
The Relevant Facts.....	7
Background on ICANN.....	7
The Government Advisory Committee (“GAC”)	9
The ICANN New gTLD Program.....	9
ICANN’s New gTLD Program Committee (“NGPC”) of the Board.....	10
GAC Advice on the New gTLDs	10
GAC Consensus Advice and ICANN Board NGPC Resolutions on .MUSIC string	11
The Community Priority Evaluation (“CPE”)	11
The DotMusic Application Materials and .MUSIC CPE Process.....	15
Independent Expert Testimonies	25
The Independent Nielsen QuickQuery Poll	26
Answers to CPE Clarifying Questions (“CQ”)	26
The .MUSIC CPE Report for DotMusic’s Community-based Application.....	28
The Reconsideration Request.....	28
About Copyright, Copyright Law, International Copyright Conventions/Treaties and Collective Rights Management	30
Expert Legal Opinion.....	39
CPE Section on Community Establishment.....	39
CPE Section on Nexus between Proposed String and Community	46
CPE Section on Support (under Community Endorsement).....	47
Conclusion.....	49

About Honorary Professor Dr. Jørgen Blomqvist

Dr. Jørgen Blomqvist is the Honorary Professor of International Copyright at the University of Copenhagen. He teaches international intellectual property law and undertakes research in the interpretation of the core international conventions on copyright and related rights, the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Formerly, Dr. Jørgen Blomqvist was Director, Copyright Law Division, at the World Intellectual Property Organization (“WIPO”) and he is continuously active in international development cooperation undertaking various ad-hoc assignments from WIPO, the European Commission and the Danish Patent and Trademark Office. In addition he is Secretary of the Danish Copyright Association and the Danish Group of the International Literary and Artistic Association (“ALAI”).

Dr. Jørgen Blomqvist has worked with copyright since 1976. From 1976 to 1990 as Secretary of the Copyright Law Review Commission under the Ministry of Culture, he played a central role in the preparation of the comprehensive law reform of 1995, and for a number of years he was also Legal Advisor and Deputy General Manager of KODA, the organization managing the performing rights of composers, writers and music publishers. He obtained his Ph.D in 1987 on a groundbreaking thesis on transfer of copyright ownership. In 1992 he was employed by the WIPO, a United Nations specialized agency in Geneva, from which he recently retired as Director of the Copyright Law Division.

Dr. Jørgen Blomqvist is counted among the leading experts in international copyright in the world, and he has in-depth experience with the substance of the international norms and their political background and development as well as with development cooperation in the field. Dr. Jørgen Blomqvist was awarded the 2015 Kockvedgaard Prize, which is awarded every two years by the Danish Association for Entertainment and Media Law for outstanding contributions to the subject area of entertainment and media law, and for his Ph.D thesis he was awarded the 1988 Gad’s Lawyers Prize. Dr. Jørgen Blomqvist has also authored the book “Primer on International Copyright and Related Rights.”¹

¹ See <http://www.amazon.com/Primer-International-Copyright-Related-Rights/dp/1783470968>

Selected Publications by Honorary Professor Dr. Jørgen Blomqvist

2016

[Immaterielret og international frihandel \[Intellectual Property and International Free Trade\].](#) / Blomqvist, Jørgen

In: UfR, litterær afd., Vol. 2016, 18.03.2016, p. 166-174

The article describes the movement of international intellectual property law from multilateral WIPO treaties towards regional, bi- and plurilateral trade agreements. Based on the TPP Agreement it discusses the influence of international trade law on the international protection of intellectual property.

[Om fortolkning af Bernerkonventionen. Er Bernerkonventionen et maksimalistisk instrument? \[Interpretation of the Berne Convention. Is the Berne Convention a Maximalistic Instrument?\]](#) / Blomqvist, Jørgen

Liber Amicorum Jan Rosén. ed. / Gunnar Karnell; Annette Kur; Per Jonas Nordell; Daniel Wesman; Johan Axhamn; Stephan Carlsson. Visby, Sweden : Eddy.se AB, 2016. p. 153-167.

Based on the reference to protection “in as effective and uniform a manner as possible” in the Preamble of the Berne Convention, it has been claimed that the Berne Convention must be interpreted in such a way that it aims for the highest possible level of protection. That is not correct. When analyzing the wording of the Convention in its context it becomes clear that the reference is to the level of protection that the contracting parties were able to agree on. Accordingly, a balanced interpretation of the Convention is called for.

2015

[Denmark.](#) / Blomqvist, Jørgen

Copyright Throughout the World. ed. / Silke von Lewinski. Vol. 1 Rel. 7. ed. Eagan, MN : Thomson Reuters, 2015. p. 13.1-13.56.

[Indledning \[Introduction\].](#) / Blomqvist, Jørgen

Ophavsret og kulturarv: Bidrag til udvikling af kulturarvsjuraen. [Copyright and Cultural Inheritance: Contributions to the Development of the Law on Cultural Inheritance.] Ed. / Helle Porsdam; Erland Kolding Nielsen; Mia Rendix. Copenhagen : Det Kongelige Bibliotek, 2015. p. 9-11.

2014

[Primer on International Copyright and Related Rights.](#) / Blomqvist, Jørgen
Cheltenham UK/Northampton, Massachusetts USA : Edward Elgar Publishing,
Incorporated, 2014. 288 p.

The international law on copyright and related rights is comprehensive and complex, spanning over a large number of different treaties which have been compiled and amended over more than 125 years. This book gives a concise, but comprehensive introduction to the rules and their rationales. Its thematic approach makes it equally valuable to the student and the practitioner who needs both an introduction to and overview over the international law in the field. The book explains all treaties relevant today, from the 1886 Berne Convention to the WIPO Marrakesh Treaty of 2013 (288p).

2013

[Denmark.](#) / Blomqvist, Jørgen

Copyright throughout the World. ed. / Silke von Lewinski. Vol. 1 2013. ed. Eagan, MN, USA : Thomson Reuters, 2013. p. 13.1-13.97.

Chapter 13 on Danish copyright law in this seminal loose-leaf edition, edited by Silke von Lewinski and published by West.

2011

[Ophavsretsloven af 1961 i dens internationale sammenhæng \[The 1961 Danish Copyright Act Seen in its International Context\].](#) / Blomqvist, Jørgen

In: N I R, Vol. 2011, No. 6, 2011, p. 526-536.

A lecture held at the celebration of the 50th Anniversary of the Danish Copyright Act, analyzing both the international inspiration which helped form the Act and its own influence on foreign and international legislation.

International ophavsret [European and International Copyright]. / Schønning, Peter; Blomqvist, Jørgen

København : Djøf / Jurist- og Økonomforbundet, 2011. 502 p.

A commentary to the European Directives on copyright and related rights and a systematic description of the international conventions in the field.

[The Consistency of Mandatory Exceptions Treaties with International Conventions in the Field of Copyright and Related Rights.](#) / Blomqvist, Jørgen

Paper delivered at the 2011 ALAI Study Days in Dublin, publication by ALAI Ireland pending, available at <http://www.alaidublin2011.org/wp-content/uploads/2011/08/Jorgen-Blomqvist.pdf>.

2009

Reflections on Article 15(4) of the Berne Convention. / Blomqvist, Jørgen

In: Emlékkönyv Ficsor Mihály 70. születésnapja alkalmából, Barátaiktól [publication in honor of Dr. Mihály Ficsor at his 70th birthday], Szent István Társulat, Hungary, 2009, p. 54 - 63

2004

The Future of the Berne Convention and the International Cooperation on Copyright and Related Rights. / Blomqvist, Jørgen

In: Autorių teisės į literatūros, mokslo ir meno kūrinis, Vilnius 2004, p. 10 – 16

1992

Non-voluntary Licensing in the Field of Radio, Television and Cable Distribution

In: AIPJ vol 1992, p. 94 – 109.

Copyright and Software Protection as viewed from the "traditional" Side of Copyright

RIDA 1992, p. 2 – 50.

1987

Overdragelse af ophavsrettigheder [Transfer of Copyright Ownership]. / Blomqvist, Jørgen

An analysis of the legal concepts of transfer and licensing of copyright and related rights and a study of the interpretation of the scope of transferred or licensed rights. Thesis. Copenhagen, Jurist- og Økonomforbundets Forlag 1987.

The Relevant Facts

Background on ICANN

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) was formed in 1998.² As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems. In particular, ICANN coordinates (i) the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as ‘DNS’); Internet protocol (‘IP’) addresses and autonomous system (‘AS’) numbers; and Protocol port and parameter numbers; (ii) the operation and evolution of the DNS root name server system; and (iii) policy development reasonably and appropriately related to these technical functions.”³
2. ICANN “is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.” ICANN “is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986.” ICANN shall “pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (‘IP’) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (‘DNS’), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).”⁴ ICANN operates “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, [ICANN] shall cooperate as appropriate with relevant international organizations.”⁵
3. ICANN’s Core Values “guide the decisions and actions of ICANN: (1) Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet; (2) Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to those matters within ICANN’s mission requiring or significantly benefiting from global coordination; (3) To the extent feasible

² ICANN, *What Does ICANN Do?* <https://www.icann.org/resources/pages/what-2012-02-25-en>

³ ICANN Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en#I>, Article I, Section § 1

⁴ ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 3

⁵ ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 4

and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties; (4) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making; (5) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment; (6) Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest; (7) Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process; (8) Making decisions by applying documented policies neutrally and objectively, with integrity and fairness; (9) Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected; (10) Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness; and (11) While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations."⁶ According to its Bylaws, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."⁷ Furthermore, ICANN's Bylaws state that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."⁸

4. ICANN is comprised of the Board of Directors,⁹ Staff,¹⁰ the Ombudsman,¹¹ the Nominating Committee,¹² three Supporting Organizations,¹³ four Advisory Committees¹⁴ and group of technical expert advisors.¹⁵

⁶ ICANN Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en#I>, Article I, Section § 2 (emphasis added)

⁷ ICANN Bylaws, Article II *Non-Discriminatory Treatment*, <https://www.icann.org/resources/pages/governance/bylaws-en#II>, Section § 3

⁸ ICANN Bylaws, Article III *Transparency*, Purpose, <https://www.icann.org/resources/pages/governance/bylaws-en#III>, Section § 1

⁹ ICANN Bylaws, Article VI *Board of Directors*. <https://www.icann.org/resources/pages/governance/bylaws-en#VI>; ICANN, *Board of Directors*. Retrieved on May 4th, 2016 from <https://icann.org/resources/pages/board-of-directors>

¹⁰ ICANN, *ICANN Staff*, <https://www.icann.org/en/about/staff>

¹¹ ICANN Bylaws, Article V *Ombudsman*. <https://www.icann.org/resources/pages/governance/bylaws-en#V>; ICANN, *The ICANN Ombudsman*. <https://www.icann.org/ombudsman>

¹² ICANN Bylaws, Article VII *Nominating Committee*, <https://www.icann.org/resources/pages/governance/bylaws-en#VII>; ICANN, *ICANN Nominating Committee*. <https://www.icann.org/resources/pages/nomcom-2013-12-13-en>

¹³ See ICANN Bylaws: Article VIII, *Address Supporting Organization* ("ASO"), <https://www.icann.org/resources/pages/governance/bylaws-en#VIII> and <https://aso.icann.org>; Article IX, *Country Code Names Supporting Organization* ("CCNSO"), <https://www.icann.org/resources/pages/governance/bylaws-en#IX> and <http://ccnso.icann.org>; and Article X, *Generic Names Supporting Organization* ("GNSO"), <https://www.icann.org/resources/pages/governance/bylaws-en#X> and <http://gnso.icann.org/en>

¹⁴ See ICANN Bylaws: Article XI, *Advisory Committees* (See <https://www.icann.org/resources/pages/governance/bylaws-en#XI>): the Governmental Advisory Committee ("GAC"), <https://gacweb.icann.org>; the Security and Stability Advisory Committee ("SSAC"), <https://www.icann.org/groups/ssac>; the Root Server System Advisory Committee ("RSSAC"),

The Government Advisory Committee (“GAC”)

5. GAC “consider[s] and provide[s] advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”¹⁶ GAC is comprised of “162 governments as Members and 35 Intergovernmental Organizations (‘IGOs’) as Observers.”¹⁷ ICANN’s Bylaws have special provisions concerning interaction between the Board and the GAC: “The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”¹⁸

The ICANN New gTLD Program

6. ICANN “has as its mission to ensure a stable and unified global Internet. One of its key responsibilities is introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system (‘DNS’). In 2005, ICANN’s Generic Names Supporting Organization (‘GNSO’) began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet. The two-year policy development process included detailed and lengthy consultations with the many constituencies of ICANN’s global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists. In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. After approval of the policy, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input on multiple draft versions of the Applicant Guidebook (‘AGB’). In June 2011, ICANN’s Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. The program’s goals include enhancing competition and consumer choice, and

<https://www.icann.org/resources/pages/rssac-4c-2012-02-25-en>; and the At-Large Advisory Committee (“ALAC”), <https://atlarge.icann.org>

¹⁵ See ICANN Bylaws, Article XI-A *Other Advisory Mechanisms*,

<https://www.icann.org/resources/pages/governance/bylaws-en#XI-A>; Also see ICANN Groups, <https://www.icann.org/resources/pages/groups-2012-02-06-en>

¹⁶ See ICANN Bylaws: Article XI, *Advisory Committees*,

<https://www.icann.org/resources/pages/governance/bylaws-en#XI>, Section § 2.1.

¹⁷ ICANN GAC, <https://gacweb.icann.org/display/gacweb/How+to+become+a+GAC+member>

¹⁸ See ICANN Bylaws: Article XI, *Advisory Committees*, Section § 2.1.j

enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name ('IDN') top-level domains. The application window opened on 12 January, 2012, [and closed on 12 April, 2012.] ICANN received 1,930 applications for new gTLDs. On 17 December, 2012, ICANN held a prioritization draw to determine the order in which applications would be processed during Initial Evaluation and subsequent phases of the program. These applications were processed by ICANN staff and evaluated by expert, independent third-party evaluators according to priority numbers.”¹⁹

ICANN’s New gTLD Program Committee (“NGPC”) of the Board

7. On April 12, 2012, the ICANN Board established the New gTLD Program Committee (“NGPC”) delegating to the Board NGPC “all legal and decision making authority of the Board relating to the New gTLD Program.”²⁰ The NGPC handled all gTLD-Program matters for the Board until the NGPC was decommissioned on October 22, 2015.²¹

GAC Advice on the New gTLDs

8. Section 3.1 of ICANN’s Applicant Guidebook describes the GAC’s special advisory role of giving public-policy advice: “3.1 *GAC Advice on New gTLDs* - ICANN’s Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues. The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors. The GAC can provide advice on any application... ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts [...]”²²
9. Section 5.1 of ICANN’s Applicant Guidebook states that ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.²³

¹⁹ ICANN, *About The Program*, <https://newgtlds.icann.org/en/about/program>; Application filing deadline was on April 12, 2012. See <https://www.icann.org/news/announcement-2012-03-29-en>

²⁰ ICANN Approved Board Resolutions (2012.04.10.01 to 2012.04.10.04), April 10, 2012. See <https://www.icann.org/resources/board-material/resolutions-2012-04-10-en>

²¹ ICANN Approved Board Resolutions (2015.10.22.15), October 22, 2015. See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.c>

²² AGB, § 3.1, pp. 3-2 to 3-3. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

²³ AGB, § 5.1, p.5-4. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

GAC Consensus Advice and ICANN Board NGPC Resolutions on .MUSIC string

10. The ICANN Board NGPC accepted consensus GAC Category 1 Advice that .MUSIC is a “string that is linked to regulated sector” that “should operate in a way that is consistent with applicable laws.”²⁴ In effect, ICANN’s resolution for “GAC Category 1 Advice Implementation” established the .MUSIC string and its associated community (as a whole) are linked to a regulated sector that coheres to international copyright law, united under international treaties, agreements and conventions.²⁵
11. The ICANN Board NGPC also accepted consensus GAC Advice to give “preferential treatment for all applications which have demonstrable community support,” “to protect the public interest and improve outcomes for communities” and to take “better account of community views and improving outcomes for communities”²⁶

The Community Priority Evaluation (“CPE”)

12. The AGB provided detailed instructions to gTLD applicants and set forth the procedures as to how new gTLD applications were evaluated. The AGB provided that new gTLD applicants may designate their applications as either standard or community based, *i.e.*, “operated for the benefit of a clearly delineated community.”²⁷ Applicants for community-based gTLDs were expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD string strongly and specifically related to the community named in [their] application.”²⁸ If two or more applications were for identical or “confusingly similar” new gTLDs and complete all preliminary stages of evaluation, they are placed in a “contention set.”²⁹ An applicant with a community-based application that is placed in a contention set may elect to proceed with Community Priority Evaluation (“CPE”) for that application.³⁰ If the applicant elected to proceed to CPE, the application is forwarded to an independent, third-party provider for review.³¹
13. ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009 from firms interested in providing an independent, third-party panel capable of

²⁴ ICANN Board Letter to GAC, June 23, 2015. See <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2 and Annex 5, p.8

²⁵ See ICANN GAC Category 1 Safeguards at <https://newgtlds.icann.org/en/applicants/gac-advice/cat1-safeguards>; Also see ICANN GAC Category 1 Advice Implementation, New gTLD Advisory (Advisory number: R1-A01-0051), 19 March 19, 2014, <https://newgtlds.icann.org/en/applicants/advisories/gac-cat1-advice-19mar14-en>

²⁶ See GAC Singapore Communiqué, <https://gacweb.icann.org/download/attachments/27132037/Final%20Communiqué%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, ¶1a, p.4; Also see Annex 1 to NGPC Resolution 2013.09.10.NG03 – Scorecard in Response to GAC Durban Communiqué, ICANN Resolutions, <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #17 (2013-07-18 – Community Applications (Communiqué §7.b.i)) and Register #18 (2013-07-18 – Community Applications (Communiqué §7.b.ii.a)), p.7

²⁷ AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

²⁸ *Ibid*, § 1.2.3.1

²⁹ *Ibid*, § 4.1

³⁰ *Ibid*, § 4.2

³¹ See <http://newgtlds.icann.org/en/applicants/cpe>

performing the Community Priority Evaluation process. The consulting firm would contractually agree: (i) that the panel had “significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role;”³² (ii) that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination;”³³ and (iii) provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”³⁴

14. ICANN’s staff selected The Economist Group’s Economist Intelligence Unit (“EIU”) to conduct Community Priority Evaluations in 2011.³⁵ The EIU agreed in the ICANN-EIU Statement of Work (“SOW”) contract that its activities will be bound by ICANN’s governance requirements and governance processes. ICANN’s Core Values were contractually imposed on the EIU through ICANN Bylaws.³⁶ The SOW stated that the Panel must “ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook” and follow “evaluation activities based on ICANN’s gTLD Program Governance requirements to directly support the Program Office governance processes.”³⁷ The Consulting Agreement also required the panel to “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by (i) “document[ing] the evaluation and analysis for each question to demonstrate how the Panelist determined a score for each question based on the established criteria;” (ii) “provid[ing] a summary of the rationale and recommended score for each question;”³⁸ (iii) and “providing ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” including “access to work papers as required verifying Panel Firm’s compliance.”³⁹
15. The CPE Panel Process Document required that “all EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures. EIU evaluators are highly qualified and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.”⁴⁰

³² New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest (“EOI”), Comparative Evaluation Panel, <https://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>, p.5

³³ Ibid, p.5

³⁴ Ibid, p.6

³⁵ See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>

³⁶ Governance Documents include ICANN’s Bylaws and Articles of Incorporation. See <https://icann.org/resources/pages/governance/governance-en>.

³⁷ EIU Contract and Statement of Work (“SOW”) with ICANN, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[2], p.8

³⁸ Ibid, p.5

³⁹ Ibid, p.12

⁴⁰ EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2

16. The CPE Guidelines required that “the panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role. The provider must be able to convene a panel capable of evaluating applications from a wide variety of different communities. The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and [...] The panel must be able to document the way in which it has done so in each case. EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to applications. All applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.”⁴¹
17. Once an applicant submits its materials in support of CPE, a panel constituted of EIU experts (known as a “CPE panel”) evaluates the application.⁴² The CPE panel evaluates the application against the CPE criteria, using the CPE Guidelines as additional guidance, which include scoring rubrics, definitions of key terms, and specific questions to be scored.⁴³ If the application is found to meet the CPE criteria set forth in the AGB—meaning that the CPE panel awards the application at least 14 out of 16 possible points on those criteria—the application will prevail in CPE.⁴⁴ If an application prevails in CPE, it (and any other community based applications in the contention set that prevail in CPE) will proceed to the next stage of evaluation.⁴⁵ Other standard applications in a contention set will not proceed if the community-based application(s) have achieved priority,⁴⁶ an outcome based on the principles and policy implementation guidelines of the GNSO that applications representing communities be awarded priority in string contention.⁴⁷
18. The CPE are set forth in Module 4 of the AGB. There are four principal criteria, each worth a possible maximum of 4 points: Community Establishment, the Nexus between

⁴¹ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

⁴² See Community Priority Evaluation Panel and Its Processes, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

⁴³ Ibid; CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>

⁴⁴ See AGB, § 4.2.2. The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of four points, See AGB, § 4.2.3

⁴⁵ AGB, § 4.2.2

⁴⁶ AGB, § 4.2.2

⁴⁷ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program , <https://icann.org/en/minutes/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>, p.94; ICANN’s 2007 Recommendations and Principles for launching the New gTLD Program provided that “where an applicant lays any claim that the TLD is intended to support a particular community, that claim will be taken on trust, with the following exceptions: (i) the claim to support a community is being used to gain priority for the application [...] Under [this] exception[...], Staff Evaluators will devise criteria and procedures to investigate the claim.” <http://gns0.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6; Also see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

Proposed String and Community, Registration Policies and Community Endorsement.⁴⁸
An application must receive a total score of at least 14 points in order to prevail.

19. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (worth 2 points) and 1-B Extension (worth 2 points). According to the AGB, “community” implies “more of cohesion than a mere commonality of interest” with (i) “an awareness and recognition of a community among its members;” (ii) an “understanding of the community’s existence prior to September 2007;” and (iii) “extended tenure or longevity—non transience—into the future.” Under the 1-A Delineation sub-criterion, the Community’s membership definition is evaluated to determine whether the Community is “clearly delineated [‘Delineation’], organized [‘Organization’], and pre-existing [‘Pre-Existence’].” Delineation requires “a clear and straightforward membership definition” and an “awareness and recognition of a community (as defined by the applicant) among its members.” Organization requires “documented evidence of community activities” and “at least one entity mainly dedicated to the community” (as defined by applicant). Pre-existence requires that the Community defined by the applicant “must have been active prior to September 2007.” Under the I-B Extension sub-criterion, the Community (as defined by applicant) must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”⁴⁹ Longevity requires that the community (as defined by applicant) “was in existence prior to September 2007.”⁵⁰ According to the AGB: “With respect to ‘Delineation’ and ‘Extension,’ it should be noted that a community can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).”⁵¹
20. The second criterion is the Nexus between Proposed String and Community, which is comprised of two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point). With respect to “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name⁵² of the community” i.e. “[t]he string matches the name of the community.”⁵³ Uniqueness means that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”⁵⁴ According to the AGB: “With respect to ‘Uniqueness,’ ‘significant meaning’ relates to the public in general, with consideration of the community language context added. ‘Uniqueness’ will be scored both with regard to the community context and from a general point of view.”⁵⁵

⁴⁸ AGB, Section 4.2.3, pp.4-9 to 4-19

⁴⁹ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

⁵⁰ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12

⁵¹ AGB, p.4-12

⁵² AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

⁵³ AGB, p.4-12

⁵⁴ AGB, p.4-13

⁵⁵ AGB, p.4-14

21. The third criterion is the Registration Policies. There is 1 point possible for each sub-criterion: 3-A Eligibility, 3-B Name selection, 3-C Content and Use and 3-D Enforcement.⁵⁶
22. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth 2 points: 4-A Support and 4-B Opposition. According to the AGB: “Support” means that the “Applicant is, or has documented support from, the recognized⁵⁷ community institution(s) / member organization(s).”⁵⁸ According to the AGB: “With respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions / organizations. In such cases there must be documented support from institutions / organizations representing a majority of the overall community addressed in order to score 2.”⁵⁹ According to the AGB: With respect to “Opposition,” 2 points are awarded if there is “no opposition of relevance.”⁶⁰ Also, “to be taken into account as relevant opposition [...] objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”⁶¹

The DotMusic Application Materials and .MUSIC CPE Process

23. DotMusic with Application ID 1-1115-14110 was invited to CPE on July 29, 2015.⁶² DotMusic accepted ICANN’s invitation, electing to have its .MUSIC community-based Application evaluated by the EIU CPE Panel (the “Panel”).⁶³ According to DotMusic’s Application Materials:
- a. The Mission and Purpose is: “Creating a trusted, safe online haven for music consumption and licensing; Establishing a safe home on the Internet for *Music Community* (“Community”) members regardless of locale or size; Protecting intellectual property and fighting piracy; Supporting Musicians’ welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and music education; Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both commercial and non-commercial stakeholders;⁶⁴
 - b. According to DotMusic’s Application, the “Community” was defined in 20A: “The Community is a strictly delineated and organized community of individuals,

⁵⁶ AGB, pp. 4-14 to 4-16

⁵⁷ AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

⁵⁸ AGB, p.4-17

⁵⁹ AGB, p.4-18

⁶⁰ AGB, p.4-17

⁶¹ AGB, p.4-19

⁶² See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

⁶³ See DotMusic’s .MUSIC Application Details on ICANN’s website, <https://gtdresult.icann.org/applicationstatus/applicationdetails/1392>

⁶⁴ See .MUSIC Application, 18A. Also see 20C, <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392> (emphasis added)

- organizations and business, a “logical *alliance* of communities of a similar nature (“COMMUNITY”)), that relate to music: the art of combining sounds rhythmically, melodically or harmonically;”⁶⁵
- c. According to DotMusic’s Application, community establishment was described in 20A: “DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination;”⁶⁶
 - d. According to the DotMusic Application, evidential examples of music community cohesion were described in 20A: “commonly used [...] classification systems such as ISMN, ISRC, ISWC, ISNI [...]”;⁶⁷
 - e. According to DotMusic’s Application, the size and extensiveness of the community were described in 20A: “The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [...] with a Community of considerable size with millions of constituents (‘SIZE’);”⁶⁸

⁶⁵ See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: “... Community definition of a “logical alliance of communities of similar nature that relate to music” ...” at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁶⁶ See .MUSIC Application, 20A, para.1

⁶⁷ Ibid, 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12th, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173,” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and http://www.iso.org/iso/catalogue_detail?csnumber=23401,” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and http://www.iso.org/iso/catalogue_detail?csnumber=28780, footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and http://www.iso.org/iso/catalogue_detail?csnumber=44292,” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

⁶⁸ See .MUSIC Application, 20A, para.4 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

- f. According to DotMusic’s Application, the “Name” of the community defined was described in 20A: “The name of the community served is the ‘Music Community’ (‘Community’);”⁶⁹
- g. According to DotMusic’s Application, the “Nexus between Proposed String and Community” was described in 20A and 20D: “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”⁷⁰ DotMusic “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in its answer to 20D: “The .MUSIC string relates to the Community by *completely representing* the *entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model;”⁷¹
- h. According to the DotMusic Application, DotMusic received “documented support” from multiple organizations representing a majority of the Community, as referenced in 20D: “See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support.”⁷² According to the DotMusic Application Materials and DotMusic’s Support letters, the .MUSIC Application is supported by *multiple* recognized and trusted organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music;”⁷³ and
- i. Documented support from multiple organizations for DotMusic’s .MUSIC community-based Application included the International Federation of Arts Councils and Culture Agencies⁷⁴ (“IFACCA”), the International Federation of Phonographic Industry⁷⁵ (“IFPI”), the International Federation of Musicians⁷⁶ (“FIM”), the

⁶⁹ Ibid, 20A, para.1

⁷⁰ Ibid, 20A, para.3 (emphasis added)

⁷¹ Ibid, 20D, para.1 (emphasis added)

⁷² Ibid, 20D, last paragraph

⁷³ See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁷⁴ IFACCA is the is the only international federation representing a global network of arts councils and government ministries of culture with national members from over 70 countries covering all continents. See <http://ifacca.org>

⁷⁵ The IFPI, founded in 1933, is a globally-recognized music organization with official relations with United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status), a globally-recognized international organization with 195 country member states (See <http://en.unesco.org/countries/member-states>); World Intellectual Property Organization (WIPO) (Permanent Observer Status). See <http://ngo-db.unesco.org/r/or/en/1100064188> and http://wipo.int/members/en/organizations.jsp?type=NGO_INT. The IFPI represents the “recording industry worldwide” encompassing 63 countries with IFPI-affiliated national groups or music licensing companies as well as 63 global markets where the IFPI’s member companies operate in. The IFPI represents the majority of music consumed globally. See <http://www.ifpi.org>. The IFPI is also the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. See <http://isrc.ifpi.org/en/isrc-standard/structure> and <http://isrc.ifpi.org/en/why-use/benefits>. The IFPI also represents the three major label groups (Universal Music, Sony Music and Warner Music), which “control 78% of the global market.” See Credit Suisse Research and

International Confederation of Music Publishers⁷⁷ (“ICMP”), the International Artist Organisation (“IAO”),⁷⁸ the Featured Artist Coalition⁷⁹ (“FAC”), the International Society for Music Education⁸⁰ (“ISME”), the International Ticketing Association⁸¹ (“INTIX”), the International Association of Music Information Centres⁸² (“IAMIC”), the Worldwide Independent Network⁸³ (“WIN”), the International Music Products

Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&extdocid=1034433411_1_eng_pdf

⁷⁶ FIM is an international federation of national music communities representing the “voice of musicians worldwide.” The FIM, founded in 1948, is a globally-recognized music community organization with documented official roster consultative status relations with the United Nations Economic and Social Council (“ECOSOC”); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”). See <http://www.fim-musicians.org>

⁷⁷ The ICMP, founded in 1991, is the “global voice for music publishing,” the world trade association representing the interests of the music publishing community internationally. ICMP’s mission is to increase copyright protection internationally, encourage a better environment for business and act as a music community forum for consolidating global positions. See http://www.wipo.int/members/en/organizations.jsp?type=NGO_INT. See <http://www.icmp-ciem.org>. The ICMP is a globally-recognized organization accredited by WIPO as an observer.

⁷⁸ The IAO is the umbrella association for national organizations representing the rights and interests of Featured Artists in the Music Industry. Our principal interests are transparency, the protection of intellectual property and a fair reflection of the value an artist's work generates. The IAO is a not-for-profit organization based in Paris that was officially founded by its six founder-members: FAC (UK), GAM (France), CoArtis (Spain), Domus (Germany), Gramart (Norway) and FACIR (Belgium). See <http://www.iaomusic.org>

⁷⁹ The FAC “represents the interests of Featured Artists within the national, European and International political arenas when relevant issues such as copyright law, music licensing are being debated.” See <http://thefac.org/about>

⁸⁰ The ISME was formed in 1953 by UNESCO “to stimulate music education as an integral part of general education.” The ISME represents an international, interdisciplinary, intercultural music community network striving to understand and promote music learning across the lifespan with presence in over 80 countries covering a network of millions of music community members. The ISME, the “premiere international organisation for music education”... “respects all musics and all culture” and believes that “every individual has a right to music education.” See <http://isme.org/general-information/4-isme-facts>

⁸¹ INTIX is the only international ticketing organization mainly dedicated to ticketing that plays a vital role for the global Music Community by generating over \$20 billion in live music ticket sales every year. INTIX “is the leading forum for ticketing professionals, representing the most comprehensive view of the industry and its practices, products and services. INTIX represents members from over 25 countries.” See <http://intix.org> and <https://icann.org/en/system/files/correspondence/hoffman-to-icann-eiu-05may16-en.pdf>

⁸² IAMIC, formed in 1958, is the only global network of international music information centres that is dedicated to the global music community by means of “facilitating the exchange of knowledge and expertise in the field of music documentation, promotion and information, leading to an increased international cooperation, performance and use of repertoire of music of all genres.” IAMIC is the “only international network of organisations that document, promote and inform on the music of their country or region in a diversity of musical genres.” See <http://iamic.net>

⁸³ WIN, formed in 2006, supports independent music trade associations globally and is a global forum for the professional independent music industry. It was launched in 2006 in response to business, creative and market access issues faced by the independent sector everywhere. For independent music companies and their national trade associations worldwide, WIN is a collective voice. It also acts as an advocate, instigator and facilitator for its membership. WIN exists to support the independent music community through interaction with representative trade organizations and groups, and working directly with international music industry bodies on issues of global significance. See <http://winformusic.org>

Association⁸⁴ (“NAMM”), the International Music Managers Forum⁸⁵ (“IMMF”), Jeunesses Musicales International⁸⁶ (“JMI”), the Independent Music Companies Association⁸⁷ (“IMPALA”), the Recording Industry Association of America⁸⁸ (“RIAA”), the National Music Publishers Association⁸⁹ (“NMPA”), the American Association of Independent Music⁹⁰ (“A2IM”), the Association of Independent Music⁹¹ (“AIM”), the Merlin Network⁹² (“Merlin”), the American Society of Composers, Authors & Publishers⁹³ (ASCAP), the Society of European Stage

⁸⁴ NAMM is a globally-recognized music association formed in 1901 representing the international music products industry and community. NAMM is the not-for-profit association that promotes the pleasures and benefits of making music and strengthens the \$17 billion global music products industry. See <https://www.namm.org>

⁸⁵ The IMMF, formed in 1992, is the umbrella international organization representing entertainment manager members. The IMMF connects music managers around the world to share experiences, opportunities, information and resources. See <http://immf.com>

⁸⁶ JMI is the world’s largest music youth organization covering over 5 million music community members aged 13-30. JMI is the largest youth music non-governmental organization in the world, created in 1945 with the mission to “enable young people to develop through music across all boundaries” powered by its 230 staff members and 2,200 volunteers. See <http://www.jmi.net>. JMI is globally recognized and has consultative status with UNESCO and official roster consultative status relations with the United Nations’ ECOSOC. See <http://ngo-db.unesco.org/r/or/en/1100033233>

⁸⁷ IMPALA was formed in 2000 by prominent independent labels and national trade associations and has over 4,000 members. IMPALA is a non-profit making organization with a scientific and artistic purpose, dedicated to cultural SMEs, the key to growth and jobs in Europe. IMPALA enables the independents to leverage collective strength to punch above their weight. IMPALA’s mission is to grow the independent music sector, promote cultural diversity and cultural entrepreneurship, improve political access and modernize the perception of the music industry. See <http://www.impalamusic.org>

⁸⁸ The RIAA, founded in 1956, is a globally-recognized music association that represents the recording industry in the United States. By “Representing Music,” the RIAA is a trade organization that supports and promotes the creative and financial vitality of the major music companies. The RIAA’s members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. See <http://www.riaa.com/about-riaa>. The United States is the world’s largest market representing 26% of the entire physical music market and 71% of the digital music market. See Recording Industry Association of Japan Yearbook 2015: IFPI 2013, 2014. Top 20 Markets, p.24. Retrieved May 12, 2016 from <http://www.riaj.or.jp/e/issue/pdf/RIAJ2015E.pdf>. The United States represents 40.6% of global music market share. See 2014 NAMM Global Report at https://www.namm.org/files/ihdp-viewer/global-report-2014/A7352D4907B25A95B2CE27A075D3956F/2014MusicUSA_final.pdf, p.6

⁸⁹ The NMPA, formed in 1917, is the largest U.S. music publishing trade association that “represents the rights of music publishers everywhere and works to protect their intellectual property.” Its mission is to protect, promote, and advance the interests of music’s creators. The NMPA is the voice of both small and large music publishers, the leading advocate for publishers and their songwriter partners in the nation’s capital and in every area where publishers do business. The goal of NMPA is to protect its members’ property rights on the legislative, litigation, and regulatory fronts. The NMPA is an active and vocal proponent for the interests of music publishers in the U.S. and throughout the world. See <https://www.nmpa.org/aboutnmpa/mission.asp>

⁹⁰ A2IM, formed in 2005, represents the Independent music community as a unified voice, representing a sector that comprises over 34.5% of the U.S music industry’s market share and as much as 80% of the music industry’s releases. A2IM represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community. See <http://a2im.org/about/mission>. A2IM also has Associate Members, such as Apple, Pandora Spotify and YouTube. See <http://a2im.org/groups/tag/associate+members>

⁹¹ AIM is a trade body established in 1999 to provide a collective voice for the UK’s independent music industry. See <http://www.musicindie.com>

⁹² Merlin is the global rights agency for the independent label sector, representing over 20,000 labels from 39 countries. Merlin serves the interests of the global independent music sector. See <http://merlinnetwork.org>

⁹³ ASCAP, formed in 1914, is a membership association of more than 525,000 composers, songwriters, lyricists and music publishers of every kind of music. Through agreements with affiliated international societies, ASCAP also

Authors and Composers⁹⁴ (“SESAC”), Broadcast Music, Inc⁹⁵ (“BMI”), the Nashville Songwriters Association International⁹⁶ (“NSAI”), The Recording Academy,⁹⁷ UK Music,⁹⁸ the British Phonographic Industry⁹⁹ (“BPI”), Bundesverband Musikindustrie¹⁰⁰ (“BVMI”), the Indian Music Industry¹⁰¹ (“IMI”), the Indian Performing Right Society¹⁰² (“IPRS”), the National Association of Recording

represents hundreds of thousands of music creators worldwide. ASCAP protects the rights of ASCAP members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. ASCAP’s licensees encompass all who want to perform copyrighted music publicly. ASCAP makes giving and obtaining permission to perform music simple for both creators and music users. *See* <http://www.ascap.com/about>

⁹⁴ SESAC, founded in 1930, is a leading global performing rights organization representing songwriters and publishers and their right to be compensated for having their music performed in public. SESAC currently licenses the public performances of more than 400,000 songs on behalf of its 30,000 affiliated songwriters, composers and music publishers. *See* <http://www.sesac.com>

⁹⁵ BMI, founded in 1939, is the largest music rights organization. BMI is the bridge between songwriters and the businesses and organizations that want to play their music publicly. As a global leader in music rights management, BMI serves as an advocate for the value of music, representing more than 8.5 million musical works created and owned by more than 650,000 songwriters, composers and music publishers. BMI’s role is international in scope. The songwriters, composers and BMI represents include individuals from the more than 90 performing rights organizations around the world. *See* <http://www.bmi.com/about>

⁹⁶ The NSAI is the world’s largest international not-for-profit songwriters’ trade association. The NSAI was established in 1967 and is dedicated to protecting the rights of and serving aspiring and professional songwriters in all genres of music. *See* <http://www.nashvillesongwriters.com>

⁹⁷ The Recording Academy is a music organization of musicians, producers, recording engineers and other recording professionals dedicated to improving the quality of life and cultural condition for music and its makers. The Recording Academy, which began in 1957, is known for its GRAMMY Awards, the world’s most recognized music award. As the preeminent membership organization for thousands of musicians, producers, songwriters, engineers, and other music professionals, the Recording Academy’s mission is to advance artistic and technical excellence, work to ensure a vital and free creative environment, and act as an advocate on behalf of music and its makers. The Academy’s mission statement is simple, but represents the heart and soul of the organization’s efforts: to positively impact the lives of musicians, industry members and our society at large. *See* <http://grammy.org/recording-academy>

⁹⁸ UK Music promotes the interests of UK record labels, songwriters, musicians, managers, publishers, producers, promoters and collecting societies through high profile campaigns and events. UK Music represents the AIM, the British Academy of Songwriters, Composers and Authors (“BASCA”), the BPI, the Music Managers Forum (“MMF”), the Music Publishers Association (“MPA”), which includes collection societies Mechanical-Copyright Protection Society Ltd (“MCPS”) and Printed Music Licensing Ltd (“PMLL”), the Music Producers Guild (“MPG”), the Musicians Union (“MU”), the Phonographic Performance Limited, PRS for Music, UK Live Music Group and the FAC. *See* <http://ukmusic.org/about-us/our-members>. British artists constitute 13.7% of all global music sales and account for one (1) in seven (7) albums purchased by fans around the globe. *See* <http://billboard.com/biz/articles/6589962/brits-share-of-global-market-hits-five-year-high>

⁹⁹ The BPI represents the UK’s recorded music industry, which includes independent music companies and the UK’s major record companies – Universal Music, Sony Music, and Warner Music. Together, BPI’s members account for 85% of all music sold in the UK. *See* <http://www.bpi.co.uk>

¹⁰⁰ BVMI represents over 85% of music consumed in Germany, the world’s 3rd largest music market globally. *See* <http://www.musikindustrie.de>. Also *see* Recording Industry Association of Japan Yearbook 2015: IFPI 2013, 2014. Top 20 Markets, p. 24. Retrieved May 12, 2016 from <http://www.riaj.or.jp/e/issue/pdf/RIAJ2015E.pdf>

¹⁰¹ IMI, formed in 1936, represents over 75% of all legal music in India. The IMI is the second oldest music industry organization in the world that was involved in protecting copyrights of music producers. *See* <http://indianmi.org>

¹⁰² IPRS was founded in 1969 and is the representative body of music owners, composers, lyricists (or authors) and the publishers of music and is also the sole authorized body to issue licenses for usage of musical works and literary music in India. The IPRS is a very active member of the Copyright Enforcement Advisory Council set up by the Government of India to advise on copyright issues and their enforcement. *See* <http://www.iprs.org>

Industry Professionals¹⁰³ (“NARIP”),¹⁰⁴ (“PPL”), the Harry Fox Agency¹⁰⁵ (“HFA”), William Morris Endeavor¹⁰⁶ (“WME”), Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte¹⁰⁷ (“GEMA”), Future of Music Coalition¹⁰⁸ (“FMC”), the Society of Composers, Authors and Music Publishers of Canada¹⁰⁹ (“SOCAN”), Music Managers Forum¹¹⁰ (“MMF”), ReverbNation,¹¹¹ TuneCore,¹¹² Believe Digital,¹¹³ CDBaby,¹¹⁴ TheOrchard,¹¹⁵ LyricFind,¹¹⁶ SonicBids,¹¹⁷

¹⁰³ NARIP promotes education, career advancement and goodwill among record executives. Established in 1998 and based in Los Angeles, NARIP has chapters in New York, Atlanta, San Francisco, Phoenix, Houston, Las Vegas, Philadelphia and London, and reaches over 100,000 people in the music industries globally. See <http://narip.com>

¹⁰⁴ PPL represents Indian music organizations and owns, as assignee, and exclusively controls public performance rights and radio broadcasting rights in more than 500,000 songs (sound recordings) in Hindi, Telugu, Tamil, Bengali, Punjabi, Marathi, Malayalam, Bhojpuri and other Indian languages, including both film and non-film songs such as Ghazals, devotional, folk, pop, classical. See <http://www.pplindia.org>

¹⁰⁵ HFA, founded in 1927, represents over 48,000 affiliated publishers and is the leading provider of rights management, licensing, and royalty services for the U.S. music industry with authority to license, collect, and distribute royalties on behalf of musical copyright owners. In addition, the HFA provides affiliated publishers with the opportunity to participate in other types of licensing arrangements including lyrics, guitar tablatures, background music services and more. See <http://www.harryfox.com>

¹⁰⁶ WME is one of the world’s largest music talent agencies with offices in Beverly Hills, New York City, London, Miami, Nashville, and Dallas. See <http://www.wmeentertainment.com/0/cta/music>

¹⁰⁷ GEMA, founded in 1933, represents the copyrights of more than 69,000 members (composers, lyricists and music publishers) in Germany, as well as over two million copyright holders globally. GEMA is one of the largest societies of authors for musical works in the world with 30 million music works online through cooperation with international partner music organizations operating through a network of databases. See <https://www.gema.de>

¹⁰⁸ The FMC, founded in 2000, is a non-profit music organization with a mission in “supporting a musical ecosystem where artists flourish and are compensated fairly and transparently for their work. FMC works with musicians, composers and industry stakeholders to identify solutions to shared challenges and to ensure that diversity, equality and creativity drives artist engagement with the global music community, and that these values are reflected in laws, licenses, and policies that govern any industry that uses music.” See <http://futureofmusic.org>

¹⁰⁹ SOCAN is a not-for-profit organization that represents the Canadian performing rights of millions of Canadian and international music creators and publishers. SOCAN plays a leading role in supporting the long-term success of its more than 125,000 Canadian members, as well as the Canadian music industry. SOCAN distributes royalties to its members and peer organizations around the world. See <http://www.socan.ca/about>

¹¹⁰ MMF is the world’s largest representative body of artist music managers. See <http://themmfm.net>

¹¹¹ ReverbNation is the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries across all music constituent types. See <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues) and <https://reverbnation.com/fan-promotion> (Fans).

¹¹² TuneCore is the world’s leading digital distributor for online music and video. Founded in 2005, TuneCore offers musicians and other rights-holders the opportunity to place their music into online retailers such as iTunes, Google Play, AmazonMP3, Zune Marketplace, Rhapsody, eMusic, Spotify, and others for sale. TuneCore distributes between 15,000 and 20,000 newly recorded releases a month. TuneCore registers musicians’ songs worldwide in over 60 countries and is affiliated with ASCAP, BMI and SESAC. See <http://www.tunecore.com>

¹¹³ Believe Digital, founded in 2004, is the largest, leading digital distributor and services provider for independent artists and labels. Believe Digital is integrated with over 350 digital music stores in the world, including all major online and wireless digital music stores. Believe Digital’s distribution network includes iTunes, Amazon, Deezer, Google, Spotify, YouTube, Vodafone, Orange and many more. See <http://believedigital.com/network>

¹¹⁴ CD Baby, founded in 1998, is the world’s largest online distributor of independent music, with over 300,000 artists, 400,000 albums and 4 million tracks in its catalog. See <http://www.cdbaby.com>

¹¹⁵ The Orchard was founded in 1997 to foster independence and creativity in the music industry. The Orchard is a music and video distribution company operating in more than 25 global markets. See <http://www.theorchard.com>

¹¹⁶ LyricFind is the world’s leader in legal lyric solutions. Founded in 2004, LyricFind has amassed licensing from over 4,000 music publishers, including all four majors – EMI Music Publishing, Universal Music Publishing Group, Warner/Chappell Music Publishing, and Sony/ATV Music Publishing. LyricFind also built a database of those lyrics

Altafonte,¹¹⁸ the League of American Orchestras,¹¹⁹ BMAT,¹²⁰ INDMusic,¹²¹ the Canadian Musical Reproduction Rights Agency¹²² (“CMRRA”), the Canadian Independent Music Association¹²³ (“CIMA”), StoryAmp,¹²⁴ Americana Music Association¹²⁵ (“AMA”), the Australian Independent Record Labels Association¹²⁶ (“AIR”), Associacao Brasileira da Musica Independente - the Brazilian Association of Independent Music¹²⁷ (“ABMI”), the Archive of Contemporary Music¹²⁸ (“ARC”)

available for licensing and service to over 100 countries. LyricFind tracks, reports, and pays royalties to those publishers on a song-by-song and territory-by-territory basis. See <http://lyricfind.com>

¹¹⁷ Sonicbids, founded in 2001, enables artists to book gigs and market themselves online. It connects more than 450,000 artists with over 30,000 promoters and brands from over 100 different countries and 100 million music fans. See <https://www.sonicbids.com>

¹¹⁸ Altafonte is the leading music distributor for Spanish independent labels and the leading independent digital distribution company in Iberia and Latin America. Altafonte distributes digital and physical music to over 100 platforms worldwide including Apple iTunes, Spotify, Amazon, Google Play, YouTube, Vevo, Shazam, Deezer, Pandora and others. See <http://altafonte.com/en>

¹¹⁹ The League of American Orchestras leads, supports, and champions America’s orchestras and the vitality of the music they perform. Its diverse membership of approximately 800 orchestras totaling tens of thousands of musicians across North America. The League is the only national organization dedicated solely to the orchestral experience, and is a nexus of knowledge and innovation, advocacy, and leadership advancement for managers, musicians, volunteers, and boards. Founded in 1942 and chartered by Congress in 1962, the League links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners. See <http://www.americanorchestras.org>

¹²⁰ BMAT provides global music identification that monitors over 16 million songs and growing in over 3000 radios and televisions across more than 60 countries worldwide. See <http://www.bmat.com>

¹²¹ INDMusic is a global music rights administration network which is YouTube Certified MCN. INDMUSIC, owned by Live Nation (“the largest live entertainment company in the world, connecting nearly 519 million music fans,” Live Nation Annual Report 2014 at http://s1.q4cdn.com/788591527/files/doc_financials/2014/LYV-2014-Annual-Report.pdf, p.2), helps the global music community and its channel partners monetize their content on multiple platforms without sacrificing creative control or rights to their music content. The INDMusic community is composed of over 3.9 million network members and over 1900 channel partners. INDMusic community’s network reach is over 3.5 billion monthly network views. See <http://www.indmusicnetwork.com>

¹²² Founded in 1975, the CMRRA is a music licensing collective representing music rights holders, who range in size from large multinational music publishers to individual songwriters. Together, they own or administer the vast majority of songs recorded, sold and broadcast in Canada. On their behalf, CMRRA issues licenses to individuals or organizations for the reproduction of songs on various media. See <http://www.cmr.ca/cmr/about>

¹²³ CIMA, founded in 1975, is the not-for-profit national trade association representing the English-language, Canadian-owned sector of the music industry. See <http://www.cimamusic.ca/about-cima>

¹²⁴ StoryAmp is the world’s leading music community for music artists, music publicists and music journalists. It provides artists and publicists the opportunity to connect and network with over 7000 music journalists globally. See <https://www.storyamp.com>

¹²⁵ The AMA is a music trade organization whose mission is to advocate for the authentic voice of American Roots Music around the world. The Americana Music Association works behind the scenes to foster an environment for growth: building infrastructure, creating networking opportunities and establishing channels, which allow the music community to work effectively and efficiently. See <http://americanamusic.org/who-we-are>

¹²⁶ AIR is a non-profit, non-government association dedicated to supporting the growth and development of Australia’s independent recording sector. AIR represents Australian owned record labels and independent artists based in Australia. See <http://www.air.org.au>

¹²⁷ ABMI was founded in January 2002. ABMI operates in the Brazilian market and global to promote the production and distribution of independent Brazilian music. Currently, the association represents the majority of record labels in Brazil. See <http://abmi.com.br>

¹²⁸ ARC, founded in 1985, is a not-for-profit archive, music library and research center. ARC contains more than 2.25 million sound recordings and over 22 million songs. ARC has electronically catalogued more than 300,000 sound recordings – more than any other public, university or private library. ARC also houses more than three million pieces of attendant support material including photographs, videos, DVDs, books, magazines, press kits,

Independent Music New Zealand¹²⁹ (“IMNZ”), PledgeMusic,¹³⁰ BureauExport - French Music Export Office,¹³¹ Western Australian Music Association¹³² (“WAM”), the Music British Columbia Industry Association¹³³ (“MusicBC”), Music Austria,¹³⁴ Manitoba Music,¹³⁵ Luxembourg Export Office¹³⁶ (“Music:LX”), Francophonie Diffusion,¹³⁷ the Alberta Music Industry Association¹³⁸ (“Alberta Music”), Pleimo,¹³⁹ Music Centre Slovakia,¹⁴⁰ Queensland Music Network¹⁴¹ (“QMUSIC”), The Northern

sheet music, ephemera and memorabilia. ARC also maintains a variety of informational databases, notably its Music Index of over 52,000 people working in the music industry. See <http://arcmusic.org>

¹²⁹ IMNZ is a non-profit trade association, the New Zealand voice for independent record labels and distributors. Its members release the bulk of New Zealand music, including commercially successful artists as well as niche music genres. IMNZ started in 2001. These labels and distributors collectively represent the majority of all musical acts in New Zealand. See <http://www.indies.co.nz>

¹³⁰ PledgeMusic is leading music global direct-to-fan platform that provides artists and labels with the tools needed to get fans to engage. PledgeMusic provides the artist or label with tools to fund, pre-sell, sell, and release their music while connecting directly with fans. See <http://www.pledgemusic.com>

¹³¹ BureauExport is a French non-profit organization and network created in 1993 that helps French and international music professionals work together to develop French produced music around the world and to promote professional exchange between France and other territories. BureauExport members include labels, publishers, distributors, promoters, artist management offices or ensembles. BureauExport is a global network whose mission is to help French music professionals develop their artists internationally. See <http://www.french-music.org>

¹³² WAM, founded in 1987, is the music body responsible for supporting, nurturing and growing all forms of contemporary music in Western Australia. WAM supports and promotes all forms and levels of Western Australian music, locally, nationally and internationally. See <http://wam.org.au/what-we-do>

¹³³ MusicBC represents the British Columbia music industry. Music BC is the only provincial music association that serves all genres, all territories and all participants in the industry from artists, to managers, agents, broadcasters, recording studios, producers and all other industry professionals. Music BC is a non-profit society established in 1994 dedicated to providing information, education, funding, advocacy, awareness and networking opportunities to develop and promote the spirit, growth and sustainability of the BC Music community. See <http://musicbc.org>

¹³⁴ Music Austria is the professional partner for musicians in Austria. Music Austria was founded in 1994 as an independent, non-profit association by the Republic of Austria to support of contemporary musicians living in Austria with advice and information and the distribution of local music through promotion in Austria and abroad. See <http://www.musicaustria.at>

¹³⁵ Manitoba Music is the hub of Manitoba’s vibrant music community and was established in 2000. Manitoba Music is a member-based, not-for-profit industry association representing over 750 members in all facets of the music industry, including artists and bands, studios, agents, managers, songwriters, venues, promoters, producers, and beyond. Manitoba Music serves all genres, from rock to roots, hip-hop to hardcore, country to classical, and everything in between. See <http://manitobamusic.com>

¹³⁶ Music:LX is a non-profit organization and network created in 2009 with the aim to develop Luxembourg music of all genres around the world and to promote professional exchange between Luxembourg and other territories. Music:LX helps its artists financially with the promotion of releases outside of Luxembourg and international tours and showcases. See <http://www.musiclx.lu>

¹³⁷ Francophonie Diffusion, founded in 1993, promotes artists and music from the Francophone area through a worldwide network of more than 1000 media, festivals and music supervisors worldwide located in 100 countries, provinces or territories. Francophonie Diffusion has been involved for 20 years in the promotion of artists from the Francophone area. See <http://www.francodiff.org/en>

¹³⁸ The Alberta Music, founded in 1980, is a music association dedicated to helping professionals in the music industry to succeed in their careers to “participate and assist in the overall development and improvement of the Alberta and Canadian recorded music industry, especially as it relates to Alberta.” See <http://albertamusic.org/about>

¹³⁹ Pleimo is an international music streaming platform which aggregates bands and music fans around the world. It offers a 360-degree platform for 250,000 artists to manage and promote their music. Music fans can also subscribe and listen to Pleimo’s catalog of over 5,000,000 songs. See <https://www.pleimo.com>

¹⁴⁰ Music Centre Slovakia was established by the Ministry of Culture of the Slovak Republic to encourage Slovak music culture by organizing concerts, bringing pieces of Slovak composers to the stages, publishing sheet music and music books, documenting the music life in Slovakia and promoting Slovak music culture abroad. See <http://hc.sk>

Territory Music Industry Association¹⁴² (“MusicNT”), Music Victoria,¹⁴³ Music South Australia¹⁴⁴ (“Music SA”), Music New South Wales¹⁴⁵ (“MusicNSW”), Music Music/Musique New Brunswick¹⁴⁶ (“MNB”), Associacao de Musicos Artistas e Editoras Independentes - the Portuguese Independent Music Association¹⁴⁷ (“AMAIE”), Music Nova Scotia,¹⁴⁸ Brasil Música & Artes¹⁴⁹ (“BM&A”), Nimbit,¹⁵⁰ MusicTasmania,¹⁵¹ BroadJam,¹⁵² ProPlay,¹⁵³ Dart,¹⁵⁴ Flanders Music Centre,¹⁵⁵

¹⁴¹ QMusic, founded in 1994, is a music association representing Queensland’s music industry. QMusic promotes the artistic value, cultural worth and commercial potential of Queensland music. See <http://qmusic.com.au>

¹⁴² MusicNT supports the growth and development of original contemporary music in the Northern Territory. Music NT represents the Northern Territory’s music industry nationally and internationally. See <http://musicnt.com.au>

¹⁴³ Music Victoria is the independent voice of the Victorian contemporary music industry. An independent, not-for-profit, non-Government organization, Music Victoria represents musicians, venues, music businesses and music lovers across the contemporary music community in Victoria. Music Victoria provides advocacy on behalf of the music industry, actively supports the development of the Victorian music community, and celebrates and promotes Victorian music. See <http://www.musicvictoria.com.au/about>

¹⁴⁴ Music SA was established in 1997 as a not-for-profit organization committed to promoting, supporting and developing contemporary music in South Australia. See <http://www.musicasa.com.au>

¹⁴⁵ MusicNSW is the peak body representing Contemporary Music in New South Wales. It is not for profit Industry Association set up to represent, promote and develop the contemporary music industry in New South Wales, Australia. MusicNSW exists to support the creative and economic expansion of the NSW contemporary Music Industry through advocacy, resource assistance, activating growth of industry infrastructure, delivery of tailored initiatives and provision of advice and referrals. See <http://www.musicnsw.com/about>

¹⁴⁶ MNB is a provincial music industry association that provides a support network for musicians, managers, and businesses that are involved in the creation of music within the province of New Brunswick. MNB was established in 2006 and is a non-profit association with ties on regional, provincial, and national levels with government agencies and departments who enable lobbying and promoting New Brunswick's music industry and artists whenever possible. MNB’s primary responsibility is to represent the interests of its members and foster the New Brunswick music industry. See <http://musicnb.org>

¹⁴⁷ AMAEI represents the Portuguese music sector. See <http://www.amaei.pt>

¹⁴⁸ Music Nova Scotia, founded in 1989, fosters, develops and promotes the music industry in Nova Scotia. Music Nova Scotia is a music association devoted to advancing the careers of music industry professionals in songwriting, publishing, live performance, representation, production and distribution, and to help ensure that Nova Scotian musicians are heard globally. See <http://www.musicnovascotia.ca>

¹⁴⁹ The BM&A is a non-profit organization, founded in 2001 with the objective of encouraging and organizing the promotion of Brazilian music abroad, working with artists, record companies, distributors, exporters, collection societies and cultural entities. BM&A carries out activities on behalf of the whole sector, including organizing seminars, workshops, international market studies, trade fairs and promotion. See <http://bma.org.br>

¹⁵⁰ Nimbit, founded in 2002, is a music industry direct-to-fan platform. Nimbit provides solutions for thousands of self-managed artists, managers, and emerging labels to grow and engage their fanbase, and sell their music and merchandise online. See <http://nimbit.com>

¹⁵¹ Music Tasmania is the peak body for Tasmania’s contemporary music community supporting and promoting Tasmanian music locally, nationally, and internationally. See <http://www.musictasmania.org>

¹⁵² Broadjam, founded in 1999, is an online music community of over 120,000 musicians from over 150 countries that provides promotional tools and services for independent musicians, the music industry and fans around the world. See <http://www.broadjam.com>

¹⁵³ ProPlay provides recording artists with the opportunity to have their songs play adjacent to the songs of established artists of the same genre on music streaming providers that reach over 100 million music listeners each month. See <http://www.proplay.com>

¹⁵⁴ DartMusic is a music distribution platform dedicated to classical music. DartMusic distributes classical music into major online stores, such as iTunes, AmazonMP3 and others. DartMusic provides global digital distribution to musicians, labels and other rights-holders who work exclusively in classical music. See <http://www.dartmusic.com>

¹⁵⁵ Flanders Music Centre (Muziekcentrum Vlaanderen) is an organization established by the Flemish government to support the music sector and to promote Flemish music in Belgium and abroad. See <http://flandersmusic.be>

Conductors Guild,¹⁵⁶ MusicBrainz,¹⁵⁷ AdRev,¹⁵⁸ Membran,¹⁵⁹ SyncExchange,¹⁶⁰ the Center for Information and Resources for Contemporary Music - Le centre d'Information et de Ressources pour les Musiques Actuelles¹⁶¹ ("IRMA"), and thousands more. In addition to organizational support, DotMusic's Application also received support from amateur, professional and globally-recognized music artists, including bands such as Radiohead.¹⁶²

Independent Expert Testimonies

24. DotMusic submitted forty-three (43) independent expert testimony letters that agreed unanimously that DotMusic met the Community Establishment, Nexus and Support criteria.¹⁶³ The experts were Dr. Argiro Vatakis, Dr. Askin Noah, Dr. Brian E Corner, Dr. Chauntelle Tibbals, Dr. Daniel James Wolf, Dr. David Michael Ramirez II, Dr. Deborah L Vietze, Dr. Dimitrios Vatakis, Dr. Dimitris Constantinou, Dr. Eric Vogt, Dr. Graham Sewell, Dr. Jeremy Silver, Dr. Joeri Mol, Dr. John Snyder, Dr. Jordi Bonada Sanjaume, Dr. Jordi Janer, Dr. Juan Diego Diaz, Dr. Juliane Jones, Dr. Kathryn Fitzgerald, Dr. Lisa Overholser, Dr. Luis-Manuel Garcia, Dr. Manthos Kazantzides, Dr. Michael Mauskapf, Dr. Mike Alleyne, Dr. Nathan Hesselink, Dr. Paul McMahon, Dr. Rachel Resop, Dr. Shain Shapiro, Dr. Sharon Chanley, Dr. Tom ter Bogt, Dr. Vassilis Varvaresos, Dr. Wendy Tilton, Dr. Wilfred Dolfsma, JD Matthew Covey Esq, Jonathan Segal MM, Lecturer David Loscos, Lecturer David Lowery, Lecturer Dean Pierides, Professor Andrew Dubber, Professor and Author Bobby Borg, Professor Heidy Vaquerano Esq, Professor Jeffrey Weber Esq and Stella Black MM.

¹⁵⁶ The Conductors Guild, founded in 1975, represents the interests of music conductors worldwide. *See* <http://conductorsguild.org>

¹⁵⁷ MusicBrainz is the largest community-maintained open source encyclopedia of music information globally. The MusicBrainz music community has nearly 1.3 million members with a database covering nearly 1 million artists and nearly 18 million songs from over 200 countries. *See* <http://musicbrainz.org>

¹⁵⁸ AdRev is music multi-channel music network providing YouTube music creators the opportunity to improve monetization, discovery, programming, audience growth and production quality for their YouTube music video content. Adrev administrates and manages over 6 million music copyrights across 26.5 million music videos. The Adrev network has over 36 billion views annually. *See* <http://www.adrev.net>

¹⁵⁹ Membran Entertainment Group, founded in 1968, controls over 300,000 musical works. Through its label-management services, Membran offers labels, artists or producers with marketing, promotion and distribution services worldwide. *See* <http://www.membran.net>

¹⁶⁰ Sync Exchange is a global music licensing marketplace for musicians, rights holders, composers and music supervisors. *See* <http://syncexchange.com>

¹⁶¹ IRMA is an organization supported by the music industry that was formed in 1986 by the French Government to provide information, guidance and resources to constituents involved in contemporary music. *See* <http://irma.asso.fr>

¹⁶² Radiohead support letter for DotMusic's .MUSIC community Application, <https://www.icann.org/en/system/files/correspondence/obrien-to-icann-eiu-15dec15-en.pdf>

¹⁶³ *See* 43 independent expert letters scoring chart at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also *see* 43 independent expert letters at <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also *see* <http://music.us/expert/letters>

The Independent Nielsen QuickQuery Poll

25. Before the .MUSIC CPE commenced, DotMusic submitted an independent poll conducted by Nielsen¹⁶⁴ as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria for Community Establishment and Nexus. According to DotMusic's Application, the "Name" of the community defined was the "music community"¹⁶⁵ and the definition of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."¹⁶⁶ The independent Nielsen QuickQuery survey was conducted from August 7, 2015, to August 11, 2015, with 2,084 neutral and diverse adults.¹⁶⁷ The survey examined whether or not the applied-for string (.MUSIC) was commonly-known and associated with the identification of the community defined by DotMusic by asking: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (i.e. 3 in 4 or 75% of the respondents) responded positively, agreeing that (i) the applied-for string (.MUSIC) corresponds to the name of community addressed by the application (the "music community") and that (ii) the "music community" definition is "a logical alliance of communities of individuals, organizations and business that relate to music."

Answers to CPE Clarifying Questions ("CQ")

26. On September 29th, 2015, DotMusic received five (5) CPE Clarifying Questions ("CQ") from ICANN and the EIU on Community Establishment and Nexus.¹⁶⁸ On October 29, 2015, DotMusic provided ICANN and the EIU with answers to CPE Clarifying

¹⁶⁴ See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

¹⁶⁵ According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392;>

According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

¹⁶⁶ According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

¹⁶⁷ See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3

¹⁶⁸ See Clarifying Questions ("CQ"), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

Questions (“CQ Answers”).¹⁶⁹ DotMusic also included supporting evidence to its answers in the Annexes of the CQ Answers. These included:

- a. *Community Establishment & Definition Rationale and Methodology*, which clarified the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and clarified the Community Establishment rationale and methodology;¹⁷⁰
- b. *Venn Diagram for Community Definition and Nexus*, which clarified the relationship between eligibility and the cohesive music community’s definition as a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined,” while also clarifying that “non-music community members that lack recognition and awareness of the community defined” were “ineligible;”¹⁷¹
- c. *Music Sector Background: Music is a Copyright Industry for Clarifying Question D*, which clarified that “[t]he community defined by DotMusic – ‘a strictly delineated and organized community of individuals, organizations and business, a ‘logical alliance of communities of a similar nature’ that relate to music, the art of combining sounds rhythmically, melodically or harmonically’ -- functions in a regulated sector. Evidence to support this assessment includes recent ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”¹⁷² DotMusic also provides evidence of music community cohesion under international copyright law and conventions, which “[a]ccording to WIPO,¹⁷³ these rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO. Copyright law defines the rights conferred on authors of original works, and those who perform them, as well as those who support their widespread dissemination [...] Under the 1886 WIPO Berne Convention for the Protection of Literary and Artistic Works, an original work is protected for a minimum of 50 years after the author’s death but in many jurisdictions that figure can be 70 years or more [...] Copyright includes economic rights which give the creator the right to authorize, prohibit or obtain financial compensation [...] Copyright also confers moral rights (Article 6b is of the Berne Convention) allowing the creator of a work to claim authorship in it (the right of paternity or attribution) and to object to any modification of it that may be damaging or prejudicial to them (the right of integrity) [...] Every piece of music is protected by copyright;”¹⁷⁴
- d. *Independent Nielsen / Harris Poll for Community Establishment and Nexus*, which provided supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for Community Establishment and Nexus;¹⁷⁵ and

¹⁶⁹ See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

¹⁷⁰ Ibid, Annex A, p.26 of 993

¹⁷¹ Ibid, Annex D, p.80 of 993

¹⁷² Ibid, Annex F, p.93 of 993

¹⁷³ WIPO is a United Nations agency with 188 member states, which provides a global forum for intellectual property services, policy, and cooperation (See <http://www.wipo.int/about-wipo/en/index.html>). WIPO is also the leading provider of domain dispute and alternative dispute resolution services under the Uniform Dispute Resolution Policy (“UDRP”) adopted by ICANN (See <http://wipo.int/amc/en/domains> and <https://icann.org/resources/pages/udrp-rules-2015-03-11-en>)

¹⁷⁴ Ibid, Annex F, pp.97 to 99 of 993

¹⁷⁵ Ibid, Annex H, pp.102 to 105 of 993

- e. *Forty-three (43) Expert Testimonies*, which provided supporting evidence of forty-three (43) independent expert letters agreeing unanimously that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.¹⁷⁶

The .MUSIC CPE Report for DotMusic’s Community-based Application

27. The .MUSIC CPE Report (“Report”)¹⁷⁷ for Application ID. 1-1115-14110¹⁷⁸ provided a total score of 10 points out of 16 points: 4 points were deducted for the “Community Establishment” criterion, 1 point was deducted for the “Nexus between Proposed String and Community” criterion, and 1 point was deducted under the “Community Endorsement” criterion.

The Reconsideration Request

28. DotMusic Limited (“DotMusic”),¹⁷⁹ the International Federation of Musicians¹⁸⁰ (“FIM”), the International Federation of Arts Councils and Culture Agencies¹⁸¹ (“IFACCA”), the Worldwide Independent Network¹⁸² (“WIN”), the Merlin Network¹⁸³ (“Merlin”), the Independent Music Companies Association¹⁸⁴ (“IMPALA”), the American Association of Independent Music¹⁸⁵ (“A2IM”), the Association of Independent Music¹⁸⁶ (“AIM”), the Content Creators Coalition¹⁸⁷ (“C3”), the Nashville Songwriters Association International¹⁸⁸ (“NSAI”) and ReverbNation¹⁸⁹ co-filed a Reconsideration Request 16-5 (“RR”)¹⁹⁰ requesting the ICANN Board Governance Committee to overturn the CPE Report based on CPE process violations and the contravention of established procedures by ICANN and the CPE Panel.¹⁹¹ According to the RR, some of the ICANN violations of established procedures and policies include:

¹⁷⁶ Ibid, Annex K, pp. 159 to 993 of 993

¹⁷⁷ DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

¹⁷⁸ DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

¹⁷⁹ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

¹⁸⁰ <http://fim-musicians.org/about-fim/history>

¹⁸¹ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

¹⁸² <http://winformusic.org/win-members>

¹⁸³ <http://merlinnetwork.org/what-we-do>

¹⁸⁴ <http://impalamusic.org/node/16>

¹⁸⁵ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

¹⁸⁶ <http://musicindie.com/about/aimmembers>

¹⁸⁷ <http://c3action.org>

¹⁸⁸ <https://nashvillesongwriters.com/about-nsai>

¹⁸⁹ <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>,

(Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

¹⁹⁰ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

¹⁹¹ Also see RR-related letter from the International Federation of the Phonographic Industry (“IFPI”) stating: “We believe the finding to be flawed [...] Given the scale of the music community’s support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process [...] highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel’s evaluation of the DotMusic Application. [...] we note with concern the different criteria that appear to have been applied to the .HOTEL and .MUSIC CPE applications respectively. Also of concern is the EIU Panel’s finding that DotMusic failed to provide documented support from ‘recognised community institution(s)/member organization(s).’ IFPI is a globally recognised organization [...] Our members operate in 61

- a. Disregard of International Laws and Conventions with respect to the defined Music Community’s “cohesion” in relation to music copyright;¹⁹²
- b. Misapplication and disregard of “Community” Definition from 20A;
- c. Misapplication and disregard of “logical alliance” Community Definition that has “cohesion” and meets criteria according to the Applicant Guidebook (“AGB”);
- d. Misapplication and disregard of Community “Name” in Nexus;
- e. Misapplication and disregard of AGB “Majority” Criterion in Support;
- f. Misapplication and disregard of AGB “Recognized” organizations recognized by both the United Nations (“UN”) and the World Intellectual Property Organization (“WIPO”);¹⁹³
- g. Disregard of global music federations “mainly” dedicated to Community recognized both by UN and WIPO;
- h. Misapplication of the AGB’s “Organized” definition in Community Establishment based on false facts and lack of compelling evidence that the Music Community defined is not organized under a regulated sector, international law and international conventions or treaties;
- i. Disregard of historical evidence that the Music Community defined existed before 2007 in Community Establishment;

countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel’s finding,” <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>; Also see RR-related letter from the National Music Council, representing almost 50 music organizations (including the Academy of Country Music, American Academy of Teachers of Singing, American Composers Forum, American Federation of Musicians, American Guild of Musical Artists, American Guild of Organists, American Harp Society, American Music Center, American Orff-Schulwerk Association, Artists Against Hunger & Poverty, ASCAP, BMI, Chopin Foundation of the United States, Conductors’ Guild, Country Music Association, Delta Omicron International Music Fraternity, Early Music America, Interlochen Center for the Arts, International Alliance for Women in Music, International Federation of Festival, Organizations, International Music Products Association, Mu Phi Epsilon International Music Fraternity, Music Critics Association of North America, Music Performance Fund, Music Publishers Association of the United States, Music Teachers’ Association of California, Music Teachers National Association, National Academy of Popular Music, National Academy of Recording Arts & Sciences, National Association for Music Education, National Association of Negro Musicians, National Association of Recording Merchandisers, National Association of Teachers of Singing, National Federation of Music Clubs, National Flute Association, National Guild for Community Arts Education, National Guild of Piano Teachers, American College of Musicians, National Music Publishers’ Association, National Opera Association, Recording Industry Association of America, SESAC, Sigma Alpha Iota and the Songwriters Guild of America) and the International Music Council (an organization that UNESCO founded in 1949 representing over 200 million music constituents from over 150 countries and over 1000 organizations globally. See <http://www.imc-cim.org/about-imc-separator/who-we-are.html>). The letter stated that: “The international music community has come together across the globe to support the DotMusic Application, and we cannot comprehend how the application could have failed on the community criteria [...] We therefore object to the decision noted above, the basis of which is an apparent inconsistency in the application of the governing rules,” <https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

¹⁹² Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>

¹⁹³ Also See RR-related IFPI Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>

- j. Misapplication of policy and disregard of ICANN-accepted GAC consensus Category 1 Advice in Community Establishment demonstrating the defined Community’s unity under a regulated sector;¹⁹⁴
- k. Failure to compare and apply consistent scoring across all CPE applications and implement the quality control process to ensure fairness, transparency, predictability and non-discrimination;
- l. Failure to address the EIU’s conflict of interest with Google, a .MUSIC competing applicant. Google’s chairman, Eric Schmidt, was on The Economist Group board during DotMusic’s CPE in violation of the ICANN-EIU Statement of Work (“SOW”) and Expression of Interest (“EOI”), the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles; and
- m. Failure to undertake appropriate (if any) research to support compelling conclusions in the CPE Report, despite DotMusic’s (and DotMusic’s supporters’) provision of thousands of pages of “application materials and [...] research” as “substantive evidence” of “cohesion,” including DotMusic’s in-depth answers and supporting evidence in response to the EIU’s Clarifying Questions. The Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.

About Copyright, Copyright Law, International Copyright Conventions/Treaties and Collective Rights Management

- 29. According to the World Intellectual Property Organization (“WIPO”): “Copyright is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.”... “[W]orks commonly protected by copyright throughout the world include [...] musical compositions.” ... “Copyright protection extends only to expressions.”¹⁹⁵
- 30. According to WIPO: “There are two types of rights under copyright: (i) economic rights, which allow the rights owner to derive financial reward from the use of his works by others; and (ii) moral rights, which protect the non-economic interests of the author.”¹⁹⁶
- 31. The public benefits of a robust copyright system are not solely economic. Copyright protects human rights. Article 27 of the Universal Declaration of Human Rights (UDHR),¹⁹⁷ adopted in 1948 by the UN General Assembly, states: “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to

¹⁹⁴ Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>

¹⁹⁵ See WIPO, <http://www.wipo.int/copyright/en>

¹⁹⁶ Ibid

¹⁹⁷ United Nations, <http://www.un.org/en/universal-declaration-human-rights/index.html>; Also see U.N Guiding Principles on Business and Human Rights, ‘Protect, Respect and Remedy’ Framework, http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, p.5

share in scientific advancement and its benefits; and (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

32. The United States Supreme Court has stated that “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”¹⁹⁸ ... “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘science and useful Arts.’”¹⁹⁹ [...] “The immediate effect of [...] copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.”²⁰⁰ When the United States Congress enacted the Copyright Act of 1909, it stated that “the enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, [...] but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings [...]”²⁰¹
33. In general, “copyright laws state that the rights owner has the economic right to authorize or prevent certain uses in relation to a work or, in some cases, to receive remuneration for the use of his work (such as through collective management). The economic rights owner of a work can prohibit or authorize: (i) its reproduction in various forms, such as printed publication or sound recording; (ii) its public performance, such as in a play or musical work; (iii) its recording, for example, in the form of compact discs or DVDs; (iv) its broadcasting, by radio, cable or satellite; (v) its translation into other languages; and (vi) its adaptation, such as a novel into a film screenplay.” [...] “Examples of widely recognized moral rights include the right to claim authorship of a work and the right to oppose changes to a work that could harm the creator’s reputation.”²⁰²
34. In the majority of countries, and according to the Berne Convention: “copyright protection is obtained automatically without the need for registration or other formalities. Most countries nonetheless have a system in place to allow for the voluntary registration of works. Such voluntary registration systems can help solve disputes over ownership or creation, as well as facilitate financial transactions, sales, and the assignment and/or transfer of rights.”²⁰³

¹⁹⁸ U.S. Supreme Court, *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), No. 83-1632, Decided May 20, 1985, 471 U.S. 53, <https://supreme.justia.com/cases/federal/us/471/539/case.html>

¹⁹⁹ U.S. Supreme Court, *Mazer v. Stein*, 347 U.S. 201 (1954), No. 228, Decided March 8, 1954, 347 U.S. 201, <https://supreme.justia.com/cases/federal/us/347/201/case.html>

²⁰⁰ U.S. Supreme Court, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), No. 74-452, Decided June 17, 1975, 422 U.S. 151, <https://supreme.justia.com/cases/federal/us/422/151/case.html>

²⁰¹ H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909) (report accompanying the Copyright Act of 1909), <http://www.copyright.gov/history/1909act.pdf>

²⁰² Ibid

²⁰³ Ibid

35. Copyright law “aims to balance the interests of those who create content, with the public interest in having the widest possible access to that content. WIPO administers several international treaties in the area of copyright and related rights: (i) the Beijing Treaty on Audiovisual Performances;²⁰⁴ (ii) the Berne Convention for the Protection of Literary and Artistic Works;²⁰⁵ (iii) the Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite;²⁰⁶ (iv) the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;²⁰⁷ (v) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;²⁰⁸ (vi) the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (co-administered by WIPO, ILO and UNESCO);²⁰⁹ (vii) the WIPO Copyright Treaty (“WCT”);²¹⁰ and (viii) the WIPO Performances and Phonograms Treaty (“WPPT”).”²¹¹
36. According to WIPO: “copyright protection is automatic in all states [171 contracting parties²¹²] party to the Berne Convention. Whilst there may be nuances to the particular national laws applicable in these states, in general there is a high degree of harmony.”²¹³
37. According to the United States Copyright Office, a department of the Library of Congress: “An “international agreement” is defined as “(1) the Universal Copyright Convention; (2) the Geneva Phonograms Convention; (3) the Berne Convention; (4) the WTO Agreement; (5) the WIPO Copyright Treaty; (6) the WIPO Performances and Phonograms Treaty; and (7) any other copyright treaty to which the United States is a party.”²¹⁴

²⁰⁴ See WIPO, Beijing Treaty on Audiovisual Performances, <http://www.wipo.int/treaties/en/ip/beijing>

²⁰⁵ See WIPO, Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne>

²⁰⁶ See WIPO, Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, <http://www.wipo.int/treaties/en/ip/brussels>

²⁰⁷ See WIPO, Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, <http://www.wipo.int/treaties/en/ip/phonograms>

²⁰⁸ See WIPO, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, <http://www.wipo.int/treaties/en/ip/marrakesh>

²⁰⁹ See WIPO, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, <http://www.wipo.int/treaties/en/ip/rome>

²¹⁰ See WIPO, WIPO Copyright Treaty, <http://www.wipo.int/treaties/en/ip/wct>

²¹¹ See WIPO, WIPO Performances and Phonograms Treaty, <http://www.wipo.int/treaties/en/ip/wppt>

²¹² See WIPO, *Berne Convention (Total Contracting Parties : 171)*, Retrieved on May 17, 2016 from http://www.wipo.int/treaties/en/ShowResults.jsp? treaty_id=15

²¹³ See WIPO, *Frequently Asked Questions: Copyright*, http://www.wipo.int/copyright/en/faq_copyright.html

²¹⁴ U.S. Library of Congress, U.S. Copyright Office, § 101. *Definitions*, <http://www.copyright.gov/title17/92chap1.html#101>; Also see list of countries indicating which international copyright convention and treaty agreements each country has signed and the date each agreement took effect at <http://www.copyright.gov/circs/circ38a.pdf>. *International Copyright Relations of the United States*, Circular 38a, Revised: April, 2016, pp. 3 to 9

38. According to the United States Copyright Office, a department of the Library of Congress: “International copyright conventions and treaties have been developed to establish obligations for treaty member countries to adhere to, and implement in their national laws, thus providing more certainty and understanding about the levels of copyright protection in particular countries.”²¹⁵ International Agreements and Treaties include: (i) Buenos Aires Convention (‘BAC’) of 1910. U.S. ratification deposited with the government of Argentina, May 1, 1911; proclaimed by the president of the United States, July 13, 1914; (ii) the Beijing Treaty on Audiovisual Performances (‘BTAP’). On June 26, 2012, the United States and 47 other nations signed the treaty; (iii) the Berne Convention for the Protection of Literary and Artistic Works. Appearing within parentheses in the country listing that follows is the latest act of the convention to which the country is party. Thus ‘Berne (Paris)’ means the Berne Convention as revised at Paris on July 24, 1971, and as amended on September 28, 1979. ‘Berne (Brussels)’ means the convention as revised at Brussels on June 26, 1948. ‘Berne (Rome)’ means the convention as revised at Rome on June 2, 1928. Other acts of the convention were revised at Stockholm on July 14, 1967, and at Berlin on November 13, 1908. In each case, a reference to a particular act signifies adherence only to the substantive provisions of the act. For example, the substantive provisions of Berne (Paris) include articles 1 to 21 and the appendix; articles 22 to 38 deal with administrative provisions of the convention. The effective date for U.S. adherence to the Berne Convention is March 1, 1989; (iv) Bilateral copyright relations with the United States by virtue of a proclamation, or treaty (‘Bilateral’). Where there is more than one proclamation or treaty, only the date of the first one is given; (v) Free Trade Agreement (‘FTA’). The United States has concluded comprehensive free trade agreements (many bilaterally, some regionally) with multiple countries. With the exception of the U.S.-Israel agreement, the FTAs contain chapters on intellectual property rights, which include substantive copyright law and enforcement obligations; (vi) the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (‘Phonograms’), Geneva, 1971. The effective date for the United States is March 10, 1974; (vii) Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (‘SAT’), Brussels, 1974. The effective date for the United States is March 7, 1985; (viii) Universal Copyright Convention (‘UCC Geneva’), Geneva, 1952. The effective date for the United States is September 16, 1955, the date the treaty entered into force. (ix) Universal Copyright Convention (‘UCC Paris’) as revised at Paris, 1971. The effective date for the United States is July 10, 1974, the date the treaty entered into force; (x) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (‘VIP’). This treaty was adopted on June 27, 2013. It will enter into force once 20 eligible parties, including countries or certain intergovernmental organizations, ratify it, (xi) the World Intellectual Property Organization (‘WIPO’) Copyright Treaty (‘WCT’), Geneva, 1996. The effective date for the United States is March 6, 2002, the date the treaty entered into force; (xii) the WIPO Performances and Phonograms Treaty (‘WPPT’), Geneva, 1996. The effective date for the United States is May 20, 2002, the date the treaty entered into force; (xiii) and the World Trade Organization (‘WTO’), established pursuant to the Marrakesh Agreement of April 15, 1994, to implement the Uruguay Round Agreements. The Agreement on Trade-

²¹⁵ Ibid, *International Issues*, <http://www.copyright.gov/international-issues>

Related Aspects of Intellectual Property Rights ('TRIPS') is one of the WTO agreements. It includes substantive obligations for the protection of copyright and other intellectual property rights as well as their enforcement. The effective date of United States membership in the WTO is January 1, 1995."²¹⁶

39. According to the United States Copyright Office, "in addition to international treaties and conventions, other instruments, such as free trade agreements, require member countries to comply with specific obligations."²¹⁷ The TRIPS is an international agreement administered by the WTO that provides minimum standards for copyright and many other forms of intellectual property ("I.P.") regulation.²¹⁸ The TRIPS agreement introduced intellectual property law into the international trading system and is a comprehensive international agreement on intellectual property covering 162 contracting parties.²¹⁹ According to Article 3, TRIPS requires WTO members to provide copyright rights to content producers including "performers, producers of sound recordings and broadcasting organizations." According to Article 7, the objective of TRIPS is the "protection and enforcement of all intellectual property rights shall meet the objectives to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."²²⁰
40. According to the WTO: "In *US - Section 110(5) Copyright Act*, the Panel emphasized the need, in the light of general principles of interpretation, to harmoniously interpret provisions of the TRIPS Agreement and the Berne Convention (1971) In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. [I]t is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body [...] [T]he legal status of the minor exceptions doctrine under the TRIPS Agreement is consistent with these general principles."²²¹

²¹⁶ Ibid, *International Copyright Relations of the United States*, Circular 38a, Revised: April, 2016, <http://copyright.gov/circs/circ38a.pdf>, pp.2 to 3

²¹⁷ Ibid, p.1

²¹⁸ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

²¹⁹ See WTO, *Members and Observers*, Retrieved on May 17, 2016 from https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Also see WIPO, *IP-related Multilateral Treaties - Agreement on Trade-Related Aspects of Intellectual Property Rights - Total Contracting Parties : 162*, Retrieved on May 17, 2016 from http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22

²²⁰ WTO, *TRIPS, Part I - General Provisions and Basic Principles*, https://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm

²²¹ WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_01_e.htm, para. 88; Also see WTO, *US - Section 110(5) Copyright Act*, June 15, 2000,

41. The Civil Code of California is a collection of statutes for the State of California. The Civil Code of California is made up of statutes which govern the general obligations and rights of persons within the jurisdiction of California. According to Section 980 of the California Civil Code: “The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.”²²² According to Section 989 of the California Civil Code: “The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.”²²³
42. In the United States, federal preemption begins with the Constitution's Supremacy Clause, which provides that “[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”²²⁴ Federal laws and regulations may preempt state laws in three ways. The first is through express preemption, where the federal law or regulation explicitly states that it preempts state or local regulation. The Second is implied preemption where it can be inferred from the language of the federal law that state law is preempted. The third means of preemption is field preemption, which arises when there is a conflict between the state and federal regulation or where attempting to comply with both federal and state laws would create a conflict. Section 301 of the Copyright Act expressly addresses copyright preemption. Section 301(a) provides: “On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”²²⁵ Section 106 provides copyright holders with the exclusive rights to reproduction, adaptation, publication, performance and display.²²⁶ Section 301(f)(1) expands the preemption right to apply to the rights of attribution and integrity, enumerated in Section 106A of the Copyright Act, which includes the following rights: (i) to claim authorship of that work; (ii) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

<https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3a%2fwt%2fds%2f160r-00.doc&> , WT/DS160/R, para.6.66, p.24

²²² California Civil Code, <http://leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=980-989>, § 980(a)(2)

²²³ Ibid, § 989(a)

²²⁴ U.S. Constitution, Article VI, cl.2, http://www.archives.gov/exhibits/charters/constitution_transcript.html

²²⁵ U.S. Copyright Office, *Preemption with respect to other laws*, <http://www.copyright.gov/title17/92chap3.html#301>, Title 17 of the United States Code, § 301

²²⁶ U.S. Copyright Office, *Exclusive rights in copyrighted works*, <http://www.copyright.gov/title17/92chap1.html#106>, Title 17 of the United States Code, § 106

(iii) to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; (iv) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right; and (v) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.²²⁷ State laws which purport to expand or decrease these exclusive rights would be preempted by the Copyright Act, according to Section 301. To avoid a preemption claim, state law (whether common law or statutory) must regulate conduct other than that associated with those exclusive rights provided by the Copyright Act. The language of Section 301 creates a two-part test for determining preemption: First, whether the work is within the subject matter of the Copyright Act; and second, whether the state law creates rights equivalent to those exclusive rights protected by the Copyright Act.

43. The United States legislation that directly addresses copyright on the internet is the Digital Millennium Copyright Act (“DMCA”) that was signed into United States law on October 28, 1998. The legislation implements two 1996 World Intellectual Property Organization (“WIPO”) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues. The DMCA is divided into titles. These titles include: (i) Title I, the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998,” implements the WIPO treaties; (ii) Title II, the “Online Copyright Infringement Liability Limitation Act,” creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities; (iii) Title III, the “Computer Maintenance Competition Assurance Act,” creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair; and (iv) Title IV contains six miscellaneous provisions, relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, “webcasting” of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in the case of transfers of rights in motion pictures.²²⁸ The DMCA also heightens the penalties for copyright infringement on the Internet.²²⁹ The DMCA amended Title 17 of the United States Code to extend the reach of copyright, while limiting the liability of the providers of online services for copyright infringement by their users, an exemption from direct and indirect liability of Internet service providers and other intermediaries. This exemption was also adopted by the European Union in the

²²⁷ Ibid; Also *see* Title 17 of the United States Code, § 301(f)(1)

²²⁸ U.S. Copyright Office, *Digital Millennium Copyright Act of 1998*, <http://copyright.gov/legislation/dmca.pdf>, p.1

²²⁹ U.S. Government Printing Office, 17 United States Code (U.S.C), Title 17 – Copyrights, Chapter 5 – Copyright Infringement and Remedies, <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title17/html/USCODE-2010-title17-chap5-sec506.htm> , §506 – Criminal Offenses

Electronic Commerce Directive 2000.²³⁰ The Copyright Directive 2001 implemented the 1996 WIPO Copyright Treaty in the EU.²³¹

44. The rights of performing artists, notably including musicians and conductors, producers of phonograms (sound recordings) and broadcasting organizations, which are normally considered part of copyright protection in the United States, are normally referred to as “related” or “neighboring” rights in other countries and not least in Europe. The following international agreements, referred to above, deal exclusively or partially with such rights: The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; The Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite; the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; The WIPO Performances and Phonograms Treaty; The Beijing Treaty on Audiovisual Performances; and the TRIPS Agreements. In addition, most free-trade agreements which deal with copyright also contain provisions regarding related rights. While such rights in many respects resemble copyright, a term which in such countries is reserved for the protection of literary and artistic works, they are normally carefully tailored to suit the specific needs of protection for such subject matter. In particular, the term of protection is shorter and is counted from the year in which the performance, recording or broadcast took place, rather than the lifespan of the beneficiary as is typically the case regarding copyright in literary and artistic works.²³²
45. Most commonly, the rights under copyright and related rights are granted as exclusive rights, which mean that the individual owners of rights must consent to each single case of use of the protected works, performances and broadcasts. The only major deviance from this model is the broadcasting and other communication to the public of commercially published phonograms. In this case Article 12 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organizations establishes a right of remuneration for the performers and producers of phonograms, which the Contracting Parties may opt out of by means of reservation (Article 16 of the Convention). Similar provisions are included in Article 15 of the WIPO Performances and Phonograms Treaty. This right is established in all the countries of the European Union and many other countries around the world, whereas it has only been established in a rudimentary form in the United States for digital broadcasting.²³³

²³⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML>, Official Journal L 178 , 17/07/2000 P. 0001 - 0016

²³¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

²³² WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO Publication No. 489(E), p.46 ff, http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf

²³³ Mihály Ficsor: Collective Management of Copyright and Related Rights, WIPO Publication No. 855(E), Geneva 2002, pp. 78 to 84, http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf; Digital Performance Right in Sound Recordings Act Of 1995 Public Law 104-39

46. In practice, it is not always feasible to obtain individual permissions or distribute equitable remuneration individually to all the rights owners involved when it comes to mass uses of protected works or objects of related rights. As Dr. Mihály Ficsor states in the WIPO publication “Collective Management of Copyright and Related Rights:” “At the time of the establishment of the international copyright system, there were certain rights – first of all the right of public performance of non-dramatical musical works – where individual exercise of the rights did not seem possible, at least not in a reasonable and effective manner; and since then, with the ever newer waves of new technologies, the areas in which individual exercise of rights has become impossible, or at least impractical, is constantly widening. Until the advent of digital technology and the global interactive network, it seemed that there were an increasing number of cases where individual owners of rights were unable to control the use of their works, negotiate with users and collect remuneration from them.”²³⁴ “In the framework of a collective management system, owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and under appropriate conditions, collect such remuneration, and distribute it among the owners of rights. This may be regarded as a basic definition of collective management (however, [...] the collective nature of the management may, and frequently does also involve some other features corresponding to certain functions going beyond the collective exercise of rights in the strict sense).”²³⁵
47. Collective rights management has a cohesive structure and is widespread in the field of music. The rights of public performance, broadcasting and communication to the public of composers and lyric writers in their compositions and lyrics (if any), together with the corresponding rights acquired by music publishers normally managed by performing rights organizations, such as the American Society of Composers, Authors & Publishers (“ASCAP”), Broadcast Music Incorporated (“BMI”) and the Society of European Stage Authors and Composers (“SESAC”) in the United States, the Performing Rights Society (“PRS”) in the United Kingdom, Gesellschaft für musikalische Aufführungs und mechanische Verfielfältigungsrechte (“GEMA”) in Germany or the Indian Performing Rights Society (“IPRS”) in India. Outside the United States and particularly in Europe the rights to record musical works are managed collectively either by the said organizations (for example GEMA in Germany) or by similar organizations set up specifically for that purpose. In the United States the music publishers play a more independent role in such management, but collective management also takes place through the Harry Fox Agency. As regards the related rights of remuneration for broadcasting and other communication to the public of commercially published phonograms separate organizations exist in many countries set up by the national member organizations of The International Federation of Musicians (“FIM”) and the International Federation of Phonographic Industry (“IFPI”). In 2014, the authors’ rights societies for music collected €6.9 billion worldwide.²³⁶

²³⁴ Ficsor, *ibid*, p.16

²³⁵ *Ibid*, p.17

²³⁶ International Confederation of Societies of Authors and Composers (“CISAC”) Press release of October 27, 2015, <http://www.cisac.org/Newsroom/News-Releases/CISAC-publishes-new-Global-Collections-Report>

Expert Legal Opinion

I, the undersigned Dr. Jørgen Blomqvist, Honorary Professor of International Copyright at the University of Copenhagen, have undertaken the expert role to provide an independent legal opinion on the well-foundedness of the ICANN Community Priority Evaluation (“CPE”) Report²³⁷ for DotMusic’s community-based Application ID. 1-1115-14110²³⁸ for the new gTLD string ‘.MUSIC.’ My legal expert opinion is based on the relevant facts presented herein in relation to music definitions, the CPE sections of “Community Establishment,” “Nexus between Proposed String and Community” and “Support” (under “Community Establishment”) as well as matters of international law, general principles of international copyright and related rights and international conventions, treaties and agreements as well as established practices regarding the management of copyright and related rights.²³⁹

CPE Section on Community Establishment

48. Activities of Music Community members – regardless whether they are commercial or non-commercial – are reliant in one way or another on the regulated structure of the music sector and cohesion of general principles of international music copyright, international law as well as international conventions, treaties and agreements that relate to music copyright and activities. The CPE Panel’s conclusion that there is “no substantive evidence” that the Music Community defined in its entirety has cohesion (i.e. does not unite cohesively under music copyright or is reliant on international conventions for its activities) is *neither* a compelling *nor* a defensible argument. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions, management of rights and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.

49. ICANN’s Articles of Incorporation mandate that all of ICANN’s activities and decision-making must be “in conformity with relevant principles of international law and applicable international conventions.”²⁴⁰ The Music Community participates²⁴¹ in a

²³⁷ CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

²³⁸ DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

²³⁹ DotMusic scored the full points under the CPE’s *Registration Policies* and *Opposition* (under *Community Endorsement*) sections, so my legal expert opinion will not include those sections because there is mutual agreement on their scoring grade.

²⁴⁰ ICANN’s Articles of Incorporation provide that: “*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations, ICANN Articles of Incorporation,*” <https://icann.org/resources/pages/governance/articles-en>, Article 4

²⁴¹ The EIU CPE Panel awarded the full *Community Establishment* points to the .ECO community applicant determining that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities*” which “*may vary among member categories.*” (See .ECO CPE Report, <https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>, p.2). Inter alia, under DotMusic’s

regulated sector with activities tied²⁴² to music that must cohere to general principles of international music copyright, international law as well as international conventions, treaties and agreements, which are held together by a strong backbone of collective management of rights that channels permissions to use protected material and the remuneration for such use from the one end of the feeding chain (the authors, performers and producers) to the other (the music users) and vice versa. Accordingly, ICANN cannot deny Music Community “cohesion” when its own Articles of Incorporation mandate it to recognize applicable international conventions, such as the 1886 Berne Convention that relates to the protection of music copyright signed by 171 countries and which, for example, in its Article 14 *bis* (3) recognizes the specific situation for musical works.²⁴³

50. The Economist Group, the parent company of the EIU CPE Panel, also publicly recognizes the Berne Convention. The Economist is reliant on copyright cohesion under applicable laws and protection under international conventions²⁴⁴ to conduct its primary activities. According to The Economist: “Copyright is a property right that gives the creators of certain kinds of material rights to control the ways in which such material can be used. These rights are established as soon as the material has been created, with no need for official registration. Copyright applies globally and is regulated by a number of international treaties and conventions (including the Berne Convention, the Universal Copyright Convention, the Rome Convention and the Geneva Convention).”²⁴⁵

51. It appears that the Panel failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of “application materials and [...] research” as “substantive evidence” of “cohesion,” including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified in its Application materials that: “The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share

Application, Music Community members, at the very least, also share similar category variance with members that also have demonstrable involvement in music-related activities.

²⁴² The EIU CPE Panel awarded the full *Community Establishment* points to the .OSAKA community applicant determining there was community “cohesion” because members “*self identify as having a tie to Osaka, or with the culture of Osaka.*” (See .OSAKA CPE Report, <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members, at the very least, also self-identify as having a tie to music or with the culture of music.

²⁴³ Berne Convention for the Protection of Literary and Artistic Works of 1886 with 171 contracting countries, See http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 and http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693

²⁴⁴ See The Economist website, *Terms of Use*, “*Governing Law and Jurisdiction*,” <http://economist.com/legal/terms-of-use>, (“*The Economist shall also retain the right to bring proceedings as to the substance of the matter in the courts of the country of your residence.*”)

²⁴⁵ See The Economist website, *Copyright Information*, <https://economist.com/rights/copyright.html>

and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.”²⁴⁶

52. The CPE Panel also ignored the significance of the Music Community’s regulated sector that is governed by general principles of international copyright law as well as international conventions, treaties and agreements as well as by the collective management of copyright and related rights. In fact, both the ICANN Board and the NGPC have admitted such a finding by accepting the GAC Category 1 Advice that .MUSIC is a “string that is linked to regulated sector” that “should operate in a way that is consistent with applicable laws.”²⁴⁷ In effect, this ICANN-approved resolution reaffirms that all music groups (and music sub-groups) that comprise the Music Community defined have cohesion because they participate as a whole in a regulated sector with activities tied to music that cohere to general principles of international copyright law, international conventions, treaties and agreements.
53. According to the AGB: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of [...] a *logical alliance of communities* (for example, an international federation of national communities of a similar nature).”²⁴⁸ As a requirement, the AGB also instructs applicants that in the case of a community of an “alliance of groups,” “details about the constituent parts are required.”²⁴⁹
54. According to DotMusic’s Application (and other Application Materials), the Music Community’s definition is a “strictly *delineated* and *organized community* of individuals, organizations and business, a “*logical alliance of communities of a similar nature* (‘COMMUNITY’), that relate to music” (Application, 20A, emphasis added). In this case, the “similar nature” component relates to DotMusic’s mission and purpose to protect intellectual property and promote music. The nature under which the Music Community operates is regulated following general principles of international copyright law as well as international conventions, treaties and agreements that relate to music copyright and activities, and it is tied together by strong mutual interests and unifying elements, including not least the collective management of copyright and related rights.
55. According to the requirements of the AGB, DotMusic’s definition of the Community meets the Community Establishment criteria of a “delineated” and “organized” community. In fact, DotMusic’s Music Community definition restricts the Music Community to a “delineated” and “organized” community, which by definition “implies ‘more of cohesion than a mere commonality of interest’” with “an awareness and recognition of a community among its members.” Along those lines, the “logical

²⁴⁶ See DotMusic Public Interest Commitments (“PIC”), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6

²⁴⁷ <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1 to 2

²⁴⁸ AGB, p.4-12 (emphasis added)

²⁴⁹ AGB, Attachment to Module 2, Evaluation Questions and Criteria: “*Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,*” Notes, 20A, A-14

alliance” of music communities has awareness and recognition of the community defined^{250 251} because each supporting community member organization admitted so by providing written community endorsement letters supporting the community-based application and its mission and purpose, which include protecting copyright/intellectual property and promoting music.

56. Furthermore, the dictionary definition of a “*logical alliance*” is inherently cohesive. Dictionary definitions for “*logical*”²⁵² and “*alliance*”²⁵³ meet the requirement of “*cohesion*” and the “*requisite awareness*.” In formation, an “alliance” requires an awareness and organization of all the groups in their entirety. For example, united in support of protecting music copyright and promoting legal music, a logical alliance of music communities (that were defined as the “Music Community”) filed comments to the U.S. Copyright Office to express “the Music Community’s list of frustrations with the DMCA.”²⁵⁴ Another logical alliance comprised of nearly fifty (50) music communities, the National Music Council, also filed a submission to ICANN in support of DotMusic’s community-application and Reconsideration Request 16-5.²⁵⁵ These are clear examples “*documented evidence of community activities*” that the Music Community is organized and united in protecting music copyright and promoting music.²⁵⁶ These organized and united documented activities based on shared core principles demonstrate that the Music Community defined “implies more of cohesion than a mere commonality of interest.”

²⁵⁰ The EIU CPE Panel awarded the full *Community Establishment* points to the .GAY community applicant determining that there was “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies.*” (See GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members have an *explicit* recognition and awareness of *belonging* to a community that is united under the principles of protecting copyright/intellectual property and promoting legal music. The Music Community defined is comprised of a “*logical alliance*” (i.e. *allies*) that operates under a regulated sector and general principles of international copyright law and international conventions.

²⁵¹ The EIU CPE Panel awarded the full *Community Establishment* points to the .SPA community applicant determining that the defined spa community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events: “*Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.*”²⁵¹ (See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members also recognize themselves as part of the music community as evidenced by their inclusion in music community member organizations and participation in their events.

²⁵² Oxford Dictionaries “*logical*” definition: (i) *1. Of or according to the rules of logic or formal argument*; (ii) *1.1 Characterized by or capable of clear, sound reasoning*; (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances, see http://oxforddictionaries.com/us/definition/american_english/logical*

²⁵³ Oxford Dictionaries “*alliance*” definition: (i) *1. A union or association formed for mutual benefit, especially between organizations*; (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities*; (iii) *1.2 A state of being joined or associated, see http://oxforddictionaries.com/us/definition/american_english/alliance*

²⁵⁴ Comments of “Music Community” to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, April 1, 2016, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89806&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.2 to 3

²⁵⁵ National Music Council letter to ICANN, March 28, 2016, <https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

²⁵⁶ See Mission and Purpose, Application 18A and 20C. DotMusic’s mission and purpose includes the unified principles of “[p]rotecting intellectual property” and “[p]romoting music.”

57. The AGB also requires “at least one entity mainly dedicated to the community” defined. DotMusic’s application has many “recognized community institution(s)/member organization(s)” that are mainly dedicated to the music community addressed (i.e the “logical alliance of communities that relate to music”), that include the International Federation of Musicians (“FIM”) and the International Federation of Phonographic Industry (“IFPI”).
58. The FIM, founded in 1948, is a recognized international federation representing the “voice of musicians worldwide.”²⁵⁷ The FIM’s global recognition is demonstrated by its official roster consultative status relations with the United Nations Economic and Social Council (“ECOSOC”); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM also consults the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).²⁵⁸
59. The IFPI, founded in 1933, is a recognized international federation “representing the “recording industry worldwide.” The IFPI represents the majority of music consumed globally.²⁵⁹ The IFPI also represents the three major label groups (Universal Music, Sony Music and Warner Music), organizations that “control 78% of the global market.”²⁶⁰
60. The IFPI is only associated with music and it is the globally-recognized music organization that administers the International Standard Recording Code (“ISRC”), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community.²⁶¹ The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.²⁶² The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured²⁶³ and “well established, widely accepted internationally.”²⁶⁴ Furthermore, it relates to the addressed Music Community defined by DotMusic, an “organized and delineated logical alliance of communities that relate to music.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global Music

²⁵⁷ Musicians represent the overwhelming majority of the Music Community defined

²⁵⁸ UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

²⁵⁹ See IFPI, <http://www.ifpi.org>

²⁶⁰ See Credit Suisse Research and Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from

https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&extdocid=1034433411_1_eng_pdf

²⁶¹ According to the DotMusic Application, evidential examples of music community cohesion were described in 20A: “commonly used [...] classification systems such as ISMN, ISRC, ISWC, ISNI [...]” The ISRC is administered by the IFPI on behalf of the entire Music Community.

²⁶² http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401

²⁶³ <http://isrc.ifpi.org/en/isrc-standard/structure>

²⁶⁴ <http://isrc.ifpi.org/en/why-use/benefits>

Community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial: “Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership²⁶⁵ (or not) with any industry association.”²⁶⁶ In fact, without the IFPI’s ISRC codes, legal music consumption as it cohesively functions currently would not exist in the manner that it does today because there would be no way to appropriately and efficiently attribute music to Music Community members.²⁶⁷ The IFPI’s global recognition is also demonstrated by its official relations with United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status), a globally-recognized international organization with 195 country member states²⁶⁸ and the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status).²⁶⁹

61. Based on the AGB criteria, both the IFPI and the FIM qualify as recognized community member organizations that are *mainly*²⁷⁰ dedicated to the community addressed²⁷¹ with organized “documented activities” that are united under the shared Music Community core principles of protecting copyright and promoting music.

62. According to the AGB, *Pre-existence* requires that the Community defined by the applicant “must have been active prior to September 2007.”²⁷² *Longevity* effectively also requires that the community defined is not ephemeral or set up for the specific purpose of

²⁶⁵ DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

²⁶⁶ <http://isrc.ifpi.org/en/using-isrc>

²⁶⁷ For example, without the IFPI’s ISRC codes, YouTube Music would be unable to effectively credit the corresponding music copyright owner related to each music video, *see* <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes²⁶⁷ (the world’s largest music retailer with over 43 million music tracks,²⁶⁷ *see* <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>)

²⁶⁸ *See* UNESCO, <http://en.unesco.org/countries/member-states>

²⁶⁹ *See* UNESCO at <http://ngo-db.unesco.org/r/or/en/1100064188> and WIPO at http://wipo.int/members/en/organizations.jsp?type=NGO_INT

²⁷⁰ According to the Oxford Dictionaries, the definition of “mainly” is “*more than anything else.*” *See* http://www.oxforddictionaries.com/us/definition/american_english/mainly

²⁷¹ In the case of .HOTEL’s CPE Report, the prevailing .HOTEL community applicant received a full grade for “*Organization*” because the Panel found “recognized community institution(s)/member organization(s),” (*See* .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6) the International Hotel & Restaurant Association (“IH&RA”), the China Hotel Association (“CHA”), the American Hotel & Lodging Association (“AH&LA”) and HOTREC: “*the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA) [...]*” (*See* .HOTEL CPE Report, *Community Establishment*, p.2) “[...] *The applicant possesses documented support from the recognized community institution(s)/member organization(s).*” (*See* .HOTEL CPE Report, p.6). According to the .HOTEL CPE Report, it is also noted that the Panel recognized that the nationally-based AH&LA and CHA were “recognized” organizations that were “mainly” dedicated to the hotel community. Consistently, DotMusic’s application had multiple recognized international federations and national organizations mainly dedicated to the music community.

²⁷² AGB, p.4-11

obtaining a gTLD approval.²⁷³ Both the IFPI (founded in 1933) and the FIM (founded in 1948) are recognized community member organizations and international federations that are mainly dedicated to the community as defined by the applicant with records of activity beginning before 2007.²⁷⁴ In fact, both the IFPI and the FIM were active and organized prior to the introduction of the Internet, top-level domains and ICANN.²⁷⁵ The defined Music Community and its music-related segments were organized prior to 2007, united under shared core principles, such as the protection of music copyright and the promotion of music. In other words, none of the .MUSIC Application's supporting community organizations were set up for the specific purpose of obtaining gTLD approval. The pursuits of the community defined are of a lasting, non-transient nature (i.e. will continue to exist in the future). With respect to the collective management of music copyright, such activities started out in 1850 in France and were widespread in Europe during the first decades of the 20th Century.²⁷⁶

63. According to the AGB, the Community defined must be of “considerable size and have longevity. *Size* requires that the “community is of considerable size.”²⁷⁷ According to DotMusic's Application, the size and extensiveness of the Music Community were shown in DotMusic's support letters from 20F and also described in 20A: “The Music Community's geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries...with a Community of considerable size with millions of constituents (“SIZE”).”²⁷⁸ Moreover, according to DotMusic's Application materials, the community defined is supported by a logical alliance of music organizations with members that represent over 95% of music consumed globally. In sum, the community defined is of considerable size.

64. DotMusic's Application meets all the criteria under the *Community Establishment* section.

²⁷³ AGB, “‘Longevity’” means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12

²⁷⁴ A similar example is the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA”) and the International Spa Association (“ISA”). According to the .GAY CPE Report, “*the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007.*” (See .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3). According to the .SPA CPE Report: “*The community as defined in the application was active prior to September 2007 [...] [T]he proposed community segments have been active prior to September 2007. For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.*” (See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3). Consistent with the .SPA and .GAY CPE Reports' rationale for ISA and ILGA (an international federation with consultative status with UNESCO, see ILGA, <http://ilga.org/about-us>), both the IFPI and FIM have “*records of activity before 2007*” (The IFPI and the FIM were founded in 1933 and 1948 respectively) and are “*mainly dedicated to the community*” as defined by DotMusic.

²⁷⁵ Internet Society, *Brief History of the Internet*, <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>

²⁷⁶ Mihály Ficsor: *Collective Management of Copyright and Related Rights*, WIPO Publication No. 855(E), http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf, p.19

²⁷⁷ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

²⁷⁸ See .MUSIC Application, 20A, para.4 at

<https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

CPE Section on Nexus between Proposed String and Community

65. According to DotMusic’s Application, the “Name” of the community defined was described in 20A: “The name of the community served is the “Music Community” (“Community”).”²⁷⁹
66. According to DotMusic’s Application, the “Nexus between Proposed String and Community” was described in 20A and 20D: “The “MUSIC” string *matches* the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.”²⁸⁰ DotMusic “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in its answer to 20D: “The .MUSIC string relates to the Community by [...] *completely representing the entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model [...].”^{281 282}
67. Before the .MUSIC CPE commenced, DotMusic also submitted an independent poll conducted by Nielsen ²⁸³ as supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for Community Establishment and Nexus. An independent Nielsen QuickQuery survey was conducted from August 7, 2015, to August 11, 2015, with 2,084 diverse and neutral adults.²⁸⁴ The survey examined whether or not

²⁷⁹ Application, 20A, para.1

²⁸⁰ Ibid, 20A, para.3 (*emphasis added*)

²⁸¹ Ibid, 20D, para.1 (*emphasis added*)

²⁸² According to the .SPA community application, the defined spa community also included a secondary community that did not relate to the operation of spas: “The *secondary community generally* also includes holistic and personal wellness centers and organizations. While *these secondary community organizations do not relate directly* to the operation of spas, *they nevertheless often* overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.” (See .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, para.3 (*emphasis added*)). The EIU CPE Panel awarded the .SPA community applicants the full points under both the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections despite the spa community defined by the applicant including a “secondary community” that “do[es] not relate directly” to the string. Inter alia, DotMusic’s Application, Music Community members are delineated and restricted to music categories and music subsets that *only* relate to music. According to DotMusic’s Application Materials, unrelated secondary communities that have a tangential relationship with the music community defined are not allowed, which is a higher threshold than the one allowed by the EIU CPE Panel in awarding maximum points for the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections of the .SPA CPE Report. Inter alia, DotMusic “restricts eligibility to Music Community members -- as explicitly stated in DotMusic’s Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes.” (See DotMusic Public Interest Commitments (“PIC”), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.1). DotMusic’s defined community “...exclude[s] those with a passive, casual or peripheral association with the applied-for string.” (See Ibid, PIC Enumerated Commitment #4, p.2)

²⁸³ See Nielsen QuickQuery. Retrieved on May 11th, 2016 from <http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

²⁸⁴ See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: “Q3505 If you saw a website domain that ended in “.music” (e.g., www name music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?” <https://www.icann.org/en/system/files/files/reconsideration-16-5->

the applied-for string (.MUSIC) was commonly-known and associated with the identification of the community defined by DotMusic by asking: “If you saw a website domain that ended in “.music” (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?” A substantial majority, 1562 out of 2084 (i.e. 3 in 4 or 75% of the respondents) responded positively, agreeing that (i) the applied-for string (.MUSIC) corresponds to the name of community addressed by the application (the “music community”) and that (ii) the “music community” definition is “a logical alliance of communities of individuals, organizations and business that relate to music.” The Independent Nielsen Poll for Community Establishment and Nexus provided independent supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections.²⁸⁵

68. The applied-for string, MUSIC, is commonly known by others as the name of the community: the Music Community (i.e. the string matches the name of the community). With regard to the community context and from a general point of view, the string has no other significant meaning beyond identifying the community described in the application: the Music Community.

69. DotMusic’s Application meets all the criteria under the *Nexus between Proposed String and Community* section.

CPE Section on Support (under Community Endorsement)

70. The AGB and CPE Guidelines allow communities that are supported and established through multiple organizations and institutions. The relevant provisions provide: “with respect to “Support,” the plurals in brackets for a score of 2, *relate to cases of multiple institutions/organizations*. In such cases there must be documented support from institutions/organizations representing a *majority of the overall community addressed in order to score 2.*”^{286 287}

71. According to the DotMusic Application, DotMusic received “documented support” from multiple organizations representing a majority of the Community, as referenced in 20D: “See 20F for documented support from institutions / organizations representing majority of the Community and description of the process/rationale used relating to the expression of support.”²⁸⁸ According to the DotMusic Application Materials and DotMusic’s Support letters, the .MUSIC Application is supported by multiple organizations with members representing over ninety-five percent (95%) of music consumed globally, a

[dotmusic-exhibits-a25-redacted-24feb16-en.pdf](#), Exhibit A32, Appendix B, pp. 38 to 41; Also *see* Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3

²⁸⁵ Ibid, Annex H, pp.102 to 105 of 993

²⁸⁶ AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

²⁸⁷ CPE Guidelines, p.18

²⁸⁸ Application, 20D, last paragraph

majority of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music.”²⁸⁹

72. According to the AGB, another alternative for a score of 2 points under “Support” is possessing “documented support from, the recognized²⁹⁰ community institution(s)/ member organization(s).”²⁹¹
73. The level of global recognition of any music community organization should be analyzed within the context of the community that such institution is claiming to be a part of, not the public in general. The AGB does not require that one organization represent an “entire” community. In fact, it would be impossible for an institution to represent any community in its entirety unless the representation is associated with the core principles of music copyright protection that all community members share, or the administration of internationally-recognized and community-shared music attribution systems conducted on behalf of the entire community (such as the administration of the ISRC by the IFPI conducted on behalf of the community in its entirety). The concept of “community” is not strictly defined by the AGB. According to the Oxford Dictionaries, a “community” could be “a group of people living in the same place or having a particular characteristic in common,” “a body of nations or states unified by common interests,” “a feeling of fellowship with others, as a result of sharing common attitudes, interests, and goals” or “similarity or identity.” It generally refers to a “group of people” that may be considered as a “unit” that share similar interests, goals or values.²⁹² The community defined, the “delineated and organized logical alliance of communities of similar nature that relate to music” are united, *inter alia*, under the principles of copyright protection and legal music promotion. As defined, the Music Community has more of cohesion than a mere commonality of interest because it functions under a structured and regulated sector. Without such cohesion and structure, music consumption and usage as we know them today would not be possible.
74. The music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. Recognized organizations include the IFPI and the FIM. DotMusic’s application possesses documented support from the recognized community member organizations.²⁹³

²⁸⁹ See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

²⁹⁰ AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

²⁹¹ AGB, p.4-17

²⁹² Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/community

²⁹³ According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): “[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.” (See .HOTEL CPE Report, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA.

75. DotMusic’s Application meets both “Support” options to meet a score of 2. DotMusic has “documented support from, the recognized community institution(s) / member organization(s)”²⁹⁴ and “documented support from institutions/organizations representing a majority of the overall community addressed.”²⁹⁵ DotMusic’s Application meets all the criteria for “Support” under the *Community Endorsement* section.

Conclusion

76. I am in agreement with the forty-three (43) independent expert testimonies, which agreed unanimously that DotMusic’s Application met the *Community Establishment*, the *Nexus Between the Proposed String and Community* and the *Support* CPE criteria. Furthermore, the findings of the Nielsen Poll provided more independent supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for *Community Establishment* and *Nexus Between the Proposed String and Community*.

77. It is my legal expert opinion that DotMusic’s application meets the full criteria under *Community Establishment*, the *Nexus Between the Proposed String and Community*, and *Support* (under *Community Endorsement*).



Dr. Jørgen Blomqvist
Honorary Professor in International Copyright, Ph.d

June 17, 2016

²⁹⁴ According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): “[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.” (See .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA. Consistent with the .HOTEL CPE Report’s “Support” rationale, DotMusic’s Application also meets the “Support” criterion.

²⁹⁵ According to the .RADIO CPE Report: “[T]he applicant possesses documented support from institutions / organizations representing a majority of the community addressed [...]The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.” (See .RADIO CPE Report, <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7). Consistent with the .RADIO CPE Report’s “Support” rationale, DotMusic’s Application meets the “Support” criterion because it has support from recognized community organizations representing a majority of the overall community defined by the applicant.

Exhibit 27

ICANN

**Moderator: Terri Agnew
January 18, 2017
9:00am CT**

Patrick Penninckx: Thank you. I hope you can all hear me. Yes? Thank you for organizing this Niels together with the Council of Europe. And I will be very brief.

It will not be a surprise to you that for the Council of Europe (are) updating for fundamental rights and freedoms in the ICANN policymaking. It's crucial. And that's why we also launched and asked to review the process for the community top level -- the main names. And we wanted to do that in order to ensure that any next process be more transparent, accountable, and that we deal with the scales and valuable resources in the most adequate manner.

That's why we asked Kinanya Pijl and Eve Salomon to do this review which we presented to you already very briefly in ICANN 67 9 (unintelligible).

So, that's all I want to say...

((Crosstalk))

Paul Zamik: It's Paul Zamik on the phone. I just joined the conference. Paul Zamik.

Patrick Penninckx: Okay. Thank you, Paul. And Niels, back to you.

Niels ten Oever: Excellent. Thank you very much, Patrick for that introduction. And we should all of course not forget that a lot of the work on human rights on ICANN has also converged on allowance of the report of ICANN and human rights by the Council of Europe. Also, which reports have been published by Article 19 and others and is of course now part of the work of the cross community working group on enhancing ICANN accountability.

But without further ado and going more into the details, we have the pleasure of having on our call Eve Salomon and Kinanya Pijl. Eve Salomon is an international consultant and legal expert on media law and human rights. And Kinanya Pijl is a PhD candidate in law at European University in Florence.

And they both are the co-authors of the report the Council of Europe on community GTLDs and Human Rights. And they will give us a short overview of the report so to refresh our minds so that we have a good basis to start our discussion on.

Maryam would you please be so kind to load the second slide deck. After which Eve and Kinanya can take it away and do the presentation. Would that work, (Mariam)?

Maryam Bakoshi: Hi, Niels. Please hold for one second.

Niels ten Oever: Okay. That one second gives me the opportunity to thank the ICANN staff for making this possible, to get the recording possible and helping us making this happen because else this would not have been possible.

So Eve and Kinanya, perhaps you could already start off while (Mariam) is loading the presentation. Would that be okay.

Kinanya Pijl: Yes. That would be fabulous. Can you hear me?

Man: Okay.

Niels ten Oever: Yes, we hear you. But please dispense.

Kinanya Pijl: Okay. That's fantastic. So, in the commission by the Council of Europe, Eve and I drafted this report. The report provides an in-depth analysis of ICANN's policies and procedures with regard to community-based applications from a human rights perspective.

Our focus is on what we have learned from the initial rounds of community-based applications. And for the report, we conducted interviews with community-based applicants as well as ICANN staff and the ICANN ombudsman, for example.

Niels ten Oever: Eve, I'm very sorry to break in. But there is a bit of echo on the line and you sound a bit distant. So if you could get a bit closer to the microphone, we might all be able to learn more from what you're saying. Thank you.

Kinanya Pijl: Okay. Great. Can I scroll in the presentation? Yes, wonderful. So, our report provides an overview of which universal human rights apply to communities and to ICANN (TLDs) and how ICANN should regard human rights when accessing the application.

The human rights perspective here is particularly relevant. It (provides) ICANN's adoption of the new bylaws as Niels already mentioned in his

introduction. And our report showed that the community (TLD) process failed to adequately protect freedom of expression, freedom of association, and nondiscrimination. And these rights fell short in large part because due process did not meet acceptable standards.

Any failure to follow a decision-making process which is fair, reasonable, transparent, and proportionate endangers freedom of expression and association as well as risk of being discriminatory.

So, our first finding in the report concerns a lack of a clear vision of the purpose of community-based TLDs. So, what is exactly the problem that community-based TLDs are to resolve? So, what are the (unintelligible) interest value community-based TLDs are to protect?

And in our report, we provide some first ideas (unintelligible) for a direction of these values that gTLDs could protect, which could be the protection of vulnerable group or minorities, protection of pluralism, diversity, inclusion, and consumer or internet user protection.

And related to this finding, we found that there's no clear definition of community for the purpose of these applications. Still very low. Is it - am I not - is it impossible to hear me or...?

Man: I can hear you.

Niels ten Oever: It's not impossible but it could be better.

Kinanya Pijl: Yes. I think it's an echo in the room and it's a bit difficult to change now, I think, so.

Niels ten Oever: It's okay. Just go ahead. No worries.

Kinanya Pijl: Okay. Wonderful. So, related to this problem of not clearly defining the purpose of community-based applications, we found that there's no clear definition of what community is -- so for the purpose of these applications. The initial broad definition of community as formulated by the GNSO Policy Recommendation had been restricted both in the applicant's guidebook, in the CPE Guidelines, and by the EIU. And as a consequence, the process goes against the spirit and the purpose of the GNSO wants formulated. Next slide.

So, we have to pay particular attention to the key processes affecting community-based applications, just on the one hand, community objections and on the other hand community priority evaluation to assess whether they are fair and reasonable -- so, with a specific focus on due process.

We concluded that there are well-founded concerns, that weaknesses within these specific processes may affect the human rights of community applicants.

When it comes to community objections, our first finding is that we found inconsistencies in the determination of whether entities had standing to object. The second thing that we found is that these panels have a slight implicit standard when making their decisions. While such implicit standards ought to be made explicit to guarantee maximum predictability in alignment with the goals of the program as formulated by the GNSO.

I'll try to slow down, absolutely. I hear you.

So, when it comes to community priority evaluation, we found that there is no external quality control over on what the EIU does and so therefore their

procedures and decisions, despite this being a term of the contract between the EIU and ICANN.

Our second finding when it comes to CPE is that ICANN has absolved itself of all responsibility for determining community priority, despite the EIU insisting that they only have an advisory role. So as a result, there's no clear appeal mechanism and both say they are in the end not responsible for the findings for the decisions. Next slide.

Great. So, then we looked into the accountability mechanisms that are in place, and generally most of the accountability mechanisms are simply not designed for this process. So, then we're talking about the reconsideration requests in the independent review process, the ICANN ombudsman, and the courts.

And as a consequence, for the fact that these processes simply have not been designed for community-based applications and have not been formulated as a substantive appeal, they have been a very limited value to the community applicants.

And there were more general concerns that applied both to the community objections as well as to the community priority evaluation process, which are on the one hand that the costs turned out to be really high, the time taken was way longer than expected, there were conflicts of interest as well as a number of areas of inconsistency and lack of transparency which at least led to accusations of unfairness and discrimination.

ICANN should at least guarantee maximum predictability of behavior of these delegated decision makers -- and to do so, it needs to make sure that there is no conflict of interest, it needs to provide full disclosure, and it needs to

integrate the quality control program. And this relates to the point thereafter that there's no appeal mechanism in place within the community objection or the community priority evaluation process. So, there should be availability of an appeal on the substance of the argument and on the representativeness and eligibility of the objectors.

And the last point again is what we also saw in the CPE, as the lines of responsibility are simply unclear. So, in the end, nobody really knows who is responsible for a decision from the EIU. And similar arguments have been put forward when it comes to community objections. Next slide.

Eve will come in here. Eve?

Niels ten Oever: I can hear someone typing, but I do not hear Eve on the phone.

Kinanya Pijl: Yes, you hear me, Kinanya typing.

Niels ten Oever: Yes. I hear Kinanya.

Kinanya Pijl: Eve, are you there?

Niels ten Oever: So, while we're - no Eve we cannot. Have you connected your audio or are you called in? If not, can you give your number to the ICANN staff so that they can call you in? Or connect your audio at the top of the screen at the little telephone button.

While Eve is doing that, Kinanya could you...

Kinanya Pijl: Yes.

Niels ten Oever: ...perhaps continue?

Kinanya Pijl: Yes, I could. So, based on these findings -- and of course, we go through it relatively quickly now -- with a look to the future and to the next round of applications, we believe that greater clarity is needed on the purpose of community TLDs and why ICANN has formulated this specific program -- so who do we try to protect and what are the values behind it.

Additional (unintelligible) firmly grounded in the human rights - Eve? In the human rights that are the core of this project, which is freedom of expression, freedom of association, and nondiscrimination.

Eve should comment here. Can you hear me?

Eve Salomon: Can you hear me now?

Kinanya Pijl: Yes.

Eve Salomon: Hello?

Niels ten Oever: Welcome, Eve.

Eve Salomon: Yes. Okay.

Niels ten Oever: We can hear you.

Eve Salomon: Hello. Sorry about that. Technical mishap. Okay. I'm now here. So, thank you very much Kinanya.

You'll see the slide. I'm not going to read it out because hopefully everybody can see what (unintelligible) them. But there are two major areas that need to be addressed going forward that we found as a result of our research.

First, we believe whether they -- ICANN -- to go back to basics and get clarity on (unintelligible) on what community top level domains are actually for. It seems to us that somewhere between inception and execution, the original (unintelligible) of community DLTs has been lost.

What was originally an intention to ensure that, for example, first-nation tribal groups could protect their online identity and have a safe space to discourse has now become a potential way for commission to (unintelligible) the option process.

We therefore think it is important to review and refrain ICANN intentions. Whether it does intend to give priority to commercial so-called communities - - what I would call (unintelligible) communities -- as well as second and third sector ones -- for example, governmental and public sector and not for profits.

Second, there's a process. Basically, the concerns that we identified that Kinanya has explained to you need to be addressed -- whether or not the overall general purpose remains the same or changing. As we've discussed, a failure of due process has a damaging effect on other human rights. That's a process right and there's a far greater likelihood that other human rights will be protected.

So on balance, rather than trying to sit on and fix the existing process, we recommend there is a (unintelligible) review based on the conclusions ICANN reaches on the purpose of community reviews. Assuming -- and I admit this is a big assumption -- that ICANN decides that the community is not (meant) the

first sector commercial communities, you put up a strawman suggestion that provides an altogether different route to benefit the communities. And that's sort of summarized on your slide.

Rather than trying to make communities fit into a variety of existing ICANN routes, we suggest creating a different stream altogether. The model we use here comes from (broadcasting) where regulators across the world have found a different licensing or community media.

So, we suggest that by making the regulatory issues appropriate and suitable for communities who are not motivated by money and are prepared and able to hold their registry to account, you can get around many of the problems of how to determine whether or not an applicant is or is not genuine and worthy of fast tracking around (unintelligible).

In conclusion, we feel that as ICANN matures and takes its regulatory responsibilities more seriously -- and remember, the allocation (unintelligible) is a regulatory activity -- ICANN can learn and borrow a lot from other regulatory societies, including how best if we see laudable, public interest and human rights objectives.

Thank you. Back to you, Niels.

Niels ten Oever: Thank you very much Eve and Kinanya for this presentation and for writing this report. You are handing out quite some rough justice, but also giving us some horizons into the future how we could improve this process. And I think quite a lot of people will want to discuss this with you. So, I really hope you can stay with us on the call.

And to ensure a variety of voices, we'll now go into five discussions from different stakeholder groups after which we'll open the floor for Q&A and discussion with us all.

So I'd like to first head to Mark Carvell who is the Vice Chair of the Governmental Advisory Committee as well as co-chair of the GAC Working Group on Human Rights and International Law. Mark, can I ask you to be the first one to comment to these reports?

Mark Carvell: Yes, thank you very much Niels. Just a slight, small correction to your introduction. I'm not actually Vice Chair yet. I'm a Vice Chair Elect. I will become a Vice Chair at the conclusion of the GAC meeting in Copenhagen. But - and I should emphasize my contribution to this discussion is on a personal basis. I'm not representing the GAC. I'll explain very briefly where the GAC is in respect of this report shortly.

But first of all, from a personal perspective, it's been rather frustrating actually as a member of the Governmental Advisory Committee to hear the increase in concerns expressed by community-based applicants in the current round and also commentators that things were going wrong in the ICANN process for prioritizing applications from community-based organizations, and groups, and so on in the process because it was a vision that many of us shared in the early days when the round was being discussed and formulated.

There was a vision that communities would find this an opportunity for them to have their own space in the domain name system where they could meet, express themselves, exchange views, undertake deliberations, and really you know, assemble online on a worldwide basis. That was the vision -- that such applications would actually be prioritized in the round.

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

So, this report really is a key review of what has gone wrong, what the kind of deficiencies of process, the lack of opportunity for appeal against decisions, inconsistencies of evaluation, and so on, which are detailed in the report very comprehensively. The work was conducted very effectively through interviews, through reviewing the state of play with a number of applicants and so on.

The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. That was not happening. Became as I say an issue of increasing concern for many of us on the GAC.

So, we were very pleased that the Council of Europe stepped forward as an observer IGO on the GAC to undertake and commission this report -- which Kinanya and Eve have prepared. And really appreciate all the work they put into it. A very impressive report.

And I really endorse its consideration in the process for developing the next round as providing corrections to what has gone wrong -- to restore that vision that I talked about when I - at the start of my speaking just know to restore that vision. And that would reflect well on the whole community.

So that's where we are. The GAC processes, well we presented it through the working group on human rights and international law with a message to GAC colleagues to look at the report, to review it, examine the recommendations in particular. And we will discuss those at the forthcoming meeting in Copenhagen with a view to endorsing I hope all of the recommendations. But as I say, that's for discussion of the committee and plenary.

So, that's basically how I see the value of this report and its impact for the future -- restoring that vision of the opportunity for communities to express themselves, to have their place in the domain name system.

I hope those opening remarks are helpful. Thank you.

Niels ten Oever: Thank you very much, Mark. We see a clear line now developing with Eve, Kinanya, and Mark, our GAC Vice Chair Elect there. So now I'm very curious to hear from Chris Disspain, one of the ICANN board members who also -- and there I'd like to echo Mark -- will speak on personal behalf and not on board of the ICANN board. So, I'd like to invite everyone to speak on their personal behalf so we can have an animated discussion in which we can also explore different opinions.

So Chris, please come in.

Chris Disspain: Niels can you hear me?

Niels ten Oever: We can hear you very well, Chris. Great.

Chris Disspain: Can you hear me? Excellent. So thank you. Sorry, thank you very much. I will be extremely brief because I'm here to listen and to take part possibly in a discussion.

But in simple terms, I read the report with great interest. I understand that, you know, there are varying views in the community. I get slightly concerned when I hear people talk about, you know, ICANN should do this and ICANN should do that.

And my concern is simply that everyone is clear what that means, because as far as I'm concerned, what that means is ICANN is acting on the policy recommendations of the community -- whatever the relevant community is. And in respect to this as (unintelligible) in essence the policy goes to the GNSO.

Any next round of new (GDLTs) is going to be subject to work done in the GNSO on the way that a new or updated applicant guidebook should be - changes that should be made to that. And so, I view this report as being extremely useful and important input into the GNSO as it goes through the processes of considering the ways in which masses in any future rounds in new GTLDs should be dealt with.

And in essence, that's my current view and that's all I really want to say at this point.

Niels ten Oever: Thank you very much, Chris for that strong but short answer. That's how we like it. Thank you very much.

And now I'd like to go to another part of the community namely to Jamie Baxter of Dot Gay. Jamie, are you there?

Jamie Baxter: Yes, I'm here. Good morning. Can you hear me okay?

Niels ten Oever: We can hear you very well. Great to hear you. Welcome.

Jamie Baxter: Perfect. Thanks again for inviting me to this webinar. And we're engaging on this topic. I think it's incredibly important.

I certainly do agree with what Chris has just said about taking the time to review and reflect and ensure that this is done correctly as we go forward. But I would like to just take a second to take a step back and correct something you said at the beginning of the call, Niels and that is that we're finished with the first round. Because in fact, we're not finished with the first round.

And I think what's important to note about that is that just because we're looking ahead to the second round, we certainly shouldn't be excusing any of the discriminatory behavior or other claims that have been put forth in the current round -- many of which have been documented in not on the Council of Europe Report but also in an independent report produced by Professor William Eskridge from Yale Law School in support of our case, which I encourage all of you to read through with respect to the nondiscrimination issue.

So again, I do agree that it's important that we take a really hard look at where things went wrong. Many have suggested in the implementation stage. I think we all concur that GNSO policy was rather clear. And how is it that we got so far off track as we moved through the first round and turned the community applicants into the suspicious ones as opposed to the ones that were intended to be protected.

So, we certainly have been more than willing and able to contribute to the ongoing efforts looking forward, and we certainly appreciate the Council of Europe taking the time to reflect and to examine what has actually taken place

in the first round. And I do just want to reiterate that it is not finished. And we shouldn't all feel like it's okay to just step over those who have been abused in this first round just because we're looking to the second round. I think there's still time. I think there's still methods and there's ways that we can get it right as it was intended in this first round. Thank you.

Niels ten Oever: Thank you very much Jamie for making that strong opinion. And again, there also reaffirming points from the report and completely correctly correcting me in making that mistake. I'm very sorry about that.

So, we have urgent issues to still address from the previous round that is actually still ongoing while people are seeking redress. But we also need to look forward to see where we're going.

And on that point, I'd like to call on the expertise of Avri Doria, internet researcher but also co-chair of the subsequent gTLD procedures working group and of course a long time active member of the community to shine her light on this issue. Avri, please come in.

Avri Doria: Okay, thank you. This is Avri speaking. Hopefully I'm loud enough and can be heard.

So like everyone else, I'm not going to be speaking as the co-chair. However, as the co-chair I do want to say that I very much appreciate this report and I think it's very important material for the working group to really work through. Everything else I say is truly personal opinion.

So, one of the things that I really liked in it is the notion of going back to the policy and going back to the intention and tone of that policy. It's part of what Jamie was just referring to. The whole notion was to be supportive of

communities. How could we encourage them? How could we support them?
How could we protect them?

Yes, tribal we used as an example but they weren't the only kind and I really want to bring up that historical tidbit -- that the report seems to indicate that the tribal support was the purpose. And no, it was one example.

So I think - but what happened is instead of it being a supportive process, the (AGB) turned it into a gauntlet, turned it into something dangerous, scary and very expensive for any community to go through and that was a problem. That was a mistake that was made in the implementation but at that time, you know, we really had no way to deal with implementations after the policy was delivered. It was in somebody else's hands.

Processes exist now that hopefully will change that in the future. Part of going through the process the first time while we were talking about supporting the communities, one of the things we really turned our back on was some of the notions that might have been learnt from the previous round that had been the supportive round. We became so afraid of what was called the beauty contests although I think the report refers to a beauty by another term probably to contest but of a similar thing and I very much appreciate the way they kind of go back to that notion of thinking about is there a way to do some sort of prescreening for communities beforehand, in a supportive, understanding way that basically takes it out of being a financial competition for things.

We've gotten into this value in ICANN that says every other criteria is difficult or maybe may have degrees of subjectivity in it and therefore money is the only criteria we can use to determine when something is right, when something is wrong, when something could happen, when something shouldn't happen.

So the idea that we use criteria - and I think we've grown much better at working with criteria to make decisions beyond the economic since the (AGB) came about. The other thing that I'd like to mention is something that's alluded to in the report but isn't gone into deeply is certainly the report accepts the interrelation of all human rights and it does mention the work of UNESCO but really doesn't at any point sort of zero in on economic social and cultural rights that are a critical part of the (TLB) process; whether it's seen in (IBN)'s, whether it's communities, what have you, the strong impetus is, you know, we talk about competition and that is one of the economic rights but it's not just competition among those that already have, it's got to be competition for those who want to compete but who - yet and support of communities, coherent communities within the population is indeed a critical piece.

So, you know, looking at this whole work, looking at the whole how do we see the work we're doing through a human rights lens I think that's an extra element that needs to be brought into it. But as a place to start the conversation as tools for us to work with, I think this report is really a good motivator. Thanks.

Niels ten Oever: Thank you very much Avri for adding some horizons and also helping us in some concrete way forward. If you do not mind, I'll ask you - I'll make use of my - maybe abuse my position of chair a bit but then I'll ask you, what are the concrete steps on how this could be improved in the (unintelligible) duty of the procedures working group or anything that should be done elsewhere so just to help us think of very concrete ways to also make the concrete very concrete for us?

Avri Doria: Okay, well first of all, yes, I think we need gTLD process, subsequent procedure work PDP is indeed the right place to basically look at the (EGD) to

look at the original policy, look at the interpretations, to look at the results and to try and correct it.

As I said last time we didn't have implementation review teams and so basically you know, had very little to say of no that's not what we meant or even if we did say it when we refused the (AGB), there was no reason for anybody to (listen) when we said it. So, and we did say it. So I think that discussing this in the new gTLD subsequent procedures PDP working group, this time I got the name right or all of the words in the right order, is important, it's a critical place, it's the place for the human rights concerned people to partake and I think it's very important that once we get the (policy) that we do make judicious use of the implementation review teams (concept) to make sure that, you know, what is implemented is indeed consistent with the intent of the policy as opposed to turning the policy on its head as was done last time.

So I think that's the concrete. I think there's a lot of some of which I would jump up and down and agree with and some of which I jump up and down and well, wait a second, you know, let's think about that some more, discussed in detail but I really believe that is the place to work on it with the outside.

Now, in terms of the current ones, you know, that's in our appeal system for better or for worse and I can only hope that those that are hearing and deciding on appeals read this and take it seriously. Thanks.

Niels ten Oever: And that was the sound of me talking against my muted microphone. Thanks so much for that very clear information and comment Avri. So, before opening the floors, I'll already invite people to get their hands up and get into queue for responses, I'll invite our last discussants, Cherine Chalaby of the ICANN board to also give her opinions and impressions from this discussion

and the report on this issue and also see and ask a bit of guidance from her where Cherine thinks we should focus on following up. Cherine, please come in.

Cherine Chalaby: Niels, thank you very much. I echo what my colleague (unintelligible) said about how (excellent) this report is and thank you to Eve and (unintelligible) for comprehensive and (excellent) report. (Unintelligible) observation, general observation, I will give a personal observation on each of the (as of) recommendation. And I want to say they are personal because I cannot represent the views of the (unintelligible) hasn't got a position on these recommendations so I'm expressing my personal views.

So on the first area which is definition of community and public interest, I think this would be a real interest to the GNSO as a recommendation although I know it will be challenging, I remember last year there was serious discussion about the definition of global public interest and public interest and it will be a challenge to get the community to agree to our definition.

This is something, a good objective here to go for it and may be challenging. In terms of the community objections I would agree that the dispute resolution process and the objection process is more complex and you have to remember that the new gTLD (last rounds) or current round is a real huge mega change management (undertaking) and therefore the processes were untested in my view and we have seen some real sound examples, live examples or objection and termination inconsistencies.

So I think there is some basis here for the community to develop standards and procedures for subsequent rounds, there's no doubt about that. In terms of the community priority evaluation I personally would comment that I have observed inconsistencies applying the (AGB) scoring criteria for (CPG)'s and

that's a personal observation and there was an objective of producing adequate rational for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the recommendation (unintelligible) important recommendation in order to be taken into account very seriously.

In terms of the accounting mechanism, I do agree that the accounting mechanisms that are currently in place, mostly was process and procedures while the merits of the issuant complaints. I have detected throughout the last two or three years the frustration on some of those objectives and the applicants and so on and there was a place really to go to and discuss the merit of the issue and it was very difficult to challenge the processes because the processes whether it was a process followed by staff, (aboard) they were really following the process very closely and (unintelligible) to challenge that. So I can detect immense frustration, there should be here some, real improvements. I like this recommendation and I'm hoping the GNSO will look into that as well.

And then to the area where the final one regarding the recommendation for the next round where there are several suggestions whether we should have the (unintelligible) files or (unintelligible) and so on and so forth. I think we've had this kind of debate, this is not going to be an easy one to make. We had this kind of debate in the beginning was, should it be batches or not; eventually we didn't end up with anything other than a long list of applications.

Suffice to note, you make one of the points and you say that staff have recommended a very community application to be considered but in the subsequent (round) and I've checked with staff and they don't recall making a recommendation of the program review report. Nevertheless, the thought of

the idea is a very valid one and your (five) suggestions for the next application round should be of real interest to the GNSO. Thank you.

Niels ten Oever: Thank you very much Cherine for those very thoughtful comments. I think we have a great input for discussion here but I do not yet see people's hands up in the queue. So while we're waiting for people to queue up and commence, I would like to - oh, I see a queue forming but I would also like before we end is we also circle back to the authors to get their response. But let's first get some responses from the queue.

I see Vidushi Marda is in the queue, Vidushi, please come in.

Vidushi Marda: Hi, thanks Niels, this is Vidushi for the record. I work at the Center for Internet and Society in Bangalore and I'm also a member of the cross-community working party on Human Rights. I had a question for Eve and Kinanya that's based on some of the work that I've done for the (CCWG) on subsequent procedures.

So one of the issues that I've encountered is to try and understand the definition of community as it was pointed out in your report. But also to understand what the definition of significant objection from the community is. I'd be very curious to know whether you had come across any discussion on specific instances on the topic and also if you would have a specific recommendation with respect to how to begin to understand that particular (dom) as well, thanks.

Niels ten Oever: Thank you very much Vidushi. I will read out the comment by Alan Greenberg and then take the comments from Constantinos Roussos and then circle back to Kinanya and Eve for some earlier responses. So Alan said that one of the issues being discussed in the PDP is to have rounds, is to not have

rounds, but to just allow applications to come in and be processed in that order. There may be impacts on community TLD's if that's adopted.

But Constantinos, please come in.

Constantinos Roussos: Hello, can everyone hear me?

Niels ten Oever: Yes, very well, thank you.

Constantinos Roussos: Okay, excellent. Excellent. First of all I'd like to say happy New Year to everyone and I'd like to thank everyone that worked on this report, Eve and Kinanya did fantastic job and I'd also like to echo the comments by Jamie Baxter about the round not finishing. I'd like to say that in our case with (unintelligible) we believe we've done more than we had to do in order to showcase that we're not authentic community applicants and of course since we're a part of a (unintelligible) engagement process and we're still under reconsideration request with the BGC, I'd like to say that providing feedback to the next round of applications, which is ourselves, that have gone through the entire process (community) objections and (CPE), we would like to provide feedback but in our cases we want everything to be resolved before we can (give) any meaningful feedback that would be useful for everyone.

Also when it comes to recommendations and decision making, I'd like to ask a question which is a primary question that was posed in this report, is who decides and who makes the recommendations and when it comes to all of these - everyone understand, yes, there's inconsistencies of issues, it would be useful for everyone at ICANN to at least recognize that there were some issues and also find a way to make decisions that are predictable and the public interest and also step away from the AGB and look at the global public interest.

So I'd like to say thank you again to everyone and this was a great Webinar and we appreciate everything. Thank you.

Niels ten Oever: Thank you very much for that concise remark Constantinos, thanks a lot. Okay, so before going back to Kinanya and Eve really now, I'll just ask the last person in the queue, Kavouss, please come in.

Kavouss Arasteh: Yes, first of all, I am not comfortable with profit making, non-profit making, it is a dangerous criteria because it will be difficult to see topics (unintelligible) profit (making) who is not profit making, sometimes profit making is not but somewhat mentioned insurance or buying (unintelligible). So you could not make such a discrimination and we would get out of the non-(incommunicative) environment that we are talking about; either reality or slow (going) I don't know, this is number one. Number 2, I am not totally in agreement with first come, first serve. ICANN does not have any experience (at all) but (unintelligible) we have a very bigger experience of this first come, first serve. It's (unintelligible) trading and so on and so forth. People try to have (unintelligible) of the (DMS) and so on and then try to do something outside so this is first of all not agreed. And second it's not a good thing.

It is better not to have any further work on the public interest, leave it as it is, as a very, very high level and not go to define that which is there's no agreed definitions. And as a recommendation, I don't think there are (unintelligible) any of the recommendations at least I am, as a GAC member, could be converted to the GAC advisor because recommendation is recommendations and advice is different because that is a real point that I can make. Thank you.

Niels ten Oever: Thank you very much for that comment (unintelligible) and now I would like to invite Eve and Kinanya to respond to the comments that have been made. Eve, Kinanya, please come in.

Eve Salomon: Yes, thank you, thank you very much. Kinanya you might want to reply to (unintelligible) question about (unintelligible) projections.

Kinanya Pijl: Yes, yes, here I am. Yes, indeed with regard to the comments on community and significant objections from that specific community, there are two points with regard to that on the one hand, of course we wrote everything down that we know about the differences with regard to the conceptualization of community within the different, yes, aspects, procedures within ICANN. One thing that we noticed with regard to significant objection is that the entire responsibilities on one person to prove that you have, or one entity, this significant support of a group, you cannot objective collectively so it's all on the shoulders of this one person which is a relatively high burden.

And to that end, we also recommended that it might be good to look at organizations that are already by - the when for example recognized as a recognized organization in the field so that we could look at whether these organizations approve the objection from this specific party. Thank you, you want to comment?

Eve Salomon: I'll comment on the other ones. So Alan Greenberg's question about what we see about not having (rounds) but to have applications come in (at the end). It's certainly a possibility doing it that way. I think that those procedural challenge that ICANN will face is in order to be fair and to give everybody a chance, if there was an application (unintelligible) has very good dissemination and publication and the fact that an application has come into (unintelligible) domain names to allow anybody else who had a potential

interest in that (unintelligible) to either apply themselves or (unintelligible) put together an application.

It would not necessarily cut down on an illustration (unintelligible). I'm just thinking (only) the best way to do that and to large - I notice there's an (interest) to apply (unintelligible) and then you'd have to be well qualified.

Oh I see that one - there would have to be another way that's fair and non-discriminative put in place around (unintelligible) but it's certainly a possibility to be (keeping).

The other point made was (unintelligible) and (unintelligible) profit and non-profit and I strongly recommend to everybody who's been making comments about that, on the chat, to put all of this into one (side) because the first priority is to go back to square one and work out what is the (attention) around (unintelligible) in the first place. What values is ICANN trying to make, what are the intentions, what are the (goals)? Because from that the definition of what (unintelligible) is, ought to be given priority. And commercial, non-commercial (unintelligible) be relevant (unintelligible) that does put the cart before the horse, goes back to (unintelligible) what (unintelligible) and then work out what the (unintelligible).

Our report we - shorthand, or as I said, it's a strong (unintelligible) and we can just the discussion going about profit, not for profit. And I prefer the (two sections) (unintelligible) people have said a lot of (pitfalls) and I'm not actually (unintelligible). The main point is go (without thinking).

Niels ten Oever: Thank you Eve and (unintelligible) for those excellent comments. I see a queue has formed. Constantinos, please come in or is that an old hand Constantinos?

Constantinos Roussos: That's an old hand.

Niels ten Oever: Okay, no worries. Then let's go over to Patrick Penninckx, Patrick, please come in.

Patrick Penninckx: I wanted to come back to a question which was raised by (unintelligible) with regards to the nature of this report and question whether or not what's an official (unintelligible) or the recommendation or whether that was personal opinions on the order. In order for a document to be (unintelligible) Europe official position, it would have to go through the committee of ministers but that is not the purpose of this document. The document has a purpose of going, making, sure that the decision making, which should (take days) is fair, reasonable, transparent, and proportionate.

And what we intend to do with the report and, that's why the Council of Europe also commissioned it, is that we want to actively promote a constructive dialogue around this and I think that's what we are already doing and this is only a start. We came up with the report just before the ICANN meeting (unintelligible) and we intend to continue the dialogue on this, this is not finished and that's also replying to his second question with regards to interpretation of this particular Webinar. I think there will be other occasions where we can continue this dialogue. And I think it's important that we get started on this.

They've recalled that - the human rights perspective that the Council of Europe tries to bring into the ICANN process, it's fundamental and that's also what now with the adoption of a new bylaw on human rights recognizes. It also recognizes the commitment of ICANN in this and we want to contribute to the debate of this and we'll actively do that. Thank you.

Niels ten Oever: Thank you very much for that Patrick. I see the last one in the queue is (Jamie Bexford), Jamie come in.

Jamie Baxter: Yes, thanks again Niels. I just wanted to jump in on a point that seems to have been raised around the issue of rounds. I think as we look forward we need to be very cognizant of any discrimination that that may give to communities who have enshrined in part of their process outreach to community groups to build support. So this is just a race to the finish line I think we need to be very careful about how we approach this speaking from experience with our application for (doc day), it took us several years to engage the global community to build the sort of support that we needed to move forward with the application and so if this is ultimately a first come, first serve basis and for ongoing rounds, it already puts community applicants at a disadvantage because there's time required for them to - in order for them to compile and assemble and design a model, an application that actually even makes sense for the community.

So I just wanted to add that quick point especially for those who are discussing this in other groups.

Niels ten Oever: Thank you very much Jamie and I think we've gathered a lot of ideas and a lot of food for thought during this meeting but we're also on the top of the hour and I personally always try to keep the Webinars and teleconferences up to one hour because that's when mostly the concentration of people seems to seep out but luckily we have a session of the cross-community working party on ICANN's corporate and social responsibility to respect human rights at the upcoming meeting at ICANN Copenhagen also with our remote support so it would be great if we continue discussing this issue, the report and a way

forward there and then of course work on concrete ways forward within the PDP on subsequent rounds.

So at this point I would like to thank very much the authors of the reports, the discussants and the Council of Europe and everyone for participating and being so sharp. The recording can be found at the address that has just been shared by (unintelligible) but you can also find it at the site, ICANNhumanrights.net and then click onwards from there. Soon we'll have a new site there too and then I would like to give the famous last words to Patrick Penninckx of the Council of Europe but not before thanking ICANN staff for making this possible.

Patrick, please come in.

Patrick Penninckx: Sorry I had a few problems turning on my microphone again. No, Niels you already took the words out of my mouth. I think thanks a lot for all of the discussants for having participated in this very important initial debate for even (unintelligible) for having made this report at our request. I think all of the discussants and all people intervening have appreciated the value of what is in there reflecting the processes, reflecting the vision, reflecting the recommendations and the initial intentions that were behind the community-based generic top-level domains.

I think it's incredibly important that we look at it and continue to revise those working methods in order to ensure what I said, keep the processes transparent and accessible to all of the communities that wish to apply for it. So, we're really counting on the ICANN meeting in Copenhagen to continue this debate. We will take up contact with the GAC and with other communities in order to continue this debate and we hope to invite you there to discuss that further with us. Thank you so much.

Niels ten Oever: Thank you all very much, enjoy your day, I'm looking forward to seeing you in Copenhagen or in the calls, the ICANN calls on related topics. Thank you all very much, bye all.

Man 3: Thank you.

((Crosstalk))

Man 4: And thank you Niels.

Niels ten Oever: My pleasure.

END

Exhibit 28



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Legal Rambling

Thursday, 28 July 2016

Dot Gay Report

This is my final report as the ICANN ombudsman.

Office of the Ombudsman

Case 16-00177

In a matter of a Complaint by dotgay LLC

Updated Report dated 27th July 2016

Introduction

This investigation was undertaken as a result of the latest rejection of the application for reconsideration for the dot gay string application by an ICANN BGC recommendation. As a result, dotgay LLC have brought this issue to me to investigate.

Issues

The issue is the future progress of this application and the final disposition of the recommendation by the BGC to the ICANN board, and the further consideration of this application on a global basis. The board will shortly be considering the recommendation from the BGC, but this report is intended to be on a wider basis than just that issue, because of its importance for the global public interest in ICANN's ambition to respect human rights.

Jurisdiction

It is unusual for the ombudsman to intervene at this stage between a BGC recommendation and the final decision made by the ICANN board. I am not aware of any occasion on which the board has rejected the recommendation. I am conscious that the recommendation will be discussed, but given the previous history of such recommendations, it is most likely that the recommendation will be accepted. So I anticipate that my recommendation will be to some extent controversial. However, I am very concerned about the apparent inevitability that the applicant will not be able to progress as the community applicant for this string, which would otherwise result in the other applicants being able to pay the highest price at an auction, which is almost certainly beyond the reach of the applicant, which is a community-based organisation with limited resources.

However, this investigation and complaint are on a wider basis than just the reconsideration recommendation from the BGC to the board, and the board's decision on the recommendation. This report is intended for the board to consider on its own, taking into account the history of reconsiderations, but also the history of the application in the context of the difficulties in the interpretations in the AGB which have constrained the EIU in their evaluation.

This is a matter where I have jurisdiction. The complainant has raised an issue of unfairness on several levels, complaining that the decisions of the Board Governance Committee are also unfair.

It is important to note that I do not have jurisdiction to review or act in some way as an appeal body, to the expert decision from the EIU. The reason I do not have jurisdiction relates to the nature of the ICANN community, which is the limit of my mandate. An ombudsman operates with what has been called informality, which means that I am not bound by strict rules of procedure, nor do I operate as if this was a formal hearing, with submissions, evidence and a reasoned decision. My powers such as they are, are limited to making a recommendation to the ICANN Board. If I were to find an unfairness in the decisions, I would recommend a course of action to remedy that unfairness. This has to be done in the context of the limits to my jurisdiction expressed in my mandate.

The extracts from the Bylaw state-

“The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly”

And

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About Me



Chris LaHatte

Wellington, New Zealand

Chris LaHatte LL.B. Auckland

University; M Mgt (Dispute

Resolution) Massey, Fellow Arbitrators' and Mediators' Institute (Mediation/Arbitration). He was the Ombudsman for ICANN for five years and acts as a mediator and dispute resolution neutral and offers a personable, pragmatic and problem solving solution.

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“problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff”

From the Framework

“The Ombudsman’s function is to act as an Alternative Dispute Resolution (ADR) office for members of the ICANN community who may wish to lodge a complaint that the staff, board or a constituent body has treated them unfairly. The purpose of the Ombudsman is to ensure that the members of the ICANN community have been treated fairly.”

The definition of the words ICANN community has been treated by me and my predecessor in fairly wide terms. Because ICANN is not a membership driven organisation, but based on a multi-stakeholder model, which includes a very diverse range of people and organisations, a widely inclusive interpretation has been given to explaining who is a member of the ICANN community. The three ICANN meetings each year are open to anybody, and the only requirement is to register prior to the meeting or at the meeting. There is no doubt that any such person would be a member of the ICANN community by this very informal step. It could even be expressed as any person who wishes to be involved, even by submission of policy suggestions. This is supported by ICANN in its material published such as explaining the multi-stakeholder model for example. In that category it describes groups such as civil society and Internet users, the private sector, international and national organisations, governments, research, academic and technical communities. As well as the individuals, any one of those groups could be described as a constituent body.

The scope of the complaint also covers the decision pending before the ICANN board about the ICANN reconsideration decision from the ICANN Board. There is no difficulty with jurisdiction in this case, because that is clearly within ICANN bylaws.

Investigation

To undertake this investigation I have reviewed the previous reconsideration decisions, and consulted with the applicant over the issues. I have also reviewed the previous own motion report which I prepared for the EIU community application process, and the specific effect that the interpretations used by the EIU from the AGB and the specific effect the interpretation has had on the CPE evaluation for this application in defining community applications. I have also considered the human rights issues and appropriate resources concerning the application of human rights, which was reiterated in the latest report from the special rapporteur on freedom of expression. In particular I have relied on the UN Guiding Principles on Business and Human Rights, the report known as the Ruggie Report. This report states among other things, that business enterprises should respect human rights. This means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Facts

The complainant says that there are many levels of unfairness, including the way in which the applicant guidebook has been applied to the application by the EIU and ICANN, but that overall significant aspects of their application and reconsideration applications have not been properly considered and the rejection of their application is therefore unfair. The history of this matter has been set out in the reconsideration decisions, and the materials filed by the complainants, and for the purpose of this recommendation it would be repetitive.

Reasoning

There are a great many issues which have been raised in the course of this application, and the three reconsideration requests. It is accurate to say that the applicant and the gay community have been unhappy with the results of those reconsideration requests, and that a considerable part of the difficulty arises from the ICANN BGC’s very narrow view of its own jurisdiction in considering reconsideration requests. Issues raised include highlighted cases of inconsistency of the EIUs application of the CPE criteria set forth in the AGB, which the BGC and the board have refused to address to date, as well as the lack of support for community endeavours as expressed in ICANN policy to foster diversity on the internet, as expressed in Article 1 Section 2 (4) of the ICANN Bylaws. It is no surprise that this jurisdiction has been discussed extensively in the CWG working groups about accountability.

Further, in the context of ICANN currently developing policy about the role of human rights, it is timely that the board demonstrates a commitment. In the past, the issue of whether ICANN had any role in the human rights was itself controversial, but the position has moved since then so that a commitment to human rights is now accepted, and the real issue is a demonstration of that commitment.

The Ruggie principles emphasise the need for organisations other than states to comply with human rights principles. The extent to which ICANN will be bound is very much a topic for discussion, but it is inevitable that there will be statements about the human rights

- ▶ 2013 (1)
- ▶ 2012 (1)
- ▶ 2011 (17)
- ▶ 2010 (68)
- ▶ 2009 (32)
- ▶ 2007 (3)

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principles which ICANN will operate under as part of its adherence to the accountability principles being discussed at present, and is also supported by the Bylaws in Article 4, and thoroughly established prior to accepting community applications for purposes of transparency and fairness. See among others, Bylaw Article III, about transparency. There comes a point where as the ombudsman I need to take a look at the greater picture. The role of the ombudsman is to deal with issues of fairness, and this encompasses issues such as respect for diversity and support for all parts of our community. Sometimes the mechanisms which we have put together to resolve challenges are simply inadequate. The community and ICANN went to considerable lengths to prepare the new gTLD program and the Applicant Guidebook as the user manual for the process. It is difficult to criticise the community for the problems which arose subsequently, particularly with regard to the community evaluation process because this was a brand-new process and it was inevitable that there would be problems with interpretation and the situation is one which no one could have anticipated. I have previously referred to the problems which arose with the process which is less transparent and regrettably the EIU process should perhaps in retrospect, have been much more open to scrutiny.

But the issue that I want to emphasise in this recommendation is that it has always been open to ICANN to reject an EIU recommendation, especially when public interest considerations are involved. What is needed is to take a bold approach and demonstrate to the ICANN community, but also much more widely, to the world of Internet users, that ICANN has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency. The board will be very aware of the human rights initiatives undertaken in the light of the IANA transition and the careful evaluation of the accountability processes. But sometimes it is necessary to take a view which evaluates whether the decision taken corresponds with the bylaws and articles of incorporation. That view should be that ICANN supports the gay community and recognises that there is a community which requires protection and recognition, which has been marginalized, threatened and attacked, and which should be considered a genuine community notwithstanding the EIU recommendation.

The result of refusal of CPE status is that the string would go to auction, even though this is said to be the last resort in the AGB. So the purpose of the CPE process to support community applicants will be lost in the auction process.

There was obviously an intention by the ICANN community to favour community applications for the new generic top level domains. The success rate of these applicants is however rather low, and I expect that this has been disappointing for the advocates of community applications. The reasons for this may well need further analysis when the program is reviewed over the next period until the next round. But now the ICANN board has an opportunity to correct the imbalance, perhaps most starkly illustrated by the dot Gay application. This is the time to recognise that even if the EIU evaluation did not achieve the appropriate number of points, that the community is real, does need protection and should be supported.

Result

As a result of this investigation, I recommend that the board looks at the bigger picture beyond the BGC recommendation and the board's decision on the recommendation and using Article IV (2) 17 where the board is not bound to support the BGC. The board should grant the community application status to the applicant and put an end to this long and difficult issue. By doing so the board will take a major step in recognising the role of ICANN in complying with its own policies and well established human rights principles.

Chris LaHatte
Ombudsman

Posted by [Chris LaHatte](#) at 10:21

Reactions: [funny](#) (0) [interesting](#) (3) [cool](#) (0)



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2 comments:

 [Jay Daley said...](#)

Chris, it appears that you accept as a given the claim that DotGay LLC represents the gay community. From that one judgement everything else in your reasoning about human rights, marginalised communities and ICANN's role flows and if that one judgement were true then so would be the rest of it. However, the whole point of the EIU evaluations is that in their view that claim doesn't stand up, and from that it flows that there is no case for ICANN to answer about failing to defend human rights or failing to defend a marginalised community. So the real question is, what reasoning do you have for accepting that claim and rejecting the EIU evaluations?

[28 July 2016 at 11:43](#)

 [giacomo mazzone said...](#)

Dear Chris,
Happy to hear these wise words from you. Disappointed to hear only now that you're leaving your job as ombudsman at ICANN and not at the occasion of your "own motion investigation" on the community based applications.
What is happening to DOT.gay is the perfect example of how not recognizing a mistake could bring to bigger mistakes and even to injustice. As you finally correctly stated, community based applications are one of the most sensitive issues in the field of action of ICANN, one of the most related with Human Rights and Public Interest.
Unfortunately when the AGB was imagined and when the rules for community applications were established the main concern was to prevent that some crooks could misuse the community priority to "game" the commercial rules that usually apply within ICANN. Nobody apparently was concerned that these high barriers could produce the opposite effects and leave most of the community applicants (real or fake they were) out. And in fact more than 80% of community applications in contention have been rejected within the CPE process : a process that imposes rules that are impossible to match for some of the real communities, such especially those politically and socially based as DOT gay or similia.
When the CPE rules ask for instance "With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). " it was clear since the beginning that DOT.gay could never match such a criteria, because homosexuality in 75 UN countries is still considered as a crime and a gay rights association would be considered as a criminal association. How ever DOT.gay could fulfill such an absurd criteria ?
Each institution that pretends to be responsible and accountable towards the community has to be able to recognize its mistakes and take action to remediate to it. Especially when these mistakes could produce irreparable damages to a minority that deserves respect and protection under any Human Rights principle.
There will be no way out from the current situation other than a unilateral decision of the Board that will remediate to the mistake and will assume responsibility for it. I hope that your gesture, even if late, shall be able to help to go in the right direction.

Giacomo Mazzone
[30 July 2016 at 10:28](#)

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Exhibit 29



The Internet Corporation for Assigned Names and Numbers

16 May 2017

VIA US MAIL

Scott Seitz
Jamie Baxter
dotgay LLC
Contact Information Redacted

Dear Messrs. Seitz and Baxter:

I write to provide you with a status update on Reconsideration Request 16-3 (Request 16-3) filed by dotgay LLC (dotgay) in response to the questions you have raised to ICANN including in your correspondence to the ICANN Board.¹

Request 16-3 was filed on 17 February 2016, seeking reconsideration of the Community Priority Evaluation (CPE) of dotgay's application for the .gay string. On 15 May 2016, dotgay made a telephonic presentation to the Board Governance Committee (BGC) regarding Request 16-3. On 26 June 2016, the BGC, having considered all relevant evidence, recommended that Request 16-3 be denied on the basis that the Requestor failed to identify any misapplication of policy or procedure by the CPE provider that materially or adversely affected the Requestor and failed to identify any action that the Board has taken without consideration of material information or on reliance upon false information.² The BGC's Recommendation on Request 16-3 was scheduled for consideration by the ICANN Board on 15 September 2016. Two days before the Board meeting, on 13 September 2016, dotgay submitted a 60 page independent expert report for the Board to consider as part of its evaluation of Request 16-3.³ As a result, the Board deferred its consideration of Request 16-3 to provide sufficient time for review of the report.⁴ The Board noted the reasons for continuing its consideration of Request 16-3 in the published Minutes of the 15 September 2016 Board meeting.⁵ Thereafter, dotgay submitted additional

¹ See Letter from S. Seitz to ICANN Board of Directors, 8 Sep. 2016, available at <https://www.icann.org/en/system/files/correspondence/seitz-to-icann-board-08sep16-en.pdf>, and email from J. Baxter to S. Crocker, 17 Apr. 2017, available at <https://www.icann.org/en/system/files/correspondence/baxter-to-crocker-17apr17-en.pdf>.

² See BGC Recommendation on Request 16-3, available at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

³ See letter from Arif Ali to ICANN Board of Directors, 13 Sep. 2016, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

⁴ <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.f>.

⁵ See *id.*



ICANN

materials for the Board's consideration.⁶ The materials have been provided to the Board for consideration and have been published on the Reconsideration page under Request 16-3.⁷

The Board has recently discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board has directed the President and CEO to undertake a review of various aspects of the CPE process.⁸ The details of this review are discussed in the 26 April 2017 letter from Chris Disspain, Chair of the BGC, to dotgay, among others.⁹ A copy of Mr. Disspain's letter has been published on the ICANN correspondence page¹⁰ and on the Reconsideration page under Request 16-3.¹¹ As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

I hope you find this update helpful.

Best regards,

Christine Willett
Vice President, gTLD Operations
ICANN

⁶ See letter from Arif Ali to ICANN Board of Directors, 17 Oct. 2016, available at <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; and letter from Arif Ali to ICANN Board of Directors, 15 Nov. 2016, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>.

⁷ See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

⁸ See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

⁹ See letter from Chris Disspain to All Concerned, 26 Apr. 2017, available at <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

¹⁰ See *id.*

¹¹ See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

Exhibit 30

ARIF HYDER ALI

Contact information
Redacted

August 8, 2017

VIA E-MAIL STEVE.CROCKER@ICANN.ORG

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Community Priority Evaluation (“CPE”) investigation

Dear Chairman Crocker and Members of the ICANN Board:

We write on behalf of dotgay LLC (“dotgay”) to both highlight its concern with and seek remedy with respect to the ongoing delays in the Board Governance Committee’s (the “BGC”) Community Priority Evaluation (“CPE”) investigation. Nearly one year ago, the BGC requested materials and research from its CPE provider, the Economist Intelligence Unit (“EIU”), as part of its investigation in the CPE process and halted its consideration of dotgay’s Reconsideration Request 16-3 (“RR 16-3”) pending the investigation.¹ The BGC has yet to resume its consideration of RR 16-3 and this delay is seemingly caused, at least partially, by the lack of cooperation and/or compliance from the EIU.

The EIU’s Noncompliance with the BGC’s Request

ICANN and the BGC has provided dotgay with little information regarding the BGC’s CPE investigation and its hiring of FTI Consulting Inc. (“FTI”) to conduct an independent review of the CPE process. But, based on the sparse information provided, it seems that ICANN’s CPE provider has been entirely uncooperative or unresponsive to requests for information regarding an already opaque process.

¹ See BGC Meeting Minutes (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

The BGC's CPE investigation began in September 2016, when the BGC asked its President and CEO to undertake a review of the process ICANN used to interact with the EIU.² The October 18, 2016 BGC meeting minutes showed that the BGC planned to "[r]equest from the CPE provider the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."³

On April 26, 2017, an update from Chris Disspain indicated that the materials were "currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course."⁴ Thus, six months after the BGC's request, the EIU had still not provided the requested materials.

On June 2, 2017, a new update on the CPE investigation was released, informing dotgay that "FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests."⁵ The June 2017 update finally provided a time estimate for the EIU to release the materials and information about the CPE process: June 9, 2017, the "end of next week."⁶

Yet, more than two weeks past the EIU's proposed delivery date of June 9, 2017, the BGC noted in its June 25, 2017 minutes that FTI "is also working with the CPE provider to

² ICANN Resolution (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

³ BGC Meeting Minutes (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>. The BGC also suspended its review of dotgay's RR 16-3 pending its investigation of the CPE process. *Id.*

⁴ Chris Disspain, Update on the Review of the New gTLD Community Priority Evaluation Process (26 Apr. 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁵ Community Priority Evaluation Process Review Update (2 Jun. 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁶ *Id.*

obtain the reference materials for the evaluations that are the subject of pending Reconsideration Requests.”⁷

Thus, more than nine months after the BGC’s request, the EIU has yet to fully comply with the request and provide the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.

dotgay’s Concerns Regarding the EIU’s Delays in Compliance

This delay in compliance is concerning. It suggests to dotgay that the EIU has no such documentation and it reinforces the assumption that the EIU conducted no meaningful research during the CPE process for the community applications. In other words, the EIU’s disclosure delays only lends further credence to dotgay’s objections to the final CPE Report for its .GAY community application and the clear evidence that the EIU inconsistently applied the CPE criteria in the final CPE Report for .GAY.⁸

ICANN’s Transparency Obligations Regarding its CPE Investigation

The entire CPE investigation has been mired in mystery since it began nearly one year ago, despite dotgay’s vested interest in the process and ICANN’s transparency obligations.

As explained by the IRP Panel in *Dot Registry, LLC v. ICANN*, “[t]ransparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.”⁹ ICANN’s Articles and Bylaws constantly reinforce that ICANN is required to act in a transparent manner:

⁷ BGC Meeting Minutes (25 Jun. 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-06-25-en>.

⁸ See, e.g., Letter to ICANN Board of Directors from Arif Ali on behalf of dotgay (15 Nov. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>.

⁹ *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

1. ICANN’s Articles of Incorporation states that it shall “carry[] out its activities. . .through open and transparent processes.”¹⁰
2. ICANN’s Bylaws also commit it to “carry[] out its activities. . .through open and transparent processes.”¹¹
3. ICANN’s Bylaws devote an entire Article—Article 3—to its commitment to “operate to the maximum extent feasible in an open and transparent manner.”¹²
4. ICANN’s accountability and review process, as set out in its Bylaws, was specifically created “for certain action. . .and procedures. . ., including the transparency provisions of Article 3.”¹³

Under these transparency obligations, ICANN is obligated to disclose the status of the EIU’s compliance with its disclosure obligations, along with the materials and research disclosed by the EIU in response to that request. Any lack of transparency regarding the materials and communications between the CPE Provider, ICANN, and FTI only fosters dotgay’s concerns regarding the independent evaluation. Without access to the materials disclosed by the EIU, dotgay cannot determine whether the EIU considered all of the relevant information when evaluating its community application—including the materials dotgay submitted. This directly relates to the core of dotgay’s suspended RR 16-3.¹⁴

¹⁰ ICANN Articles of Incorporation, Art. 2(III).

¹¹ ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(a).

¹² ICANN Bylaws (22 Jul. 2017), Art. 3(3.1).

¹³ ICANN Bylaws (22 Jul. 2017), Art. 4(4.1).

¹⁴ See dotgay Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

ICANN's Timeliness Obligations Regarding its CPE Investigation

The EIU's delay in complying with the BGC's request for documentation has stalled the BGC's CPE investigation and, as a result, unfairly delayed resolution of RR 16-3. ICANN has an obligation to act in a timely manner.¹⁵ The BGC has failed to do so by allowing the EIU's compliance failures to stall the entire CPE investigation.

When dotgay submitted its RR 16-3 over a year ago, in February 2016, it expected that the process would proceed pursuant to the timeframe enshrined in ICANN's Bylaws. And, according to the Bylaws, the BGC was required to provide a determination "within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board . . . its best estimate of the time requires to produce such a final determination or recommendation."¹⁶ It has now been over a year¹⁷ and dotgay still has no estimate as to when the BGC will conclude its CPE investigation and consider the pending RR 16-3.

Request for Relief

In light of the above, dotgay requests that ICANN set an immediate deadline for the EIU to deliver a complete set of the requested materials to ICANN and FTI. Clearly, there appears to be no legitimate or rational reason why reference materials and research requested for the CPE investigation have yet to be fully delivered to FTI. If not delivered

¹⁵ ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(b)(v) ("[T]he following '**Core Values**' should also guide the decisions and actions of ICANN. . .[o]perating with efficiency and excellence.").

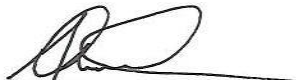
¹⁶ ICANN Bylaws (11 Feb. 2016), Art. IV, §2(16).

¹⁷ Even under the current version of the Bylaws, which were not in effect when dotgay submitted its RR 16-3, the BGC has delayed considering and issuing a determination on dotgay's RR 16-3 over a year past the expected deadline. According to the current Bylaws, the BGC should issue a determination within 45 days of the Reconsideration Request's submission. A requestor's Reconsideration Request is sent to the Ombudsman once it is submitted to the BGC, and the Ombudsman has 15 days to provide "a substantive evaluation of the" Reconsideration Request to the BGC. ICANN Bylaws (22 Jul. 2017), Art. 4(4.2)(c)(1)(ii). The BGC then has 30 days to "make a final recommendation to the Board" after receiving the Ombudsman's evaluation. *Id.*, Art. 4(4.2)(q).

immediately, ICANN should assume that such materials do not exist and FTI should proceed with the investigation in order to avoid further delays.

dotgay further requests that ICANN discloses any and all materials received from the EIU to the relevant applicants, in order to ensure the legitimacy of the CPE investigation.

Sincerely,

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

Arif Hyder Ali

Exhibit 31

dotgay LLC Reconsideration Request (“RR”)

1. Requester Information

Requester:

Name: dotgay LLC (“dotgay”)

Address: Contact Information Redacted

Email: Jamie Baxter, Contact Information Redacted

Requester is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

dotgay LLC (the “Requester”) seeks reconsideration of ICANN’s response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”)

review of the Community Priority Evaluation (“CPE”) process (the “DIDP Request”).¹
Specifically, the Requester submitted 13 document requests as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”¹⁵ and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

¹ Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

Review.²

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[ly] submitted by dotgay."³

4. Date of action/inaction:

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

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

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

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

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

² Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

³ Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>; *see* Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

By way of background, the Requester filed a community-based generic Top-Level Domain (“gTLD”) application for the string “.GAY.” However, the CPE report, authored by the Economist Intelligence Unit (the “EIU”), recommended that ICANN reject the Requester’s application for the .GAY gTLD. As evident from the Requester’s submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay’s application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.⁴

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. (“FTI”), to review the CPE process and “the consistency in which the CPE criteria were applied” by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requester’s Reconsideration Request 16-3 (“Request 16-3”), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requester, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration

⁴ Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

Requests related to CPE.” Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to “operate in a manner consistent with [its] Bylaws” and “through open and transparent processes.”⁵ ICANN failed to do so.

Specifically, according to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”⁶ The Bylaws require that ICANN (1) “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”⁷ (2) “employ[] open and transparent policy development mechanisms;”⁸ (3) “apply[] documented policies neutrally and objectively, with integrity and fairness;”⁹ and (4) “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”¹⁰

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.¹¹ ICANN’s failure to provide complete responses to the Requester’s DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.¹²

⁵ ICANN Bylaws, Art. 1, § 1.2(a).

⁶ *Id.*, Art. 4, § 4.2(o).

⁷ *Id.*, Art. 1, § 1.2(a).

⁸ *Id.*, Art. 3, § 3.1.

⁹ *Id.*, Art. 1, § 1.2(v).

¹⁰ *Id.*, Art. 1, § 1.2(vi).

¹¹ *See id.*, Arts. 1, 3-4.

¹² Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.¹³ It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN’s claims.

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

ICANN’s action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and insecure operation of the identifiers managed by ICANN. Accountability, transparency, and

¹³ ICANN’s Documentary Information Disclosure Policy (last visited June 29, 2017) (“If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.”), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials.¹⁴ In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.¹⁵ This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."¹⁶ ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

¹⁴ See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

¹⁵ See Exhibit 6, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

¹⁶ ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

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

8.1 Background

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.¹⁷ In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.¹⁸

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of

¹⁷ Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

¹⁸ See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.¹⁹

Almost a year later, and after numerous letters to ICANN,²⁰ on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).²¹

8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.²² The reason for

¹⁹ See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

²⁰ See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 14, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

²¹ See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

²² Exhibit 15, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

this request is twofold. *First*, the Requester sought to “ensure that information contained in documents concerning ICANN’s operational activities, within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”²³ *Second*, the Requester, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”²⁴ The Requester sought this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”²⁵

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”²⁶

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.²⁷ ICANN explained that:

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.²⁸

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.²⁹

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:³⁰

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

²⁸ *Id.*

²⁹ Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

³⁰ Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

8.3 ICANN’s Response to the Request

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.³¹ ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
- *Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.*
- *Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.*

³¹ Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

- *Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.*³²

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”¹⁵ and (b) all communications between the EIU and ICANN regarding the request;

*ICANN provided the same response as for Item 1.*³³

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

*ICANN provided the same response as for Item 1.*³⁴

Request No. 8: The materials provided to the evaluator by the EIU;

*ICANN provided the same response as for Item 1.*³⁵

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

*While ICANN provided a list of materials that it provided FTI, but also determined that the internal “documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.”*³⁶

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.³⁷

*ICANN provided the same response as for Item 1.*³⁸

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

³⁸ Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

9. What are you asking ICANN to do now?

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

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

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

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

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

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

This is not applicable.

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

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

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



Arif Hyder Ali

June 30, 2017

Date

Exhibit 32

DotMusic Limited and dotgay LLC Reconsideration Request (“RR”)

1. Requestor Information

Requestors:

Name: DotMusic Limited (“DotMusic”)

Address: Contact Information Redacted

Email: Constantinos Roussos, Contact Information Redacted

Name: dotgay LLC (“dotgay”)

Address: Contact Information Redacted

Email: Jamie Baxter, Contact Information Redacted

Requestors are represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

DotMusic Limited and dotgay LLC (the “Requestors”) seek reconsideration of ICANN’s response to their joint DIDP Request, which denied the disclosure of certain information requested

pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP").

On June 10, 2017, the Requestors sought disclosure of documentary information relating to ICANN's Board Governance Committee's (the "BGC") review of the Community Priority Evaluation ("CPE") process through an independent review process by FTI Consulting, Inc. ("FTI") (the "DIDP Request").¹ Specifically, the Requestors submitted four requests as follows:

Request No. 1: "Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;"

Request No. 2: "Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its 'first track' review;"

Request No. 3: "Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and"

Request No. 4: "Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review."²

Subsequently, on July 10, 2017, ICANN responded to the DIDP Request by asserting that the "information responsive to Items 1 and 3 were previously provided" to the Requestors, and the information requested in Items 2 and 4 (1) "is not an appropriate DIDP request" because it does not concern documentary information and (2) "is subject to the [] DIDP Conditions of Non-Disclosure."³

¹ Exhibit 1, Request No. 20170610-1, dotgay LLC and DotMusic Limited DIDP Request (June 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

² Exhibit 2, ICANN's DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

³ *Id.*

4. Date of action/inaction:

ICANN acted on July 10, 2017 by issuing its response to the DIDP Request (the “DIDP Response”).

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

The Requestors became aware of the action on July 10, 2017, when they received the DIDP Response.

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

The Requestors are materially affected by ICANN’s refusal to disclose certain information concerning FTI’s independent review of the CPE process, as requested in the DIDP Request.

By way of background, the Requestors filed separate community-based generic Top-Level Domain (“gTLD”) applications: DotMusic applied for the “.MUSIC” string and dotgay applied for the “.GAY” string. However, the Economist Intelligence Unit (the “EIU”) recommended that ICANN reject the Requestors’ community applications.⁴ Since the Requestors received the EIU’s decision, they made various submissions, including independent expert reports in support of their separate community applications,⁵ that show the EIU’s decision is fundamentally erroneous. These submissions explain how the EIU Panel disparately treated DotMusic’s application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community

⁴ Exhibit 3, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>; Exhibit 4, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁵ Request 16-5: DotMusic Limited, <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en> (listing documents submitted in support of DotMusic’s Reconsideration Request 16-5); Request 16-3: dotgay LLC, <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en> (listing documents submitted in support of dotgay’s Reconsideration Request 16-3).

applications, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria. dotgay’s submissions show that the EIU, in evaluating dotgay’s community application, misapplied the CPE criteria, failed to follow its own guidelines, discriminatorily treated the application, and made several factual errors that demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities.

In January 2017, ICANN retained an independent reviewer, FTI, to review the CPE process and “the consistency in which the CPE criteria were applied.” FTI is collecting information and materials from ICANN and the CPE provider as part of its review process and will then submit its findings to ICANN based on this underlying information. FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requestors’ Reconsideration Requests—DotMusic submitted Reconsideration Request 16-5 (“Request 16-5”) and dotgay submitted Reconsideration Request 16-3 (“Request 16-3”). Both reconsideration requests are currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requestors, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.”⁶

Thus, on May 5, 2017, DotMusic filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “DotMusic DIDP Request”).⁷ Subsequently, dotgay filed a DIDP Request also seeking documents concerning the BGC’s review of the CPE process on May 18, 2017 (the “dotgay DIDIP Request”).⁸ In submitting these two

⁶ Exhibit 5, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁷ Exhibit 6, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

⁸ Exhibit 7, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

requests, the Requestors expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes.”⁹ ICANN failed to do so when it denied certain requests made in both DotMusic’s DIDP Request on June 4, 2017 and dotgay’s DIDP Request on June 18, 2017.¹⁰

The Requestors had also filed the DIDP Request in pursuit of supplemental information regarding FTI’s independent review process. Once again, ICANN failed to adhere to its Bylaws by acting “through open and transparent processes” when it issued the DIDP Response on July 10, 2017 and did not produce the requested information.¹¹

Specifically, ICANN must “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets.”¹² According to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”¹³ The Bylaws require that ICANN “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”¹⁴ “employ[] open and transparent policy development mechanisms;”¹⁵ “apply[] documented policies neutrally and objectively, with integrity and

⁹ ICANN Bylaws, Art. 1, § 1.2(a).

¹⁰ Exhibit 8, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>; Exhibit 9, Request No. 20170518-1, ICANN’s Response to dotgay’s DIDP Request (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

¹¹ Exhibit 10, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

¹² Amended and Restated Articles of Incorporation, § 2(III).

¹³ ICANN Bylaws, Art. 4, § 4.2(o).

¹⁴ *Id.*, Art. 1, § 1.2(a).

¹⁵ *Id.*, Art. 3, § 3.1.

fairness;”¹⁶ and “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.”¹⁷

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.¹⁸ ICANN’s failure to provide complete responses to the DIDP Request raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Request 16-5, and the .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.¹⁹

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising that ICANN maintains that it can hire FTI to undertake such a review without providing all the materials that will be used to inform FTI’s findings and conclusions to affected parties and without confirming that FTI would even consider documents submitted by the affected parties.

It is of critical importance that ICANN confirm the scope of the material provided to FTI in the course of its review and the details of the review proves in order to ensure full transparency, openness, and fairness. This includes the names of the ICANN employees, officials, executives, board members, agents, etc. that were interviewed by FTI during its independent review process. By providing this information to applicants, ICANN will prevent serious questions from arising concerning the independence and credibility of FTI’s investigation. For similar reasons of

¹⁶ *Id.*, Art. 1, § 1.2(v).

¹⁷ *Id.*, Art. 1, § 1.2(vi).

¹⁸ *See id.*, Arts. 1, 3-4.

¹⁹ Exhibit 11, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

transparency and independence, ICANN must disclose not only the details of FTI's selection process but also the underlying documents.

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

ICANN's action through the DIDP Response materially affects the two global communities supporting the DotMusic and dotgay applications: the global music community and the global gay community. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC and the .GAY gTLDs, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN's identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed ICANN damages its credibility, accountability, and trustworthiness. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that the EIU followed in evaluating community applications, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.²⁰ This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to

²⁰ See Exhibit 12, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; see also Exhibit 13, dotgay's Presentation to the Board Governance Committee (May 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

safeguard the interests of their separate community members, which have supported DotMusic's .MUSIC application²¹ and dotgay's .GAY application, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in disclosing the identities of individuals interviewed by FTI during its independent review process and in confirming that FTI will disclose its final report to the public is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.²² This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."²³ ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the requested items will undermine both the integrity and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5 and Request 16-3. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

²¹ See Exhibit 14, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf> (identifying co-requestors for reconsideration of DotMusic's CPE Evaluation).

²² See Exhibit 15, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

²³ ICANN's Documentary Information Disclosure Policy (last visited Jun. 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

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

8.1 The Community Applications Serving as the Bases for the DIDP Request

The Requestors elected to obtain their respective gTLDs by undergoing the CPE process as community applicants. However, both Requestors discovered that the CPE process, as implemented by the EIU, discriminatorily treated community applicants and are now contesting the EIU's final determinations on their applications.

8.1.1 DotMusic's community application for .MUSIC

The .MUSIC CPE process for DotMusic's application was initiated in mid-2015. Nearly a year later, DotMusic discovered that it did not prevail as a community applicant.²⁴ In response to this denial, DotMusic, supported by multiple community organizations, filed Request 16-5 on Feb. 24, 2016.²⁵ Now, over a year later, and after numerous submissions to ICANN²⁶ and a presentation before the BGC,²⁷ DotMusic still has not received a determination from the BGC regarding Request 16-5.

²⁴ Exhibit 16, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

²⁵ Exhibit 17, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

²⁶ *See, e.g.*, Exhibit 18, Letter from DotMusic Limited to the BGC (Mar. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>; Exhibit 19, Letter from DotMusic Limited to the BGC (Mar. 28, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>; Exhibit 20, Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (Jun. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>; Exhibit 21, Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>; Exhibit 22, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; Exhibit 23, DotMusic's Additional Responses to a Question by the Board Governance Committee during the 17 September 2016 Presentation (Sep. 19, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf>; Exhibit 24, Supplement to DotMusic's Additional Responses to a Question by the BGX during the 17 Sep. 2016 Presentation (Dec. 6, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic Limited to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

²⁷ *See* Exhibit 26, DotMusic's Presentation to the Board Governance Committee (12 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

8.1.2 dotgay's community application for .GAY

Similar to DotMusic, dotgay's CPE evaluation of the .GAY gTLD was initiated in early 2014. dotgay discovered that it did not prevail as a community applicant later that year.²⁸ In response, dotgay filed a reconsideration request with the BGC, which was granted because the BGC determined that the EIU did not follow procedure during the CPE process. As a result, the BGC sent dotgay's community application to the EIU for re-evaluation. However, the second CPE produced the same results based on the same arguments—the EIU rejected dotgay's application.²⁹

When dotgay submitted another reconsideration request to the BGC in regards to this rejection, though, the BGC excused the discriminatory conduct and the EIU's policy and process violations. It refused to reconsider the CPE a second time. Therefore, dotgay filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC's non-response on many of the issues highlighted in the second reconsideration request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.³⁰ For nearly a year afterwards, despite numerous letters to ICANN,³¹ dotgay had still not received a final determination by the ICANN Board.

²⁸ Exhibit 27, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

²⁹ See Exhibit 28, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

³⁰ See Exhibit 29, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

³¹ See Exhibit 30, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 31, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 32, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 34, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board

8.1.3 The BGC’s Decision to Place the Requestors’ Reconsideration Requests on Hold

Then, on April 26, 2017, ICANN finally updated both Requestors on the status of Request 16-5 and Request 16-3 through a general update to several gTLD applicants with pending reconsideration requests. The Requestors received a letter from ICANN BGC Chair Chris Disspain indicating that their reconsideration requests were “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).³²

This update on the status of their reconsideration requests failed to provide the Requestors with any significant information on the BGC’s review of the CPE process, despite the fact that their requests had been pending for over a year.

8.2 The Requestors’ Prior DIDP Requests

As a result of this dearth of information, the Requestors submitted separate DIDP requests to ICANN.³³ ICANN’s DIDP “is intended to ensure that information contained in documents

(March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

³² Exhibit 35, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

³³ Exhibit 36, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”³⁴ It serves as a principle element of ICANN’s approach to transparency and information disclosure.”³⁵ In accordance with this principle and policy, ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.³⁶ While the “DIDP procedures do not require ICANN to create or compile summaries of any documented information[,] . . . as part of its commitment to transparency and accountability, ICANN has undertaken [] effort[s] to do so” in the past.³⁷

8.2.1 DotMusic’s DIDP Request

Acting in accordance with ICANN’s DIDP process, DotMusic submitted the DotMusic DIDP Request on May 5, 2017. DotMusic sought information to further its investigation of the “numerous CPE process violations and the contravention of established procedures,” as described in Request 16-5,³⁸ *and* information regarding the CPE process as it concerned its Request 16-5 because “the BGC Letter does not transparently provide any meaningful information besides that

³⁴ Exhibit 37, ICANN Documentary Information Disclosure Policy (lasted visited Jul. 17, 2017), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³⁵ *Id.*

³⁶ See Exhibit 38, ICANN Response to Request No. 20080924-1 (Oct. 24, 2008), <https://www.icann.org/en/about/transparency/20080924-1/younger-response-24oct08-en.pdf> (providing information to applicant not contained in a specifically-identified document); Exhibit 39, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf> (same); Exhibit 40, ICANN Response to Request No. 20161024-8 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-8-cis-response-23nov16-en.pdf> (same); Exhibit 41, ICANN Response to Request No. 20160211-1 (Mar. 12, 2016), <https://www.icann.org/en/system/files/files/didp-20160211-1-rrsg-response-12mar16-en.pdf> (same).

³⁷ Exhibit 42, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf>. In responding to any request submitted pursuant to the DIDP, ICANN staff first identifies all documents responsive to the DIDP request and then reviews those documents to determine whether they call under any of the DIDP’s Nondisclosure conditions. And, if they do, ICANN staff determined whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure. Exhibit 43, Process for Responding to DIDP Requests (Oct. 29, 2013), <http://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

³⁸ Exhibit 44, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

there is a review underway and that the RR is on hold.”³⁹

DotMusic made ten separate requests to ICANN in the DotMusic DIDP Request. These requests were as follows:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;”
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review.⁴⁰

DotMusic concluded in its request that “[t]here are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence

³⁹ *Id.*

⁴⁰ *Id.*

and credibility of such an independent review.”⁴¹

8.2.2 dotgay’s DIDP Request

dotgay also filed a DIDP request, which is related to the .GAY CPE.⁴² It sought to “ensure that information contained in documents concerning ICANN’s operational activities, with within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”⁴³ Further, like other gTLD applicants, dotgay sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”⁴⁴ because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”⁴⁵

As a result of this dearth of information from ICANN, the Requestor made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”¹⁵ and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

⁴¹ *Id.*

⁴² Exhibit 45, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.⁴⁶

Like DotMusic, dotguy concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”⁴⁷

8.3 ICANN’s Response to the Prior DIDP Requests

⁴⁶ *Id.*

⁴⁷ *Id.*

Prior to responding to the DotMusic DIDP Request and the dotgay DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to both requests.⁴⁸ ICANN explained that:

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.⁴⁹

No other information was provided to the Requestors regarding the CPE review at issue in its Request until ICANN issued its formal responses to their prior DIDP Requests.

8.3.1 ICANN's Response to the DotMusic DIDP Request

⁴⁸ Exhibit 46, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁴⁹ *Id.*

ICANN first responded to the DotMusic DIDP Request on June 4, 2017.⁵⁰ ICANN's response provided the same information that had already been given to DotMusic on June 2, 2017 regarding the ICANN's decision to review the CPE process and to hire FTI to conduct an independent review of the CPE process.⁵¹ ICANN further denied Requests Nos. 1-6, 8 and 10. ICANN's responses to these requests were as follows:

Items 1-4: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDIP previous submitted by DotMusic Limited. . . .

Item 8: . . . This item overlaps with Items 4 and 5. . . .

Item 10: . . . These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure.⁵²

⁵⁰ Exhibit 47, ICANN's Response to DotMusic Limited's First DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

⁵¹ *Id.*

⁵² *Id.*

ICANN, in providing such responses to the DotMusic DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. DotMusic thus submitted Reconsideration Request 17-2 (“Request 17-2”) in response.⁵³

8.3.2 ICANN’s Response to the dotgay DIDP Request

ICANN finally responded to the dotgay DIDP Request on June 18, 2017. It provided the same basic information that had already been given on June 2, 2017 to dotgay, and on June 4, 2017 to DotMusic.⁵⁴ ICANN denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN’s responses to these requests were as follows:

Items 1, 2, 3, 8, and 13 . . .

As stated in ICANN’s Response to DIDP Request 20170505-1 that you submitted on behalf of DotMusic Limited, these documents are not appropriate for disclosure based on the [] applicable DIDP Defined Conditions of Non-Disclosure. . . .

Item 9 . . .

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.⁵⁵

⁵³ Exhibit 48, Reconsideration Request 17-2 (Jun. 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

⁵⁴ Exhibit 49, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

⁵⁵ *Id.*

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy. dotgay thus submitted Reconsideration Request 17-3 (“Request 17-3”) in response.⁵⁶

8.4 The DIDP Request

In response to ICANN’s insufficient documentary disclosures on June 2 and 4, 2017, the Requestors sent ICANN a joint letter on June 10, 2017. The letter stated, *inter alia*, that:

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very

⁵⁶ Exhibit 50, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

limited approach of how staff was involved.”⁵⁷

Furthermore, the Requestors made an additional DIDP Request in the joint letter for additional information. The Requestors asked ICANN to provide the following information:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.⁵⁸

8.5 ICANN’s Response to the DIDP Request

On July 10, 2017, ICANN’s responded to the DIDP Request by denying all four information requests.⁵⁹ According to ICANN, its DIDP is only intended to provide “documentary information already in existence within ICANN that is not publically available.”⁶⁰ And, as such, it refused the four requests for the following reasons:

Items 1 and 3

. . . The information responsive to Items 1 and 3 were previously provided in Response to DIDIP Request 20170505-1 and Response to DIDIP Request 20170518-1.

Items 2 and 4

. . . As noted above, the DIDP is limited to requests for documentary

⁵⁷ Exhibit 51, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

⁵⁸ *Id.*

⁵⁹ Exhibit 52, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁶⁰ *Id.*

information already in existence within ICANN that is not publically available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update. This request for information is not an appropriate DIDIP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure. . . .

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.⁶¹

Regarding ICANN’s denial of Items 1 and 3, this information was not previously provided to Requestors. ICANN has not confirmed “that FTI will review all of the documents submitted by DotMusic . . . in the court of their reconsideration requests.”⁶² The documents referenced in ICANN’s response—ICANN’s prior responses to the DotMusic DIDP Request and the dotgay DIDP Request—simply claim that ICANN provided FTI with materials relevant to the Reconsideration Requests at issue, and does not in any way confirm that FTI will review the documents.⁶³ Further, ICANN clearly did not disclose “the details of FTI’s selection process . . . and the terms under which FTI currently operates for ICANN”⁶⁴ to the Requestors in its prior responses to the Requestors’ information

⁶¹ *Id.*

⁶² *Id.*

⁶³ Exhibit 53, ICANN’s Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

⁶⁴ Exhibit 54, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

requests.⁶⁵ The Requestors and other gTLD applicants have not yet received any details regarding ICANN's contract with FTI, even though the contract itself is a document in ICANN's possession.

Further, regarding ICANN's denial of Items 2 and 4, both items request information that is more than likely contained in ICANN documents and that is in the public's interest to disclose. The Requestors seek simply the identity of individuals interviewed by FTI and not the substance of those interviews and seeks confirmation that FTI's final report will be available to the gTLD applicants. Disclosure of such information to the gTLD applicants is necessary to ensure that the independent review remains a fair, transparent, and independent process, as discussed in **Sections 6 and 7** above.

9. What are you asking ICANN to do now?

The Requestors ask ICANN to disclose the documents requested in the DIDP Request.

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

As stated above, the Requestors are community applicants for gTLD strings and the organizations that issued the DIDP Request to ICANN. They are materially affected by ICANN's decision to deny the DIDP Request, especially since its gTLD application is at issue in the underlying request. Further, the communities supporting their applications—the music community and the gay community—are materially affected by ICANN's failure to disclose the requested

⁶⁵ See Exhibit 55, ICANN's Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

documents.

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

Yes, this Reconsideration Request is being brought on behalf of DotMusic and dotgay.

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

Yes, there is a causal connection between the circumstances and the harm for both DotMusic and dotgay, as explained above in **Sections 6 through 8**.

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

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

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

Exhibit 33

dotgay LLC Reconsideration Request (“RR”)

1. Requestor Information

Requestor:

Name: dotgay LLC

Address: Contact Information Redacted

Email: Jamie Baxter Contact Information Redacted

Requestor is represented by:

Counsel: Arif Hyder Ali

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

Email: Contact Information Redacted

Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

dotgay LLC (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180115-1, in which ICANN refused to disclose certain requested documents pursuant to the DIDP.

On January 15, 2018, Requestor submitted a DIDP request (the “DIDP Request”) seeking disclosure of documentary information relating to FTI Consulting, Inc.’s (“FTI”) independent

review of the Community Priority Evaluation (“CPE”) process.¹ Specifically, Requestor submitted 21 document requests:

Request No. 1: All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;²

Request No. 2: All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;³

Request No. 3: The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”⁴

Request No. 4: All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;⁵

Request No. 5: All emails provided to FTI that (1) are “largely administrative in nature,” (2) “discuss[] the substantive of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”⁶

¹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

² Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 3 (citing Exhibit 2, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; Exhibit 3, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), p. 7, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

³ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 3-4 (citing Exhibit 2, Scope 1 Report, p. 6; Exhibit 3, Scope 2 Report, p. 7).

⁴ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 10).

⁵ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 10).

⁶ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, pp. 11-12).

Request No. 6: All draft CPE Reports concerning .GAY, both with and without comments;⁷

Request No. 7: All draft CPE Reports concerning .GAY in redline form and/or feedback or suggestions given by ICANN to the CPE provider;⁸

Request No. 8: All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey;”⁹

Request No. 9: All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, and Christine Willett;¹⁰

Request No. 10: The 13 January 2017 engagement letter between FTI and ICANN;¹¹

Request No. 11: The original Request for Proposal (RFP) pertaining to FTI’s review of the CPE process;

Request No. 12: All of the “CPE Provider’s working papers associated with” dotgay’s CPE;¹²

Request No. 13: “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”¹³

⁷ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 15).

⁸ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, pp. 13-16).

⁹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 16).

¹⁰ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 13).

¹¹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p 5 (citing Exhibit 4, Reference Materials – Board Submission No. 2017.09.23.0a (23 Sep. 2017), p. 363, <https://www.icann.org/en/system/files/bm/briefing-materials-1-2-redacted-23sep17-en.pdf>).

¹² Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5(citing Exhibit 5, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>., p. 6).

¹³ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 7).

Request No. 14: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”¹⁴

Request No. 15: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”¹⁵

Request No. 16: FTI’s investigative plan used during its independent review;¹⁶

Request No. 17: FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”¹⁷

Request No. 18: All communications between ICANN and FTI regarding FTI’s independent review;

Request No. 19: All communications between ICANN and the CPE Provider regarding FTI’s independent review;

Request No. 20: All communications between FTI and the CPE Provider regarding FTI’s independent review; and

Request No. 21: All documents and communications regarding the scope of FTI’s independent review.

On February 14, 2018, ICANN responded to the DIDP Request (the “DIDP Response”) by denying all of the requests except for Request Nos. 10, 11, and 17—which ICANN claims “does not exist.”¹⁸ ICANN reasoned that the requested documents are not appropriate for disclosure based on the Nondisclosure Conditions.¹⁹

¹⁴ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

¹⁵ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

¹⁶ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

¹⁷ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 9).

¹⁸ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

¹⁹ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

4. Date of action/inaction:

ICANN acted on February 14, 2018 by issuing the DIDP Response.

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

Requestor became aware of the action on February 14, 2018, when it received the DIDP Response.

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

Requestor is materially affected by ICANN's refusal to disclose certain documents concerning FTI's independent review of the CPE because ICANN intends to rely on FTI's three reports (the "FTI Reports") in order to make a decision on Requestor's Reconsideration Request 16-3 ("Request 16-3"), which concerns Requestor's community application for the .GAY generic Top-Level Domain ("gTLD"). The procedural and substantive problems with the FTI Reports, as discussed further below, means that ICANN's reliance on the FTI Reports will materially and adversely affect Requestor's rights regarding Request 16-3 and its community application for the .GAY gTLD. Requestor cannot even properly analyze the conclusions contained in the FTI Reports because ICANN refuses to disclose the underlying documents. ICANN's decision to deny access to these documents both prevents a proper analysis of the FTI Reports and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

6.1 The Flaws in the Community Evaluation for .GAY and the FTI Reports

Requestor filed a community-based application for the .GAY gTLD. However, the Economist Intelligence Unit (the "EIU") determined that Requestor failed the CPE; ICANN

resultantly rejected the application. Requestor sought reconsideration of that determination through Request 16-3, which raises several problems with dotgay’s CPE.²⁰ As explained by Prof. William N. Eskridge of Yale Law School, the CPE is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.²¹

In January 2017, ICANN retained FTI to review the CPE process and “the consistency in which the CPE criteria were applied” by the EIU.²² It concluded its independent review based on information and materials from ICANN and the EIU, and wrote the FTI Reports. On December 13, 2017, ICANN published the FTI Reports on the CPE process.²³ The first report, “Communications Between ICANN Organization and the CPE” (“Scope 1 Report”), concluded that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider.”²⁴ The “Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports” (“Scope 2 Report”) found that the EIU “consistently applied the CPE criteria throughout all

²⁰ Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²¹ See Exhibit 7, Letter from Arif Ali, on behalf of dotgay LLC, to the ICANN Board attaching the Expert Opinion of Prof. William N. Eskridge (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

²² Exhibit 32, Letter from C. Disspain to A. Ali (10 Oct. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-to-ali-10oct17-en.pdf>.

²³ Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

²⁴ Exhibit 2, Scope 1 Report, p. 17.

Community Priority Evaluations.”²⁵ And, finally, the “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests” (“Scope 3 Report”) determined that the researched referenced in the CPE reports were reflected in the research materials.²⁶

Given that FTI reviewed the CPE process and whether the EIU consistently applied the CPE criteria, its findings directly affect the outcome of Request 16-3.²⁷ This is especially concerning for Requestor because Prof. William N. Eskridge, Jr. has identified significant problems with FTI’s purported “independent” review of the CPE process.²⁸ His examination of the Scope 2 Report, for instance, reveals that the report “is long on description and conclusory statements and short on actual evaluation.”²⁹ The fact that the FTI Reports are clearly supported by no independent analysis emphasizes the problems with both the “independent” review method used by FTI and the conclusions it reached in the reports.

6.2 ICANN Breached its Bylaws in the DIDP Response

Since Request 16-3 is currently pending before the ICANN Board, and the FTI Reports will likely impact the ICANN Board’s consideration of Request 16-3, Requestor filed the DIDP Request seeking various categories of documents concerning FTI’s independent review the CPE process and the FTI Report’s documentary basis. In submitting this DIDP Request, Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . , carrying out its

²⁵ Exhibit 3, Scope 2 Report, p. 57.

²⁶ Exhibit 5, Scope 3 Report, pp. 57-58.

²⁷ Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²⁸ See Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

²⁹ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), ¶ 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.”³⁰ ICANN failed to do so.

6.2.1 ICANN Must Comply with International Law and Conventions

The ICANN Bylaws require that it comply with international law and conventions. Pursuant to these laws and conventions, there is an “an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems.”³¹ This principle is violated “when a decision is based upon evidence and argumentation that a party has been unable to address.”³² The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.³³ While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the Second Expert Opinion of Professor William N. Eskridge, it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-3—the FTI Reports—and therefore threatening its due process rights.

³⁰ Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(a).

³¹ Exhibit 12, Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law” 23 *Duke J. of Comparative and Int’l L.* 411, 422 (2013).

³² Exhibit 13, Charles T. Kotuby and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 179 (Mar. 15, 2017).

³³ Exhibit 14, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. . . . While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

6.2.2 ICANN Must Remain Accountable, Transparent, and Open

ICANN’s Bylaws also require that ICANN hold itself to high standards of transparency, accountability, and openness.³⁴ These standards require that ICANN (1) “employ[] open and transparent policy development mechanisms;”³⁵ (2) “apply[] documented policies neutrally and objectively, with integrity and fairness;”³⁶ and (3) “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”³⁷

ICANN has violated its transparency obligations by refusing to disclose the requested documents in lieu of hiding behind its Nondisclosure Conditions. By acting in a closed-off and non-transparent manner, ICANN only raises additional questions as to the credibility, reliability, and trustworthiness of the CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for Requestor’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.³⁸

Instead of publishing the necessary documents for a critical analysis of the FTI Reports, and thus the basis for their erroneous conclusions regarding the CPE process, ICANN continues to try and avoid any accountability for its actions in regards to the CPE. This is most evident in its responses to the DIDP Request; ICANN, in an obvious attempt to side-step the disclosure of any responsive documents, attempts to argue that FTI’s independent review “includes the information responsive to” the requests.³⁹ However, the alleged ‘responsive information’ is the

³⁴ Exhibit 11, ICANN Bylaws, Arts. 1, 3-4.

³⁵ Exhibit 11, ICANN Bylaws, Art. 3, § 3.1.

³⁶ Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(v).

³⁷ Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(vi).

³⁸ Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

³⁹ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

*exact same language stated by Requestor as the basis for its request for documents.*⁴⁰ The fact that “FTI provided ICANN organization with a list of search terms”⁴¹ does not in any way produce “[t]he ‘list of search terms’ provided to ICANN.”⁴²

6.3 The Public Interest Outweighs Any Compelling Reasons for Nondisclosure

ICANN cannot simply circumvent its own Bylaws by hiding behind the Nondisclosure Conditions because the public interest clearly outweighs any “compelling reasons” for nondisclosure. It is surprising how ICANN maintains that it can ask everyone affected by the FTI Reports to accept their conclusions without question, even where there are clear problems and contradictions contained within the reports. For instance, in clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.⁴³ However, it is impossible to analyze whether ICANN unduly influenced the EIU without the underlying documents; these documents are given even greater import because ICANN argued that “the CPE Provider has not agreed [to disclose the documents] . . . and has threatened litigation.”⁴⁴ The problem with this excuse is compounded by the simple fact that the DIDP Request only asked for documents provided to FTI and, as such, ICANN has already disclosed those same documents to FTI as part of its review rather than keep them confidential. ICANN’s failure to disclose the requested documents only underscores the serious questions that have been raised by Requestor

⁴⁰ Compare Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 4-5 with Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

⁴¹ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14 (citing Scope 1 Report, p. 10).

⁴² Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4.

⁴³ See Exhibit 31, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

⁴⁴ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 9, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

about the impartiality, independent legitimacy, and credibility of FTI's investigation. Such an action harms the global public interest, Requestor, and the entire gay community.

Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.⁴⁵ Instead, ICANN deliberately chooses to hide behind waivable privileges as an excuse to not disclose the documents. ICANN admits that "ICANN organization's outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law."⁴⁶ Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags. It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI's findings and conclusions.

In order to resolve the serious questions concerning the credibility of FTI's investigation, it is critically important that ICANN disclose the requested materials to Requestor and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by Requestor that were denied by ICANN in its DIDP Response.

⁴⁵ Exhibit 15, ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial."), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁴⁶ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 11, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

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

ICANN's action materially affects the global gay community. Its nondisclosure has negatively impacted the fair resolution of the .GAY gTLD in accordance with the ICANN Bylaws and international law, and raises serious questions about the consistency, transparency, and fairness of FTI's review of the CPE process. Openness, transparency, and accountability are key components of ICANN's identity and ICANN is purposefully ignoring them by impeding efforts to analyze the FTI Reports. As such, ICANN has only increased the likelihood of an expensive Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requestor's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that "there are no circumstances at this point in time for which the public interest in disclosing the information [that] outweighs the harm that may be caused by the requested disclosure" is untenable.⁴⁷ There is significant public interest in the information underpinning the FTI Reports, which may have a significant impact on the CPE process as a whole and the future of the New gTLD Program because both the ICANN Board and the BAMC may rely upon the FTI Reports in determining reconsideration requests relating to the CPE process—including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the credibility of the FTI investigation.

⁴⁷ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 22.

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

8.1 Background

Requestor elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant.⁴⁸ In response, Requestor, supported by multiple community organizations, filed a reconsideration request with the Board Governance Committee (“BGC”). The BGC granted the request because the EIU did not follow procedure during the CPE process. As a result, the Requestor’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.⁴⁹

When this issue was brought before the BGC via another reconsideration request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. Requestor therefore filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.⁵⁰ The ICANN Board, though, remained silent in regards to Request 16-3.

Almost a year later, and after numerous letters to ICANN,⁵¹ Requestor finally heard from

⁴⁸ Exhibit 16, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁴⁹ See Exhibit 17, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

⁵⁰ See Exhibit 18, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

⁵¹ See Exhibit 19, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 7, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board->

ICANN on April 26, 2017. Requestor received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. ... The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: ... 16-3 (.GAY)⁵²

8.2 The Prior DIDP Requests

In response to this new information regarding the delay, on May 18, 2017, Requestor filed a DIDP request in relation to the .GAY CPE (the “First DIDP Request”).⁵³ Requestor, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”⁵⁴ It asked ICANN for this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”⁵⁵

Prior to responding to the First DIDP Request, ICANN issued the CPE Process Review

redacted-13sep16-en.pdf; Exhibit 18, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 20, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 21, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

⁵² See Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁵³ Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

⁵⁴ Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

⁵⁵ Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

Update on June 2, 2017.⁵⁶ The publication briefly described the scope of FTI’s independent review and its “two parallel tracks.”⁵⁷ No other information was provided to the Requestor regarding the CPE Review Process at issue in its Request until ICANN issued its inadequate formal response to the DIDP Request on June 18, 2017 (“First DIDP Response”).⁵⁸ The First DIDP Response disclosed none of the requested documents and instead maintained the secrecy that surrounds FTI’s “independent investigation of the CPE.”⁵⁹

In response to the CPE Review Process Update, and the lack of any additional information from ICANN, the Requestor sent ICANN a joint letter with DotMusic Limited on June 10, 2017 (the “Second DIDP Request”). The letter requested more information related to FTI’s review based on the CPE Review Process Update in order “to ensure the integrity of FTI’s review.”⁶⁰

However, on July 10, 2017, ICANN issued a response that simply reiterated already-provided information regarding the BGC’s decision to review the CPE Process and FTI’s independent review (“Second DIDP Response”).⁶¹ ICANN further denied the requests for information.⁶² ICANN, in providing such a response, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy.⁶³

In response to the First DIDP Response and Second DIDP Response, Requestor initiated

⁵⁶ Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁵⁷ Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁵⁸ Exhibit 25, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

⁵⁹ See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

⁶⁰ Exhibit 27, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

⁶¹ Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁶² Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁶³ See Exhibit 29, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

separate reconsideration requests for each DIDP request.⁶⁴ The processes for both of these requests have concluded and the matters are currently undergoing the Cooperative Engagement Process (“CEP”) pending ICANN’s consideration of Request 16-3.⁶⁵

8.3 The DIDP Request

After Requestor initiated the separate reconsideration requests, FTI concluded its independent review. On December 13, 2017, ICANN published the FTI Reports.⁶⁶ Requestor’s expert has reviewed the FTI Reports and concluded that (1) The FTI Reports are “based on a superficial investigative methodology wholly unsuited for the purpose of an independent review;”⁶⁷ (2) the Scope 2 Report “is long on description and conclusory statements and short on actual evaluation;”⁶⁸ and (3) the Scope 3 Report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to” the Requestor’s CPE.⁶⁹

Given Requestor’s concerns about the FTI Reports, it submitted a request for documents “to obtain the documents provided by ICANN to [FTI] in connection with FTI’s so-called

⁶⁴ See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>; Exhibit 28, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

⁶⁵ See Exhibit 30, Cooperative Engagement and Independent Review Processes Status Update (Jan. 31, 2018), <https://www.icann.org/en/system/files/files/irp-cep-status-31jan18-en.pdf>, p. 1.

⁶⁶ Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

⁶⁷ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 1.

⁶⁸ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 2.

⁶⁹ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 3.

independent review of ICANN’s [CPE].”⁷⁰ The specific requests, as described in **Question 3** above, sought information explicitly identified by ICANN and FTI related to the FTI Reports.⁷¹

ICANN responded to the DIDP Request on February 14, 2018.⁷² It argued that it could not disclose the requested documents because the EIU did not consent to the disclosure of documents.⁷³ However, all of the documents that Requestor seeks from ICANN has already been disclosed to FTI; it is not seeking documents that the EIU refused to provide to FTI.⁷⁴ And, yet, ICANN refused Request Nos. 1-9, 12-16, and 18-21 because the “CPE Process Review Reports includes the information responsive to these Items” and based upon the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making processes by inhibiting the candid exchange of ideas and communications
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation. . . .
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process[.] . . .

⁷⁰ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

⁷¹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

⁷² See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

⁷³ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

⁷⁴ See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceeding of internal appeal mechanisms and investigations. ...
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.⁷⁵

As discussed in **Questions 6 and 7** above, the public interest warrants disclosure of documents related to FTI’s independent review of the CPE; disclosure is necessary to ensure that the independent review remains a fair, transparent, and independent process.

ICANN further confirmed that the three remaining document requests (Request Nos. 10, 11, and 17) do not exist: (1) “the 13 January 2017 engagement letter between FTI and ICANN;”⁷⁶ (2) “the original Request for Proposal (RFP) pertaining to FTI’s review of the CPE Process;”⁷⁷ and (3) “FTI’s follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided.”⁷⁸

9. What are you asking ICANN to do now?

Requestor asks ICANN to disclose the documents requested under Request Nos. 1-9, 12-16, and 18-21.

⁷⁵ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

⁷⁶ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

⁷⁷ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 18.

⁷⁸ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 20.

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

As stated above, Requestor is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its DIDP Request, especially since its gTLD application is at issue in the underlying Request. And, further, the community it represents—the gay community—is materially affected by ICANN's failure to disclose the requested documents.

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

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

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

This is not applicable.

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

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Arif Hyder Ali

March 15, 2018

Date

Exhibit 34

COPENHAGEN – Public Forum 2
Thursday, March 16, 2017 – 13:45 to 16:45 CET
ICANN58 | Copenhagen, Denmark

BRAD WHITE: Ladies and gentlemen, welcome to ICANN 58 Public Forum 2. Allow me to introduce ICANN board vice chair, Cherine Chalaby. Cherine?

CHERINE CHALABY: Good afternoon, everyone. Could you please take your seat?

Well, hello and welcome to the ICANN Public Forum Number 2. For those of you who are new to ICANN, this is our second public forum. We've had one already on Monday, and sometimes we refer to the public forum as the open mic session. So there are a few mics around and, please, you would come in due course to speak, if you wanted to, come to those mics. Thank you.

So this session will last three hours and we will take a break around about an hour and a half from now. An hour and 15, hour and a half.

A couple of short announcements and then we'll kick off.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

The first two sessions or topics before we get into the questions will be around what the expected standards of behavior are for this session, and this will be done by our ombudsman, Herb Wayne, when he's there, and I will call him in due course.

And then another session about the participation rules and how to handle any unanswered questions, and this will be done by Khaled, who is sitting next to me, and I understand he's going to do this in Arabic, so please pay attention.

So one thing is that, please understand that this session, coming to the mic and speaking, is not a replacement for submitting your comments to any public comments of a review, of a policy. Make sure you do that in the right way. This is not the place to do it.

And the other thing I'd like to bring to your attention, that sometimes there's a bit of frustration in the community when someone comes to the mic and asks a question and we look at each other here and don't give you an answer immediately.

That is not because we don't want to give you an answer but it's sometimes we don't have the information at our possession at this point in time but we promise that we will answer it afterwards, but not in the session, if we can't do that.

So with that in mind, we can kick off this second public forum, and I'm going to ask our ombudsman, Herb Waye, to come and talk to us about the expected standards of behavior during this session. Thank you.

HERB WAYE:

Mr. Vice Chair, thank you for the opportunity to present the ICANN expected standards of behavior.

For those who are participating remotely, there is a link to the standards of behavior in the Adobe Connect room.

My name is Herb Waye and I was appointed to the ICANN ombudsman role last July. I've also been actively involved in the office for over 10 years, serving as the adjunct for the two former ombuds.

Ladies and gentlemen, it is all about relationships. ICANN is a unique environment that thrives on volunteerism. Without the devotion and sacrifice of the people who support ICANN, and their participation, often as volunteers, in the multistakeholder model, ICANN simply could not survive.

Look around the room at the vast diversity of culture, knowledge, passion, and commitment. Devoted people who have given up the comfort of their homes and families to spend a week at the Internet's alternative Club Med.

[Laughter]

HERB WAYE:

During my 35 years in law enforcement, I was paid to take abuse and to ignore the swearing, the insults, and the hate, but at all times my organization demanded that I respond with compassion, professionalism, and, above all, respect.

It's imperative to challenge decisions, demand transparency, question the application of policy. Community members and their leadership understand their role and expect to be held accountable.

But in the past few months, I have received several complaints regarding inappropriate behavior. Not many, but even a few is too many.

Nobody in ICANN should have to tolerate abuse and nobody should be forced to have to deal with inappropriate behavior except me.

So before you hit "Send" or before you speak, I would like you to ask yourself a very simple question: Is my message respectful and am I being constructive?

As I've said before, live the ICANN expected standards of behavior that asks you to respect all members of the ICANN

community equally, behave in a professional manner, and demonstrate appropriate behavior.

Together, we can make ICANN a safe, respectful, and harassment-free environment for everyone. Thank you.

Mr. Koubaa, the mic is yours.

[Applause]

KHALED KOUBAA:

Thanks, Herb. I would like to ask you, please, to use the headset, so I will be speaking in Arabic, please.

I would like to present to you a brief on what we're going to do today. We're going to have four blocks of Q&A. Each block will take 15 minutes and we will welcome all the questions of community interest.

If you have any question or comment, I would like to invite you to start queueing up now at these two microphones.

In addition, for remote participants, you can ask questions via email at engagement@icann.org. Again, that email address is engagement@icann.org.

When you speak, please remember three things.

First, to state your name and who you are representing, and to speak slowly and clearly.

As most of you know, there is a time limit on questions and comments. You will have two minutes to ask your question, and that will be enforced by a timer that is projected on the screen behind me, and also the board responses will be also limited to two minutes and there will be one follow-up to be allowed which is also limited by two minutes.

We want to hear from as many participants as possible, and the timer is aimed at facilitating that.

So with that, I'm now going to turn to our first board facilitator, Becky Burr, and before that, you, Brad, probably there is something to add about engagement. Thank you.

BRAD WHITE:

Thank you. I just wanted to add that it looks like we will have three video hubs during this session. One from Venezuela, Uganda, and Kenya.

And Becky, it's yours.

BECKY BURR: Thank you. And welcome, everybody. I believe that we may have had some questions in the -- in remote participants from Forum 1.

Brad, is that correct? I don't --

BRAD WHITE: That is correct. We had one question from Michael Fleming.

Are there any ICANN board members that are involved in the PDP process for subsequent procedures or at least following the process?

BECKY BURR: Well, I will take a stab at that and ask others if they have additions.

Generally, there's no rule that prohibits board members from participating -- being participants in PDPs but it hasn't traditionally been done. However, board members are free to follow them. I do. I think that there is -- that there are others that may be following it.

In addition, the board is regularly briefed on development in the PDPs, both prior to our board meetings and intersessionally in board calls or in our workshops.

Okay. If there are no other comments, we will go to the floor.
Andrew?

ANDREW SULLIVAN:

Hi there. My name is Andrew Sullivan and I work for a company called Dyn, and I am currently, for a very short time -- I'm looking forward to the end of it -- still the chair of the Internet Architecture Board, but I'm not speaking for anybody except myself.

And I should say that this is not intended as a "gotcha" question or anything. It's just something that occurred to me this morning and I thought I would ask about it.

This week I looked for some session on the PTI, which of course is an organization that is subsidiary to ICANN but has exactly one customer and it's this community, and it struck me that I didn't see one.

I saw lots of sessions from the customer standing committee but I didn't see anything about the PTI itself, and I wondered whether that was on purpose or by accident or if I just overlooked it, which is entirely possible.

And, you know, if you could say something about what the plan is in the future for how those things would be put across to the --

to the community, I mean, there are lots of ways to do this and I just didn't know what the plan was. Thanks.

CHERINE CHALABY:

Thank you for that question, and it is a good question. The -- a couple of points.

One is that the PTI budget was discussed by the board in an open session on I think Sunday morning, and this was open to the public, and there are other budget sessions which discuss it.

Also, the board had a meeting with the customer standing committee and we went through all of the safeguards and the role of each one of the committees, whether it's the CSC or the review committee or the RZERC committee and what's the bylaws and interrelationship between them. That was open to the public.

But point taken, and we will make sure that in the future there is a session for the public on it. That's definitely a good point because it's an important part of our structure now. I agree with you. Thank you.

BECKY BURR:

Mr. Palage.

MICHAEL PALAGE: Thank you, Ms. Burr.

Mike Palage, Pharos Global.

My question is to the board. On September 17th, 2016, you passed a board resolution which directed the president and CEO to undertake an independent review of the process by which staff interacted with the CPE providers.

Can you provide any update on the status of that independent review?

BECKY BURR: Chris?

CHRIS DISSPAIN: Thank you. Hi, Mike.

Yes. It's ongoing. They are -- the independent people are -- have been in the -- have visited the offices and are working through what needs to be worked through. I can't give you a time because I don't know, but I'm told it's not that long before it's going to be -- it's going to come back to us, having been completed.

So it is underway.

MICHAEL PALAGE: What is the exact -- could you provide what the scope of the review was and who oversaw that?

CHRIS DISSPAIN: It would probably be best if that was done by -- by Goran or John. Whoever. Goran, probably.

GORAN MARBY: J.J.?

CHRIS DISSPAIN: Okay. Apparently J.J., so thanks.

JOHN JEFFREY: This is John Jeffrey. I'm way back at the secretary's table behind the camera man.

The scope of the review is consistent with the board's suggestion in the resolution that it be a review of the community priority evaluations, and so they're looking at both staff involvement that came from the IRP question and looking -- because there were other complaints from reconsideration requests, we're looking more deeply at all of the community evaluations.

So we instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in very deeply and, as you can imagine, trying to understand the complex process of the new gTLD program and the community priority evaluation process.

MICHAEL PALAGE:

So thank you. So just to clarify, it is broader than the resolution because the original resolution was just interaction between staff and CPE providers? You're suggesting that there's a broader scope?

JOHN JEFFREY:

Yes. I think that when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.

MICHAEL PALAGE:

And since I have 45 seconds left, just a quick follow-up. Perhaps, John, you could answer this as well.

Has this review impacted any of the applicants? Has the ICANN taken any action?

JOHN JEFFREY: We've certainly heard from a number of the applicants that they're unhappy with the delay, and so with some of the reconsideration requests -- and I don't have them at the top of my head, but a few of the reconsideration requests have also been delayed in light of that evaluation.

MICHAEL PALAGE: So with 10 -- 15 seconds left, question to Becky from a governance standpoint.

I guess my concern here is the bylaws provide some specific guidelines on when reconsideration requests, independent reviews, need to be processed, and I guess I just have a governance concern --

[Timer sounds]

-- that a board resolution on an independent evaluation would somehow stay or impact other time lines set forth in the bylaws, so --

CHRIS DISSPAIN: Mike --

MICHAEL PALAGE: -- just a point.

CHRIS DISSPAIN: Mike, just stay there. It's Chris.

Yes, I understand. I was actually -- I have -- we have actually drafted a blog about this but it -- I think it's all got caught up in the rush of an ICANN meeting but I had hoped to get it out before we started.

There are a number of reconsideration requests, et cetera, that have been delayed and are, in essence, outside of our time frame, but I think our time frame is described as, you know, where -- "unless necessary," and I think the board's strong view is that any of the reconsideration requests or IRP results that could -- that could -- where there might be an impact from the results of the independent review should await the results of that before making a decision.

So we've taken that view. I accept that it's inconvenient, but I think it's the right way forward.

MICHAEL PALAGE: Thank you. The only thing I would have to say is: If you could just communicate, that would help.

CHRIS DISSPAIN: I agree. And hopefully we'll get the blog out shortly.

BECKY BURR: Next?

RICHARD HILL: Richard Hill speaking for myself.

It's been some years since I attended an ICANN meeting, and I have to say I find the organization has significantly matured and stabilized, from what I've seen, and it's a comment, really, not a question.

I think the new independent review panel is going to be an important component to help the organization to further progress, and I'm very pleased with the criteria that have been developed for choosing the arbitrators, which includes, of course, legal expertise but also knowledge of ICANN and independence of ICANN and its supporting organization and advisory committees. So I really commend the organization for that step. Thank you.

BECKY BURR: Does anybody have a comment? I think we agree with you and we always like positive feedback.

And actually in this case, the feedback, the initial positive feedback, goes to the community who established the criteria.

SAURABH DUBEY:

Hello. Saurabh, first-time ICANN fellow from India. I have two questions.

My first question is how ICANN manages to receive complaints from stakeholders and how is the most kind of complaints board -- complaints raised to the board?

BECKY BURR:

I think I will turn this to Goran.

GORAN MARBY:

Thank you.

Now we don't handle complaints very well. They seem to, unfortunately, disappear. There are complaints.

What we do now is to try -- we -- through the new function we have with a complaints officer, when she takes office, she's going to make sure that they're publicized and they're commented and proposed for eventual change.

In my job as the CEO responsible for the ICANN org, it is important for me there are things that will be -- I have to take up

the role because they could be systematic approaches, so we're building that process to be able to do that. It's going to be completely open and completely transparent, so that's an answer to your question. Thank you for it.

SAURABH DUBEY: One more question. How did the public interest factor into the decision?

BECKY BURR: I'm sorry. How did the public interest factor into the decision? Is this with respect to the complaints officer?

SAURABH DUBEY: Yeah.

BECKY BURR: This is Goran's organization. So I'm going to turn to him to ask him for that. But we always -- public interest always factors in.

GORAN MARBY: It is an important part. But, to be honest, it's going to be related to what kind of question or complaint we get in. We have underlying principles how we do things. We started to get the first -- thank you very much -- complaints coming in. And most

of them are probably related to things that we probably need to address or questions that are unanswered. So maybe we can -- you can challenge me in a year or so and say if you think we've fulfilled that obligation. Thank you.

SAURABH DUBEY: Thank you so much.

BECKY BURR: Cherine.

CHERINE CHALABY: I'd like to also respond quickly to best to get complaints to the Board.

The community is not shy about doing this. And we individually get complaints all the time when we walk in the corridor on any meeting. So, please, never be shy.

But I think the best way to get a formal response is to write to the chairman of the board either an email or drop a note. This will, then, get formally logged. And you'll get a formal response to that. Thank you.

BECKY BURR: Before we take the next question, I just want to -- we've been -- we've gotten a reminder from one of our very thoughtful participants. And this is a reminder to the Board and to participants. The first time you use an acronym and maybe even the second, let's say the whole name. We have a lot of new people here, and we have an awful lot of acronyms.

So you, please, go ahead.

CLAIRE CRAIG: Thank you. Good afternoon. My name is Claire Craig. I'm from Trinidad and Tobago, and this is my first ICANN meeting as well as I'm a fellow, and I appreciate being here. I'm also an ICT researcher looking at Internet exchange points in the Caribbean.

At our first meeting we were asked what were our expectations of this meeting. I felt at the time, while it was critical and important to network, that it was also important for me to understand enough about ICANN so that I could go back home and use the information effectively to contribute to the development of the Caribbean region.

As you know, the Caribbean is part of the Latin America and the Caribbean. However, I have found, based on my research and also some of the meetings that I have been to here, that

sometimes the LAC landscape is seen as -- there's a small "c."
So, as one person actually put it, the "c" is silent.

So I know that there are several persons from the Caribbean who have been members and volunteers and have contributed to ICANN over the years.

However, for me to effectively go back home and say that, yes, I have learned a lot from this meeting and I have achieved my goal, the question I have for the Board is: How can I, and my other fellows at ICANN 58 who are Caribbean members, what can we take back home and with us that would help us to not only raise the profile of the Caribbean at these meetings but also to help our region to be regarded as a capital "C" within the LAC landscape so that we are not only seen as SIDS but as viable markets with opportunities, resources that can be developed.

BECKY BURR:

Thank you very much. Do we have any -- Asha.

ASHA HEMRAJANI:

Thank you very much for that question. To me the "C" is never silent. The Caribbean is the most beautiful place in the world, and I have a big family living in the Caribbean Islands. So in many different islands that constitute the Caribbean.

But your question, I think, is not only about the Caribbean but, really, it applies to multiple regions who are not as present in ICANN.

And I think your question is about how do we contribute and how do we go back -- how do you go back home and say that you have contributed in different areas? Is that a fair summary?

CLAIRE CRAIG:

And how do we continue to contribute so that we become a force within -- because we do have resources. And we are quite knowledgeable, and we are quite innovative.

ASHA HEMRAJANI:

Yes, you are. And I think, to answer those questions, I think it has to be continued participation, not only at ICANN meetings but between ICANN meetings. A lot of our work is done between ICANN meetings in a lot of conference calls. Some of them, unfortunately, at very odd hours of the day, depending on where you live.

But that's where -- and I think Herb alluded to that earlier on. That's where the strength of ICANN lies in the hard work and the awesome attitude of its multiple volunteers.

So this is where I think it's very important to have more people from the Caribbean contributing to all the different parts of the different activities that ICANN is involved in.

And not only coming -- so not only coming to ICANN meetings, but being involved in that. And then as well as participating in ICANN meetings to share in what has been completed and achieved

So I encourage you to continue what you're doing. Thank you.

BECKY BURR:

Thanks. Lito?

LITO IBARRA:

Yes. I would like to answer in Spanish. So you may use your --

Lito Ibarra speaking. Thank you very much for the question. I come from El Salvador, a Central American country, very related to the Caribbean region.

We share the same needs and aspirations. My recommendation would be to come closer to the regional organizations such as LAC TLD for the domain names, the ccTLD TLD managers, or LACNIC, which is the IP managers.

And there are some other organizations in the regions that might be useful for you to reinforce and to work together towards a

better development of skills and competencies in the region. So welcome. Thank you.

BECKY BURR: Great interest in this topic. Maarten, I think, has a quick comment and then Chris.

MAARTEN BOTTERMAN: Very quickly, one of the things ICANN does to make it easier for newcomers to participate is also to accommodate new leaders. As I'm new on the Board, I was in the new leader training last week. And, actually, there was a Caribbean gentleman, Javier Rua. And I'm sure we're going to hear more of him. It's just an example. The ways are open to participate. And it's really to encourage the people around you to also step up for that.

CHRIS DISSPAIN: Thank you.

Hi, Claire. Right here. Welcome. Speaking from a ccTLD perspective and generally just to acknowledge what you said, I think this is a level below what you said or above what you said, which are the language challenges. And the Caribbean is particularly challenged in that area because there are islands that speak English, French, Spanish, and probably Dutch as well.

Maybe others. So I think that's quite challenging. Because you find yourself in the Latin America Caribbean region. And it's hard sometimes to work out how to get your voice heard and so on.

The only point -- having said that, I wanted to briefly raise the point. There is work going on right now at the CC world and generally in ICANN about how to help with those things. There's talk of the possibility of being able to sort of move region in certain circumstances, not, obviously, physically. That would be quite a challenge, not even ICANN could pull that off. But virtually. So, from that point of view, I just wanted to flag that and say that, if you wanted to get involved in helping with that, that will be fantastic. And I can see you afterwards and give you some details on who you should talk to.

CLAIRE CRAIG: Just a few minutes, can I just respond?

BECKY BURR: Briefly, please.

CLAIRE CRAIG: So I agree very much with what you're saying. And it's not that I'm saying the Caribbean has not participated. We have. It's just

that the awareness sometimes we still feel that there's a small "c." Just as a matter of comment, I also wanted to thank the CTU. Because I went to a session yesterday. And we were invited to come and look at your Network Operating Center, the NOC. And I was really amazed at the amount of work that goes on by that team to bring this meeting together and the kind of facilities that are available.

So kudos to your team, to Josh and his team, for the work that he has done. And I think that it is an opportunity that other people should take to go have a look at the NOC to see what it does to bring this meeting together.

[Applause.]

BECKY BURR:

Thank you. As I said, we always like to recognize the great contributions. We're going to go to you. And then after that we'll take one of the remote participation questions. So please go ahead.

SALVADOR CAMACHO:

Hello, my name is Salvador Camacho. I'm from Mexico. First time fellow and newcomer. I'm speaking in my personal capacity.

Okay. ICANN has been known since its creation as a revolutionary pioneer and a concerned, evolving organization in several topics such as inclusion of new gTLDs and IDNs. They are changing the way that we really do understand the Internet.

Last year the DynoTech raised the forgotten topic that has been brought by several people around the globe for around five years. I'm referring to the years of blockchain to create an alternative and more secure, allegedly, DNS, mainly like projects like Namecoin and BlockStack that are raising this issue and these topics. So my question is: Is ICANN on this constant evolution starting the possibility or the probability to adapt blockchain, that is also changing the way we understand the Internet? Is ICANN starting the possibility to use blockchain for an alternative DNS or the evolution of the DNS? Thank you very much.

BECKY BURR: So we have both Steve and Kaveh are going to respond. Thank you very much.

STEVE CROCKER: Thank you very much. We do watch for emerging technologies. We have a Technical Expert Group that met yesterday and had presentations on Namecoin which is built on blockchain.

So there's really two things that I want to say on top of that. One is the technology that is implemented in the Internet is generally created and standardized and tested through the IETF. We are not generally in the position of making leading-edge decisions about technology but more about administering and following in a way

The other is that -- and I have a long -- most of my career is in leading-edge research. There is a very, very long distance from a neat idea versus what it takes to put it into use. And I would not be too worried about how long it's taking. Just as a personal thing. 1971, I went to work at the Defense Advanced Research Project Agency. The first node on the ARPANET had been installed two years earlier in 1969. The director of the agency had a pattern of inviting new program managers to have a talk shortly after they're on board.

So I got a call. And on my way up to the office I'm in my 20s I'm thinking how am I going to keep this guy entertained for 20 minutes? And so I said, "Sir, ARPANET has been running for two years. How come it hasn't totally transformed the defense communication system?"

He took it very well. He leaned over his desk and looked at me. And he said, "I think you should look at the U.S. government as like a computer that has a cycle time of one year, and it's only

had two computing cycles to think about this." So these things take time. Thank you.

BECKY BURR: Kaveh.

KAVEH RANJBAR: Thank you very much. I think you, basically, covered everything I wanted to say except for the part when you were 20 years old.

BECKY BURR: Kaveh.

KAVEH RANJBAR: Thank you very much. Steve basically covered everything I wanted to say, except the part about when you were 20 years old.

[Laughter]

SALVADOR CAMACHO: Thank you.

BECKY BURR: Okay, Marilyn. If you would just wait one second. We were going to go to the online question. Brad.

REMOTE INTERVENTION: We have a question from Nick O'Donnell. A long comment and then a question. He's a developer with IWantMyName.

Mr. O'Donnell says: I would like to speak first on behalf of my team and then for my own person. To acknowledge the obvious, we live in a time of increased threat from botnet, DDOS and cybercrime attacks, hurtful hate speech, fake news, not talking here about -- talking here about real fake news, not that defined by President Trump, but through to invasive -- but rather to invasive attempts at capturing private information and content filters. But all this reinforces the vital role our community plays through our diversity and willingness to come together and engage in dialogue. We, in effect, provide a compass toward a global voice of reason. With that in mind, we invite all others in this community to contribute to ICANN, but also to the independent Web with direct action in the decisions we make daily within our own channels of influence, be it your position, Twitter accounts, blogs, Snapchats, and medium threats.

A more personal remark I would like to say is that I attended ICANN 50 in London, and though I still feel like a newcomer, there has been a factor of magnitude improvement in how this experience compares with the one in terms of the efforts taken to be more inclusive, welcoming, and approachable for us

coming in. A big part of that, I believe, is the adoption of a more humble and honest, less-strictly-enforced formal tone.

And finally a question, which is, more important, a point of clarification. I've heard about two board members on two separate occasions stating that ICANN has no obligation to end users. So in your mantra about being multistakeholder, bottom-up, I'd just like to ask who those board members might think the bottom-up is if not end users?

BECKY BURR: Do we have somebody interested in speaking on that topic?

George. We think you're the man here.

GEORGE SADOWSKY: Thank you.

BECKY BURR: He's been elected by the Board.

GEORGE SADOWSKY: Thank you.

I'm not aware -- Excuse me. I'm not aware of statements like that being made, although they probably have been. I think it's quite clear that ICANN operates in the global public interest, and

to me that means it operates on the -- for every Internet user on the planet, including people who are going to become Internet users.

This is a bottom-up organization. Users are a fundamental part of how we get ideas and opinions that make our programs better and make us more effective in serving.

Thank you.

BECKY BURR:

Thank you.

I am going to hand over the facilitation role to Maarten, and in the meanwhile call on Marilyn to ask her question.

MAARTEN BOTTERMAN:

Marilyn, please.

MARILYN CADE:

Thank you. My name is Marilyn Cade and I am a small business owner that has been active in ICANN for a very long time.

My comments are going to address ICANN's engagement in external parts of the Internet governance ecosystem and some views I have that I wish to share with the broader community, and then I will close with a question.

This morning there was a Cross-Community Working Group on Internet governance that held a dialogue about some of the activities of that working group that took place last year and looked ahead and tried to highlight some of the rather serious challenges that continue to face ICANN.

At the time of the conclusion of the IANA agreement, there were some comments made in hallways, and perhaps elsewhere, that sort of "we're done now, we're free of government."

We have only begun to work outside of ICANN in the Internet governance ecosystem to make sure that we are satisfying answering questions and clarifying about ICANN's role, and that we are playing a role in helping to build a stronger, more informed multistakeholder ecosystem, so some people will participate in ICANN but some people will also participate in auxiliary activities such as the IGF and the NRIs, the national and regional IGF initiatives. And some of us will participate in all.

We highlighted several very challenging meetings that are going to happen, and I wanted to mention to the community that there will be a posting on the CCWG-IG page, the Wiki which will describe some of those meetings and provide more information.

My question is, is the board also aware of the full range of challenging events and activities that are out there?

MAARTEN BOTTERMAN: Thank you for this question, Marilyn. I think we have an answer.
Markus.

MARKUS KUMMER: Yes. The answer is yes.

MARILYN CADE: Okay. I'm done now.

MARKUS KUMMER: The board is aware of these. We had a session, we have a Board Working Group on Internet Governance, and we went through the whole list of events with staff and, indeed, it's a remarkable series of events. It's certainly many, many more events and processes have started than when we first had discussions on Internet governance in the ICANN framework.

Staff -- ICANN org engages, but it's also clear that ICANN org cannot be everywhere, and the involvement of the community is obviously greatly appreciated.

The Board also discussed at some length the IGF. We had a retreat in early February, and memories are still fresh. Many board members have participated in Guadalajara. And we all

agreed and reaffirmed the importance ICANN attaches to the IGF as an organization where broad issues related to Internet governance are taken up.

ICANN's support to the IGF is a support to the broader multistakeholder Internet system, and it is important this takes place in a U.N. context. The IGF, as you all know, is called -- is convened by the Secretary-General of the United Nations and that gives it a great credibility, especially among developing countries.

And we think that the engagement and the support of the IGF, also financial support for an organization which is funded through voluntary contribution, is important and should continue.

And also, ICANN, and through also the regional vice presidents, supports the national and regional IGFs and makes a contribution to the IGF support --

[Timer sounds]

-- association which in turn also supports national/regional IGF initiatives.

So yes, you can see we are aware.

Thank you.

MAARTEN BOTTERMAN: Thank you very much for that. Do I understand there's an online question? Brad?

REMOTE INTERVENTION: Yes. We have a question from Tracy Hackshaw. What are the next concrete steps for various DNS market studies that have now been completed? In many cases it is clear that the various subregions -- eg, the Caribbean, would require a different strategic and/or tactical approach than the region in which they were included. In this case, the LAC region.

MAARTEN BOTTERMAN: Thank you for the question. Is that a question for you, Goran?

GORAN MARBY: I think that the underlying question is is there going to be a new round, is something going to happen? That lies very much in the community and not with us.

We try to provide the facts going forward. So we are in the waiting mode for that.

We have received several questions about this this week, and we're looking forward to how the community is going to work with it.

Thank you.

MAARTEN BOTTERMAN: Chris, please.

CHRIS DISSPAIN: Thank you. I may have misunderstood the question, Tracy. I know you're listening remotely. But if I have understood it correctly, I think we have a Caribbean strategy group. We have an African strategy group and we have various other strategy groups, and I think -- I'm not 100% sure but I think we have a Caribbean strategy group. And assuming I am right, that would be the place to have the discussion. I can see Rodrigo is nodding at me from the audience.

Thank you.

MAARTEN BOTTERMAN: Thank you very much for that. Please, gentleman on the right.

CLEMENT GENTY: Good afternoon. I'm going to ask my question in French.

Hello, everyone. My name is Clement Genty. I am a Ph.D. student and I'm a member of the next gen. I'm here to tell you about my mother.

Domain names today feed people, companies, and even entire countries. We know full well today that individuals and young people in general seek medical information through Google, for instance, and so they Google with different tasks and different things referred to, with (indiscernible) are. So sometimes I have no answer for my mother when she asks me how to identify on Internet what is a new TLD, what a new gTLD is, the ccTLDs, the marketplace.

And so trying to explain this to her makes me think of how we lack communication for end users. Why do we not have this type of communication for end users in the countryside to help them understand what domain names are?

Thank you.

MAARTEN BOTTERMAN: Thank you.

Who would want to respond to this one?

UNKNOWN SPEAKER: I think it's about ALAC.

MAARTEN BOTTERMAN: This is the intent, this has to do with an ALAC connection?

ASHA HEMRAJANI: Maarten, Duncan.

MAARTEN BOTTERMAN: Please.

ASHA HEMRAJANI: No; Duncan from staff.

MAARTEN BOTTERMAN: Duncan, can you take this one?

DUNCAN BURNS: Hi, Duncan Burns, communications with ICANN. So we're trying to do a lot to help simplify and explain what we are doing. We have various info graphics, and I can talk to you afterwards, that try and explain the gTLD system, what they are, some examples. We're doing case studies that we can help share as well. And we're trying to populate the site with that. But you have any ideas, do let us know.

CLEMENT GENTY: Okay.

MAARTEN BOTTERMAN: Okay?

CLEMENT GENTY: Thank you.

MAARTEN BOTTERMAN: Mayors see.

GORAN MARBY: Maarten.

MAARTEN BOTTERMAN: Goran, please.

GORAN MARBY: Your question is very good. It think that coming back to the question that was pointed before as well is that not everybody should be, even if I understand your mother's interest, doesn't need to understand how we actually do things, because most Internet users -- it would be very expensive if 3.7 billion people came to all ICANN meetings, even if it feels like that sometimes.

But you're trying to (indiscernible) after the transition we also tried to change our language and how we talked about things because it's become more and more important to tell people what we do in a bit of more simple terms or easier terms so

people understand what we do so they can also understand what we don't do.

And in that, that's a -- that's a travel, that's a journey, not an end point. You cannot say. But we are constantly looking into how to do that. And one of those things I'm really pleased with is that we stopped, you know, acronym soup that we always used to try to explain going down to the weeds. And the story of ICANN and what we do is actually quite fantastic, together with our partners and the numbers community and the protocols community.

I think we have an obligation to do that, because if we don't get people to understand that, we could be challenged for the wrong reasons.

Good luck with your mother and explaining it. My mother is 85 and she never figured out what I do or why.

Thank you.

CHERINE CHALABY:

Hello, I'm just going to reply. This is Cherine Chalaby speaking. Thank you for your question. We understand full well the issue for you. It is significant. You got two to three answers. They might not be enough, so we're going to reach out to you at the end of the session in order to write down your address and try and give you fuller answer.

Thank you.

CLEMENT GENTY: Thank you.

MAARTEN BOTTERMAN: The next speaker, please. Gentleman on the left.

UNKNOWN SPEAKER: Hi, everyone, this is Louie Zhang from CNNIC. We are the second largest registrar in China, but I'm speaking on behalf of the Chinese registrars. And this is my first time to ICANN, so I still need this draft with me. Sorry.

And there's one issue that I would like to bring to the board's attention. The domain name data escrow issue. During my participation in one of the RSC session I learn that ICANN decide to -- decide in the near future to designate one data escrow provider for European registrars with a subsidized from ICANN due to EU general data protection regulation. But in China, we have to bear the cost of domestic data escrow on our own eventually, which will trigger unfair competition among European registrars and Chinese registrars.

So my questions are what ICANN will do if other countries have similar regulations? Will ICANN designate subsidize the data

escrow providers as well? What procedures ICANN will follow to decide the order of data escrow providers' designation?

Thank you.

MAARTEN BOTTERMAN: Thank you very much for this question and thank you very much for speaking up. Welcome. Always good to see newcomers be prepared to take the microphone.

Akram, could you take this one?

I mean the question, not the gentleman.

[Laughter]

AKRAM ATALLAH: So we are considering doing the same thing we do with Iron Mountain, do that in Europe. Right now there are multiple data escrow providers qualified in Europe, but we want to look at basically doing -- subsidizing that cost in Europe as well. We have a lot of learnings to do as we start this program, and once we do this, we will consider next regions after that.

But we need to understand how we reduce the contract we have with Iron Mountain in Europe, and then launch that in Europe, and then we will consider other regions as well.

Thank you.

UNKNOWN SPEAKER: Okay. So do we have any priority for after the Europe, the next step, which will be? Or do we have a timeline of this plan?

AKRAM ATALLAH: We haven't even started doing the program in Europe. We're just basically assessing it. We will do an RFP, and once we do an RFP, we will see who wins and then when they will actually be active. And as we do this, we will take our learnings and apply them to the other regions where the need is also there.

Thank you.

MAARTEN BOTTERMAN: Thank you very much. I have a feeling this is not the last we heard from you.

Thank you very much. The gentleman on the right.

JIMSON OLUFUYE: Thank you. My name is Jimson Olufuye. I run Contemporary Consulting, an I.T. firm based in Abuja, Nigeria. We are a member of AfICTA, African ICT Alliance, and a member of the business constituency of ICANN.

I have three quick feedbacks. Two has to do with BC and one with AfICTA. I have actually provided this feedback when we met with the board, where I felt so that the general public may also be fully aware.

Over the past three years, BC has grown its membership from 2% to 10% across Africa and Asia. And we do appreciate ICANN org for the outreach support, funding support that is also coupled with the BC's funding as well the leadership program from developing countries and also support at U.N. program.

So just to say that this should not stop. We need to enhance it. But we could also save funds through maybe ticketing, the Travelocity mechanism. So we could look at that and save through that so we can support all our very valuable projects.

So now for -- to AfICTA. Well, we made a public response during the CCWG, that is cross-community working group, meeting on IG last year that ICANN need to reach out to U.N. where they have needs for transcription and for remote services. And I'm happy to provide this feedback that ICANN did responded, and the working group of the U.N. really appreciated the work. And this is to say we hope that it's not just one-off engagement but to continue in the spirit of enhanced cooperation.

Thank you.

MAARTEN BOTTERMAN: Thank you very much for your feedback. We try to help where we can within reason, of course.

Anyone wants to add something on this? Thank you very much.

Next question, please.

BAKIAU TAKENTEBWEBWE: Thank you. My name is Bakiau from Kiripati. I'm a newcomer, and I'm very honored to be given the opportunity to attend this ICANN meeting through the Fellowship Program.

I am from a small island developing state, and I am very keen and interested to participate and continue to participate in the engaged activity in ICANN either remotely, if and when possible, or in person.

I want to share with you on behalf of my colleagues from the small island developing states and colleagues from the underserved regions, in particular the Pacific, two of the many challenges that we face in terms of participating in ICANN.

The first challenge is you know our part of the world is mainly of a mass of ocean with countries consisting of many islands (indiscernible). And to travel is based on availability of sea or air transportation, which is costly, and for some areas operate once

a week or even twice a week. So for some of my colleagues to attend international conferences, it translates to being absent from home for more than two weeks from the start of the travel.

Number two is that, you know, our Internet connectivity in terms of availability, accessibility, speed, cost is an obstacle that prevents us from participating remotely.

[Timer sounds.]

We have many more challenges, but I think these two are important to share for now so you are aware and able to make the necessary provisions in your plans to ensure we continue to participate and engage activity -- in the work of ICANN. Thank you.

MAARTEN BOTTERMAN: Thank you very much. And very welcome here. Glad to see you made it. And, yes, we try to facilitate this as much as we can and within reason.

Is there any addition to this? Lousewies.

LOUSEWIES VAN DER LAAN: Yeah. I'd like to make a general comment about increasing the diversity of the ICANN community. And I think it's relevant also to the comment that Jimson made and Grace before. So within

the Work Stream 2, there is a working group on diversity which is being led very competently by Fiona and by Rafik. And we are looking at many, many aspects of diversity. There is linguistic diversity, geographic diversity, gender diversity, background diversity. And it is the stated ambition of the ICANN community to be as diverse as possible. And I would encourage everyone to get involved in this working group because we need to hear from as diverse a group of people about the challenges to participating in order to be able to overcome those challenges.

And so I think if people like you, people from -- who come from geographies which are difficult to reach, who come from -- who have language challenges, if we can hear from you about how to better increase the diversity, that would be an incredible asset. So you would be very welcome. And, of course, Internet connection is required because most of it is done by email. That's where most of the hard work in ICANN is actually being done. Luckily, you don't need a high-speed connection for that. But that would be great to hear many, many voices there. And the concrete proposals that will come out of that will become part of the way that the community can become more diverse and stay diverse because, of course, we are already very diverse. Thank you very much for your contribution.

BAKIAU TAKENTEBWEBWE: Thank you.

MAARTEN BOTTERMAN: Thank you very much.

[Applause]

We have one question from Brad.

REMOTE INTERVENTION: We have a question from Volker Greimann. Many members of the communities, myself included, have long requested that ICANN engage with data protection officials. I, therefore, applaud the panel that was held this week with data protection officials and experts on this subject. It really highlighted some of the issues of the current ICANN policies with current and incoming data protection regulations and laws.

My three questions, therefore, are, one: Will this kind of engagement be continued and supported by ICANN?

Two, will ICANN consider establishing an office dedicated to the protection of private data and review of existing ICANN policies?

And, finally, three, what kind of planning has ICANN undertaken so far with respect to upcoming European general data protection regulation?

MAARTEN BOTTERMAN: Thank you very much for this very relevant question.

I will give it to Becky.

BECKY BURR: So I think that all of us were very pleased and it was great to have the expertise of the European Data Protection supervisor, the Dutch Data Protection Authority, and the U.N. special rapporteur. All of them have expressed willingness and interest to engage with the community going forward on this important issue. And I think that we will be planning that. I will -- I'll ask Goran if he has any additional suggestions on -- any additional comments on the internal preparation, but I do -- it is my understanding that ICANN is, in fact, doing what all of us are doing, which is going through the compliance checklist to make sure they're ready on -- the organization is ready and in compliance on May 25th -- 28th of 2018.

MAARTEN BOTTERMAN: Yes.

Thank you very much. Before we are heading for a break of 15 minutes, I'm going to toss the microphone to Steve.

Jeff, you are the first one in the next open forum block. Please remember who was there first.

Steve, up to you.

STEVE CROCKER:

Thank you, Maarten.

Okay, folks. We're going to take a break in a couple of minutes. But before we do, we're going to honor someone who is leaving the ICANN family after 14 years. We have a slide. Yes.

Glen de Saint Gery -- how bad is that?

[Laughter]

-- secretariat of the Generic Names Supporting Organization is retiring. To say she will be missed, an extreme understatement. She proudly told me that in her 14 years at ICANN she has survived six CEOs, seven GNSO chairs, and three husbands.

[Laughter]

[Applause]

More interesting question is how many of them have survived her.

[Laughter]

She is the type of person that we all strive to become. She is the consummate professional, yet defined by her calm, her class, and her compassion. For almost a decade and a half, Glen has inspired us with an attitude that redefines the term "positive."

Now we have a short video tribute.

[Music]

UNKNOWN SPEAKER: Gorgeous Glen, today the GNSO Council passed the unanimous resolution to rename the GNSO the Glen Names Supporting Organization.

UNKNOWN SPEAKER: Glen, thank you for everything.

UNKNOWN SPEAKER: We'll miss you.

UNKNOWN SPEAKER: And we love you.

UNKNOWN SPEAKER: So now I only have one question for you. Now when you are leaving ICANN, which community will you now join? I know there will be a competition for that. So welcome back.

UNKNOWN SPEAKER: Goran Marby is always complaining that we don't have enough acronyms. Two more are hereby created. All time is divided into two parts: During Glen, D.G., and after Glen, A.G. We'll miss you.

UNKNOWN SPEAKER: Of all the things I have been involved in in ICANN over the past 20 years, one that I'm most proud of is interviewing Glen de Saint Gery for the DNSO secretariat position. She has proven my recommendation right over and over again.

UNKNOWN SPEAKER: How can ICANN work without Glen? The answer is unknown. I can't guarantee FOR anything.

UNKNOWN SPEAKER: And I can't conceive of an ICANN, let alone a GNSO, without Glen.

UNKNOWN SPEAKER: Happy retirement!

UNKNOWN SPEAKER: Reason to celebrate!

UNKNOWN SPEAKER: Enjoy your retirement! You deserve it!

UNKNOWN SPEAKER: I think her overwhelming skill has been her generosity of spirit.

UNKNOWN SPEAKER: Most people just call her Glen. She has been with ICANN for many years. And those who have worked with her know her for her dedication, her sense of humor, and her joy.

UNKNOWN SPEAKER: I want to thank Glen for her years of unflagging support at ICANN and the work that she's done for the GNSO community.

UNKNOWN SPEAKER: Hello. I hope you enjoy retirement. Remember, if you have any question about the Internet, just come and ask me.

UNKNOWN SPEAKER: We will miss you, Glen!

UNKNOWN SPEAKER: Glen, you are one of the classiest people I have ever met. And to say you're going to be missed is an understatement.

UNKNOWN SPEAKER: Thank you, Glen!

UNKNOWN SPEAKER: We will always be connected, and I love you dearly.

UNKNOWN SPEAKER: Hi, Glen. Thank you for your example of excellence and how you work and elegance in who you are.

UNKNOWN SPEAKER: Because you are really beautiful, so take care, enjoy your life.

Je t'aime. (Speaking French).

Je t'aime. Je t'aime. Je t'aime.

UNKNOWN SPEAKER: I love you, love you, love you, love you.

UNKNOWN SPEAKER: You are invaluable and incredibly kind and helpful to all of us.

UNKNOWN SPEAKER: Thank you for all your support and all your caring.

UNKNOWN SPEAKER: Your support has meant so much to me coming through the Council as chair. I know it's meant so much to other people. Glen, you will be sorely missed. We all love you.

UNKNOWN SPEAKER: We would like to thank you all the work you have done for the GNSO yourself and being a large part of how successful it's been over all of its years. Lastly, I'd like to thank you for bringing Gisella into the ICANN family. She is just marvelous and takes after you, of course.

UNKNOWN SPEAKER: Thank you for all your guidance. I have no idea what I will do without you. But I wish you all the very best, and I finally have a baby-sitter for Evelyn. So wishing you all the very best, and I know that you will be looking forward to lots of golf, lots of baby-sitting. And I somehow think it's going to be difficult for you to leave ICANN. But I will still be seeing you and talking to you on a daily basis. So all the very best. I love you.

[Music]

STEVE CROCKER: Will you come up? Glen, will you come to the stage.

[Applause]

[Standing ovation]

So that was the short version.

[Laughter]

If we give you the whole thing, we'd be here another hour. Here it is.

GLEN de SAINT GERY: Thank you, Steve.

STEVE CROCKER: Thank you.

GLEN de SAINT GERY: Thank you very much.

STEVE CROCKER: Is there anything you want to say?

GLEN de SAINT GERY: I'd just like to say to everyone it's from science fiction to reality. When I started at ICANN, little did I ever know that the whole

world would be connected to the Internet and the Internet would become an integral part of our lives. And I so associate myself with the comment that our participant from France made about his mother.

By the way, nobody really understands what I do outside of my ICANN family. So I feel very close to you. Thank you for this wonderful journey. Thank you for all the learning, experiences that I've had, for all the fun, and for all the joy. And they say actually that ICANN is like a life sentence.

[Laughter]

But I've never felt imprisoned by ICANN at all. And I suppose that it's very difficult to really pull yourself away and to drop everything and to drop your life experience over these years. So I will still take an enormous interest in everything that ICANN does. And all I can say is thank you to you all.

[Applause]

Thank you, Steve.

[Applause]

STEVE CROCKER:

Well done.

GLEN de SAINT GERY: Thank you so much.

STEVE CROCKER: We're going to take a 15-minute break. And you're all invited to come back. We're going to start again either with you or without you.

[Laughter]

[Break]

BRAD WHITE: Ladies and Gentlemen, we're going to begin the second part of public forum number 2. Please welcome board member Mike Silber.

MIKE SILBER: All right. Welcome back from the break, and welcome to the second half of the public forum. Before we start taking additional questions and comments, we're going to take a quick look ahead to ICANN 59. From June 26-29 we'll be in Johannesburg, South Africa, which some of you may know is my hometown. So it will be a pleasure to have you there. To give you more details, allow me to introduce Vika Mpisane, the Chief Executive Officer of the .ZA, or if you prefer .ZA, domain name authority.

VIKA MPISANE: Good afternoon. Thank you, Mike Silber and Brad and the board. It's nice for once to be the guy really standing behind the board.

[Laughter]

I want to do just a brief talk. We'll be hosting the next ICANN meeting in Sandton, Johannesburg, as the dates will show, from the 26th of June. We really look forward to have you there. Some of you I know -- I bet a lot of people in this community

have been to Johannesburg, so it's not going to be a new experience.

It's the city of gold. The people there -- the province is called Gauteng, which is a place of gold. Not so much that I've seen the gold myself, but they keep on digging there.

It is a place also that where we have the high-speed train called the Gautrain, which is a gold train, which in itself looks gold. It's not made up of gold, though.

And the place that will be in Sandton, which is the fastest growing hub in Johannesburg you will see when you get the mall and that's Mandela Square and the hotels in the surrounding. And then, of course, the people. The people of South Africa with all their nice things to do and the challenges and so forth, they are waiting for you. We are looking forward to really have you there, guys. It's always an honor when you came. It was an honor in Durban in 2013, and I sure hope that this time around again it's going to be an honor. There's a video that we prepared here from the city of Johannesburg that will be played, and I invite you to take a look.

UNKNOWN SPEAKER: Welcome to the city of Johannesburg, or Jozi, as the capital of South Africa's Gauteng province is fondly called. Leaders of

global industry, architects of enterprise, and people who make opportunity spotting a hobby are drawn by some verdant force to this bustling metropolis of urban energy.

Arriving at Johannesburg's O.R. Tambo, one is greeted by a world class international airport designed to handle 22 million passengers each year. O.R. Tambo is both a passenger and freight hub and is situated in the middle of a substantial commercial and industrial node with easy access to the main arterials and secondary highways of the city. For travelers wanting fast, convenient, and reliable transport from O.R. Tambo, the Gautrain, Johannesburg's famous fast train, provides a speedy link to the business districts in the city.

With a wide range of accommodation available, travelers will have no trouble finding a place that is conveniently located and suits everyone's needs.

In addition to the Gautrain, car hire, shuttle services, private taxis, and an integrated bus system provide a transport network that will get you around the city quickly and on time.

Johannesburg has become a destination of choice for conferences, trade shows, expos and summits. The city's four major conference venues are all capable of handling up to 5,000 conference delegates with state-of-the-art facilities tailored to suit specific needs. Ideal for exhibitors and visitors,

Johannesburg's trade shows are regular features on international conference directories, attracting hundreds of African and international buyers and media.

Johannesburg is also Africa's largest inland port and the clearing and forwarding hub of goods to and from the rest of Africa and the world.

Sports and leisure come naturally to a city that boasts some of the best weather in the world year-round. Several inspiring stadiums are home to the province's rugby, soccer, and cricket teams, and the impressive calabash-shaped soccer city has hosted many local and international events. Johannesburg is an inspiring city with local flavor and a cosmopolitan appeal. Visit one of the cultural precincts downtown and take in the creative vibe and experience the urban lifestyle.

When the sun goes down and the lights come on, ease into the evening, with a cocktail at one of the city's many funky night spots and an evening of entertainment Jozi style.

With 55 airlines linking Johannesburg with the rest of South Africa, Africa, and the world, our doors are wide open. Just step in.

VIKA MPISANE: Ladies and gentlemen, that was it. We look forward to have you in Johannesburg in June. Thank you.

[Applause]

MIKE SILBER: Thank you, Vika. And I just wanted to let people know that apparently the -- the hosts have arranged that the first 50 people registered for the Johannesburg meeting will receive a wildebeest, or as you would know, a wildebeest. Everybody else after that gets two.

[Laughter]

Then the -- the welcome having been done to the next meeting, I'm going to ask Rinalia to take over the chairing of the session.

RINALIA ABDUL RAHIM: Thank you, Mike. Rinalia Abdul Rahim speaking. Hello, everyone. Welcome back to the public forum. This is the block that will deal with any subjects of community interest, and I've received a request to allow Mr. Neuman to go first, and I was promised sweets to give you this slot. So please, go ahead.

JEFF NEUMAN: Thank you. My name is Jeff Neuman, and I'm here on behalf of the working group, the policy development process working

group on subsequent procedures. It's a long title, but it's basically for discussing issues related to the implementation of the next application window for new gTLDs.

In line with other comments that were said before, our work does, in fact, continue in between ICANN meetings, and in that vein I want to talk about a program on April 25 on the handling of geographic names at the top level to prepare for the face-to-face sessions on the same topic at ICANN 59.

An announcement will follow shortly with this information, but as a preview I just want to call out the following dates. We're asking that by April 7 we are hoping to get expressions of intent on submitting contributions and participating in the April 25 webinar. By April 18 we're asking for the contributions to be submitted in writing so that there's ample time, or at least a week, for those that are participating in the webinar to review the materials. And then on April 25, we'll likely actually have two webinars because as we all know there is no one time to have a webinar where everyone can actually attend.

So I cordially invite everyone, the entire community, to submit contributions and to participate in the webinar. I've been around some sessions where there were groups that weren't sure if they were invited. So specifically, everyone is invited, including the board and the entire community, whether it's a

generic Name Supporting Organization, the Governmental Advisory Committee, the Country Code Name Supporting Organization -- I'm trying not to use acronyms -- and everyone else, the At-Large Advisory Committee to participate. Thank you.

RINALIA ABDUL RAHIM: Thank you for the invitation. Becky, would you like to comment?

BECKY BURR: Yes, I would actually just like to say it's great to have advance notice and sort of great planning. It really helps get the word out, and I don't think that we've ever had anything quite as -- as deliberately laid out in advance in a meeting like this. So it's actually a great practice, and we should do more of it.

RINALIA ABDUL RAHIM: Thank you. Can I have the lady on the right, on my right, please.

FIORELLA BELCIU: Thank you. Fiorella Belciu, first-time fellow speaking in my personal capacity. Originally from Romania but based in Belgium. Most probably the question that I will ask has been tackled before somehow, but I will wear my newcomer's hat and I will go ahead and ask it.

During one of the fellowship sessions that we had, one of the issues that was somehow brought out was the hidden IP addresses, therefore, got me thinking about the dark net or the dark web, as you wish to call it. And I tried to look up in the following days and see if there were some particular recommendations or statements made by ICANN on this matter, but I haven't found anything concrete. So I figured I could bring this up here and ask you if there were any policy recommendations made on the dark net specifically. Thank you.

RINALIA ABDUL RAHIM: Thank you for the question. Anyone want to respond? Steve. Please.

STEVE CROCKER: Thank you. And thank you for both your participation and your willingness to overcome any hesitation to jumping right in.

The -- it's not uncommon in this forum to think that all of the different topics related to the network have a place here, and indeed we do worry a lot about security, but we're not the primary or sole place for all things related to Internet security. There are other forums where issues of the dark net and what goes on there, how to combat that, et cetera, et cetera, take

place. Very little of it has direct impact on the identifier system, per se. I mean, there's some use of unused addresses and so forth. But those are primarily discussed in other forums. So that's why you don't see a lot of attention to that here. Not that it's an unimportant topic.

RINALIA ABDUL RAHIM: Thank you very much.

FIORELLA BELCIU: Thank you.

RINALIA ABDUL RAHIM: So I see you back up to the microphone. Please go ahead.

SHIVA UPADHYAY: Hello, my name is Shiva Upadhyay, and first time I'm attending an ICANN meeting as an ICANN fellow. So my suggestion, firstly, I would like to appreciate ICANN supporting the outreach programs in different regions. And my suggestion is for ICANN and GAC -- as per my understanding and what I have learned during my job, is a simple thing where -- I know ICANN is having a limitation like they can't -- they can't -- they are not having any role in governments and in the -- in the nations, how they will design their education programs. But my suggestion is that

ICANN and GAC can mutually discuss and develop some kind of course for the -- for the students from the school level, at least one chapter, because ICANN is a very broad -- broad ICANN and IGF are very big. So I think one chapter will not be able to serve the actual, but at least students will be having an idea what is ICANN, IGF, and the different RIRs, what they do exactly, so that they can in future can use these platform and -- for as a career opportunity and also for awareness.

RINALIA ABDUL RAHIM: Thank you for the suggestion. Does anybody want to comment?
No. Thank you very much.

Next in line, please.

SEBASTIEN BACHOLLET: Thank you very much. My name is Sebastien Bachollet. I'm going to speak in French.

At-large members, I would like to go back to the first question that was asked earlier on by our colleague, Saurabh Dubey, from India. He asked a question regarding the complaints, the issues that the community might have.

I don't think we had a full answer on these complaints and issues. We heard our CEO about the new complaints service that

was developed recently. We have an ombudsman. We've had an ombudsman for many years, and this is a good place. When we have complaints and issues, this is a good place to go. And I'd like to say that as a rapporteur on the work that is being done by the ombudsman's services, looking at reinforcing the accountability of ICANN, and I think it's an important topic where do we go when we have a complaint, when we have an issue.

Today, we need to know about all the solutions, all the places to go, and what type of complaints, where do they go, how does it work, how are they taken into account.

Thank you very much.

RINALIA ABDUL RAHIM: Thank you, Sebastien. Cherine?

CHERINE CHALABY: Sebastien, thank you for telling us about the ombudsman. This - - you are absolutely right. We assume that the community is aware of all the opportunities to talk about issues and complaints, but we have to be very clear about the role of the ombudsman at ICANN who is absolutely available for everybody. You're absolutely right. Thank you.

RINALIA ABDUL RAHIM: And since it's a topic that keeps recurring, I'm going to ask John Jeffrey, general counsel, to also comment.

Please go ahead.

JOHN JEFFREY: And if I understood the question, it was about what is going to be the process with the new complaints officer. Is that correct, Sebastien?

SEBASTIEN BACHOLLET: I wanted to add that there are two types of offices today, the newly creation of the complaints office that you are responsible for. Not directly but indirectly. And the CEO. But we didn't talk about the ombuds office. I wanted to be sure that the community is aware of all.

But if I have a question to you, what will be -- I am sure that a lot of people in this room would like to know what will be the exact role of the new office of complaints that you are building right now with the newly appointed person?

Thank you, John.

JOHN JEFFREY: Thank you. Very happy to answer. And it is an important difference.

So the ombudsman role is traditional. It's bylaws-mandated. It will remain. And that role is a role that reports to the board. It's an independent office outside of staff that files reports and recommendations to the board which they can act on.

The complaints officer is intended to help improve the organization, and as it was envisioned by Goran from his experience in other organizations, it will be formed to take specific complaints about processes and operations inside of the ICANN organization and to have those complaints come to Goran and the executive team and possibly the board, in some instances, to help change things within the organization that can help us improve it and provide better services to the community and to the whole purpose.

Does that help?

SEBASTIEN BACHOLLET: Yes. Thank you very much, John. I think it's very important what you say. It will help the community to figure out where to go when they have any complaints.

JOHN JEFFREY: And just one part of it which I think you said is how do we file with complaints with it. That's yet to be determined. Krista is just now -- who is sitting down here in the front is just now taking that role, and she'll be developing processes, putting up a Web page, creating a mechanism to file those complaints, which will be transparently posted and dealt with wherever possible on the Web pages and very open to the community.

RINALIA ABDUL RAHIM: Thank you. And if the information that's provided is still not clear when it's up on the Web site, please come back to us and we will get the organization to make it even more abundantly clear.

Thank you, John.

JOHN JEFFREY: Yes.

RINALIA ABDUL RAHIM: May I have the young lady on the left, please.

AFFIFA ABBAS: Hello. I am Affifa Abbas from Dhaka, Bangladesh, a first-time fellow and a newcomer and this is my first time ICANN meeting ever. Currently, I'm working as a security analyst in a telecom

operator in Dhaka, Bangladesh. So my questions are very simple. I'm not going to ask any complicated questions. So out of curiosity, I just want to ask three questions as a newcomer.

So as a newcomer, I've been following many sessions during this week and I found myself interested in RSSAC and SSAC, as a security analyst, so my first question would be why SSAC meetings are closed.

My second question is, in my local community, there are brilliant people working on security sector that might prove themselves as a good resource to contribute in SSAC community, so I just wanted to know, is there any entry point for them to enter and to work with the SSAC?

And my third question is: In Bangladesh people hardly know about ICANN and this is really also disappointing that I hardly see anyone from my Bangladesh government to proactively come and participate in GAC, so does ICANN have any plan to conduct any outreach session in Dhaka, Bangladesh, so that they can step in and participate, as I know that there are a few talented people who are out there who can live into the expectations of ICANN.

Thank you.

RINALIA ABDUL RAHIM: Thank you, Ms. Abbas, for the questions.

For the first two questions, I will throw it to our SSAC liaison, Ram Mohan. Please.

RAM MOHAN: Thank you very much, and I'm so pleased that from Bangladesh we have you coming and that you're also so interested and focused on security. That's actually a really wonderful thing. I want to, you know, underline that-that. That's really excellent.

Two questions.

The first is why are SSAC meetings closed.

There are actually a couple of different things that the Security and Stability Advisory Committee does. There are open meetings that the SSAC does. In fact, I believe it was sometime yesterday, and that's a public meeting with invited comments from the community, et cetera.

The SSAC itself, from its origin, is a small group of international experts in security matters, and one of the issues when you're working with security issues is that sometimes people who bring security matters to your attention are concerned about what will happen to the information that they provide because it may be that there is a vulnerability they're speaking about or it may be

that there is a particular issue that if the release of that information or the analysis of that information is not done in a deliberate and controlled manner, the harm from that might far exceed the actual problem itself.

So for the most part, that is the primary reason why the SSAC, in its deliberations, they -- it tends to be private.

Having said that, all of the reports, all of the current work that the SSAC is doing, the SSAC publishes that. The SSAC says, "Here are the areas of focus. Here is what we're working on," invites the community to suggest new topics for it to focus on as well.

So the work plan is public. The actual deliberations are private by design for that reason.

The other question on participation, it's really wonderful that you want to promote that. The -- if you'd please go to the ssac.icann.org page, you will find that there is -- there is the -- a way to contact the committee, and all that has to be done is to send an email to the director of support there, Julie Hedlund, and she will be able to provide information on how to apply.

It's an open rolling process for applications into the SSAC, and there is a group that evaluates people who come in and apply. It's -- it would be really wonderful to have more people come in

and I'm always available if you'd like to speak as well further about it. Thank you so much.

RINALIA ABDUL RAHIM: So there are other responses to your questions. I'm going to ask our RSSAC liaison to also comment.

KAVEH RANJBAR: Hello. Thank you for the question. Just wanted to clarify, RSSAC is a bit different from SSAC in that regard and all of the actual technical work of RSSAC is done in RSSAC caucus which is basically an open membership. Everything is open, accessible. If you wanted to be part of the work, you can actually apply to become an RSSAC caucus member. The only -- the RSSAC meetings, which is only the RSSAC members but not open to the public, that's only administrative work, so we don't do any work related to the RSSAC publications or documents and we keep those closed mainly for efficiency reasons but we never do actual technical work in those deliberations.

RINALIA ABDUL RAHIM: Thank you. That was my colleague, Kaveh Ranjbar, since the name listed was Cherine Chalaby, for the record.

The answer regarding the outreach question, first my colleague, Akinori from Japan.

AKINORI MAEMURA: Thank you. Thank you very much. Akinori Maemura for the record.

Thank you very much for your comment and I'm really happy to help you here and then thank you for your courage to come up to the microphone.

And then security and -- you know, network engineering and security thing is not only done by ICANN but we have a lot of colleagues, fellow organizations, who collectively, you know, run the Internet.

For example, I know that Bangladesh has a really active node, network operators group, BD node, and they're so keen to do and maybe help you, so please try to contact him -- contact them for your -- then you will have very good resource of the information.

And another point is the APNIC, one of the Internet -- regional Internet registries, has a very big -- good activity for the security and some other network operational things, and that's another source you can rely on. Thank you very much.

RINALIA ABDUL RAHIM: Okay. Thank you, Akinori.

And finally, a response from ICANN organization.

Sally?

SALLY COSTERTON: Thank you, Rinalia. Sally Costerton, head of stakeholder engagement. Thank you for your question. It's a very good one. I'm happy to tell you that by happy coincidence -- I like to say I planned it but by happy coincidence the head of our India engagement team is a Bangladeshi national and Bangla is his first language, so he's particularly keen to help you and others in your country, in Bangladesh.

And in our technical community, as Akinori is saying, we have a real role for Samiran. Samiran is here. He's the guy in question. And I know he's already active, but he is very committed to working with you and others to make sure that we -- we help join the dots for you, bringing your GAC rep, your other I.T. ecosystem system partners together, to deepen and strengthen Bangladesh's contribution at ICANN.

So if that -- please keep talking to us about that. It's important that we do it. Thank you.

AFFIFA ABBAS: Thank you.

RINALIA ABDUL RAHIM: Thank you, Sally, and thank you for the question.
Please go ahead.

STEVE DelBIANCO: Thank you. Steve DelBianco of Netchoice. I wanted to remind you all that it was three years ago this week that the U.S. government announced that it intended to transition the IANA contract to the global multistakeholder community, and for me and many in this room and many of you on that table, those three years were consumed by that transition. Many of us spent time on Capitol Hill describing and then defending the transition against its critics in Washington. Some of those critics and attackers overstated ICANN's role in free expression, and many intentionally tried to mischaracterize ICANN and the people in this room as if we were the United Nations.

Imagine that.

And last September, we finished the transition, just barely, and just a few weeks before that election surprise that all of us watched from Hyderabad, if you'll recall.

So I think it is worth noting and recognizing how much was at stake -- more than we even thought -- and then how much we actually accomplished.

And if you'll allow me to just add a personal note, I am deeply and forever grateful to the expressions of concern that this ICANN family has shown to me in the past year since my personal loss. What I had never fully appreciated until that experience is the degree to which this passionate community can be incredibly compassionate, and I thank you all from the bottom of my broken heart. Thank you.

[Applause]

RINALIA ABDUL RAHIM: Thank you, Steve.

We have an online question, Brad?

BRAD WHITE: Yes, Rinalia. Thank you. Before I read the question, I want to make one quick announcement for the people who submitted online queries. We're getting a lot coming in. We're not going to be able to handle all of them in the course of this session. They will be addressed. We will not let them go into a black hole. They may not be taken up during this particular session.

And also, to the people in the room who are submitting online questions or questions at the engagement@icann.org, we're not taking those. Because that would be unfair to the people in the queue. We will answer them, but not during the session.

Now, to the question. It's a long comment by followed by a couple questions.

From Manuel Haces from .MX.

"On behalf of Mexico the entity that manages the ccTLD .MX, I'd like to make a firm and respectful statement that we are not pleased with Board Resolution 2016.11.08.15 that allows the opening of two-character country code as a second-level domain under new gTLDs.

"We expressed several concerns during the proper public comment periods which we feel were not taken into consideration. I would like to point out several.

"One: The resolution increases complexity on registration as national identification shall be done within the ccTLD and not below an N gTLD, creating registries under a registry. The proper identification of national space for DNS corresponds to ccTLD space. On that behalf, we firmly opposed opening national spaces below N gTLDs.

"Two: The measures to avoid confusion don't offer any deterrent to precisely avoid confusion. They are not measures to avoid confusion. They're solely priority sunrise offerings to the ccTLD or to the government that will imply that both parties protecting the two character potentially on every N gTLD.

Money wise, this is unsustainable. If the national policy is to use the ccTLD for national identification, it is not fair to neither the ccTLD CCLTD, neither the government to be preoccupied with protecting national space or at second level below the N gTLDs.

"Three: On our comments we specifically had concerns to assure that the N gTLDs registry operator communities with both parties, government and ccTLD --

[TIMER SOUNDS]

-- and that it will be needed actual written approval from both parties." I'm going to skip ahead of the -- because the dinger has gone, I'm going to skip ahead the other points and go directly to the questions.

"So my questions are: What are the future of this resolution? Are there any possibilities of rolling back the decision? In case not, how is the Board going to make sure our concerns are properly taken into consideration and that no further opening of

the ccTLD below the N gTLD can proceed further, if the concerns are not dutifully resolved?"

RINALIA ABDUL RAHIM: Thank you for the question.

Any responses? Steve?

STEVE CROCKER: Thank you for your question. This, obviously, is a contentious area. We've had multiple inputs on it. A lot of interaction with the GAC. It continues to be under discussion, and we'll take a great deal more discussion. I don't want to say what the outcome will be or who is going to end up being happy or unhappy about this. But we recognize that it's a sensitive and contentious area.

RINALIA ABDUL RAHIM: And, of course, we'll be responding to the GAC communique as well.

And Thomas Schneider wants to respond. Go ahead.

THOMAS SCHNEIDER: Thank you, Rinalia. Just to say that, as has been referred to, we've had repeated intense discussions in the GAC about this

issue. And it's obvious that this is an issue of great concern to a large -- very large number of countries. And, as we've stated in the communique, we do hope that we can get together the concerned governments with the registries and try and find a solution that is acceptable for everybody. Thank you.

RINALIA ABDUL RAHIM: Thank you, Thomas.

The gentleman on my right. That's you, Phil. No, it's you, Phil.

PHILIP CORWIN: Okay. Thanks. Philip Corwin. I wear many hats in this organization. Speaking in an individual capacity right now.

I note that the subject I'm about to address was the -- quite a bit of evidence or concern in two separate GNSO meetings I was in this morning. A clearly defined relationship between the Board and the GAC and the post-transition ICANN was a critical factor defining that for business sector support for the transition. Now, I was not at the Board/GAC discussion the other day, because I was locked in a different room. But I have read one press report. And I have read the GAC communique this morning.

On the subject that was just addressed, two-character domains, their release, the GAC advice was for the board to engage in

separate discussions, either on a bilateral basis or collectively with a small group of governments from within the GAC, on this subject.

And I would hope that the Board would not act on that advice, would not take that process advice.

This is the reason: The Board should certainly engage with the GAC as a whole when the GAC has strong collective feelings or even full consensus on the underlying subject matter. But for the GAC to advise the Board to engage in separate discussions with individual governments makes no more sense than the Board advising the GAC that it should engage with separate discussions with individual board members.

These are two collective bodies. There's one GAC, not 190 GACs. And that's what the relationship should be, in my opinion. And I hope the Board will consider the precedential effect of taking that GAC advice and how that might play out in the future if you act in the manner they requested. Thank you very much.

RINALIA ABDUL RAHIM: Thank you, Phil. I believe we're clear on what is consensus advice and what is not. Mr. Thomas Schneider.

THOMAS SCHNEIDER: Thank you. Hello, Phil.

PHIL CORWIN: Hi Thomas.

THOMAS SCHNEIDER: Just to make this very clear, this advice is consensus advice that the whole GAC has agreed upon. And maybe it's useful to hear that the Board said that it had accepted previous advice. There's a feeling with very many -- with a large majority of those who responded of countries that they feel that the Board has said it had accepted, but actually in substance, it has not. If the Board had publicly said it had not accepted the advice, what would happen in such a case, that the Board would need to talk to the GAC -- and that does not just include the GAC chair, but it includes other members of the GAC as well -- to try to find the so-called mutually acceptable solution. And I don't think it's any -- there's anything intransparent or bypassing or bad about the Board engaging with the GAC or parts of the GAC in a responsive way, a responsible way, an accountable way, to try and find a mutually acceptable solution for everybody. So this is just my remark on this one. Thank you.

PHILIP CORWIN: I appreciate that response. But I will tell you that -- again, I have no problem personally with the Board and the GAC engaging with one another collectively.

But the GNSO -- and I'm not projecting what it will say -- will be, as usual, preparing a response to this GAC advice. And there was significant concern about the consensus advice, if that's what it was, to engage in discussions with discrete government representatives. Thank you very much.

RINALIA ABDUL RAHIM: Thank you, Phil.

Chris, did you want to respond? Okay. The gentleman on my left.

PIERRE GERMEAU: Thank you very much. My name is Pierre Germeau, and I work for SportAccord, which is the umbrella organization of the International Sports Federation. SportAccord is also the community-based applicant for the .SPORT TLD.

One of the agenda items of the board meeting later this afternoon is the final declaration of an independent review panel.

This IRP panel against ICANN has been initiated by an applicant who had lost a community-based objections proceeding. In fact, the sports community had won all the three objection proceedings regarding .SPORT -- two community objections and one string confusion objection. This applicant belongs to a group made famous for media, and the extension managed by that group have constantly been on the top of the list of the most abused TLDs.

I'm talking here about the list of disparate identities such as SpamHaus or SURBL and even by the ICANN staff at the occasion of the report that's been discussed yesterday in this room.

The ICDR panelist recently issued a resolution in that case that was heavily disappointing to our community, especially because one key piece of evidence has not been submitted to the panel.

And this piece of evidence was a report from the ICANN ombudsman that has been -- that is dated from August 25, 2014. SportAccord wrote to ICANN to raise this concern.

That being said, the ICDR panel issued clear guidance to the ICANN board allowing ICANN to move forward quickly in that case.

The sports community has been waiting for five years. We faced many unexpected challenges in the ICANN process. And I would

like to insist here that this case should be resolved without further delay.

[TIMER SOUNDS]

And to tell you that the sports TLD operated by the sports community must move forward to the delegation process. Thank you very much.

RINALIA ABDUL RAHIM: Thank you. And we do sympathize.

Chris?

CHRIS DISSPAIN: Thank you very much. It wouldn't be appropriate to enter into a dialogue about a matter that is subject to our accountability mechanisms. But we've heard you and thank you for coming to the microphone and delivering your message.

PIERRE GERMEAU: Thank you.

RINALIA ABDUL RAHIM: Thank you. I think there's another online question. Brad?

REMOTE INTERVENTION: We have a query from Desiree Boxberger with gTLD Help, LLC.

"The .REGISTRY LLC versus ICANN IRP declaration was issued July 29, 2016. ICANN has passed five board resolutions without any further action since the IRP declaration. When will the Board address the harms caused to .REGISTRY, LLC, relating to the .INC, .LLC, and .LLP community applications? Why such a long delay, eight months, in addressing this matter? And do you intend to take any further actions in this matter? Thank you."

RINALIA ABDUL RAHIM: Thank you. This one goes to the chair of the Board Governance Committee, Chris Disspain.

CHRIS DISSPAIN: That will be me again.

Thank you very much for the question. I don't know if you were listening earlier when we talked about the current independent review in respect to various aspects of the panel decisions.

But this particular matter in respect to these strings is caught up in that and delayed because of that. There are a number of strings that either have reconsideration requests pending or decisions following IRP recommendations pending. And the BGC and the Board has decided that it would be not appropriate

to deal with those particular reconsideration requests or IRP recommendations until such time as the independent review has been completed.

That review is under way. It has been happening for a little while. We don't have an actual date for completion yet.

As soon as it's completed, we will consider the findings. And we will then get on with dealing with the outstanding reconsideration requests and IRP recommendations. Thanks.

RINALIA ABDUL RAHIM: Thank you, Chris.

Can I have the gentleman on my right, please.

JAMIE BAXTER: Thank you. Jamie Baxter. I'm with the community application for .GAY. I want to parse from a comment I made earlier in the week in the subsequent rounds discussion related to a couple of things.

So I have a couple of comments, and then it will come eventually to a question.

There's been incredible work going on in the reports and the subsequent round work to make sure that the next time we do gTLDs, that it looks perhaps a little bit different.

And all that work is incredibly appreciated.

There's been also a lot of data that's come out of that. One of the data points identifies the various types of applications. What dawned on me is that there hasn't necessarily been a breakdown of those data points in the community applications, per se. Because what I think we would find is that there's a wide variety of types of communities that applied that also take varying lengths of time to create because of funding, because of stakeholder engagement. And I think there's a lot to be learned from that.

And the reason it's important is, because of all the great work that's gone into creating a new mobilizer for the next round, when we're ready to start, we have to have stepped back and considered did we give enough time for people to actually engage? Did they actually have enough time to communicate with their communities or their populations or whatever it might be, especially since one of the goals behind all of this is to create diversity. If we haven't thought about those folks, at the point that this great mobilizer or vehicle is ready to go, there's going to be so much excitement to get it started, that there may not be enough time for some potential applicants to get involved.

And so it brings me to my question about the effort that's being put into marketing the new program, even though it's not designed, and what that looks like.

And so it brings me to my question about the effort that's being put into marketing the new program, even though it's not designed and what that looks like.

[Timer Sounds]

RINALIA ABDUL RAHIM: So I'm going to request Akram Atallah to come and take a shot at this one.

Akram.

AKRAM ATALLAH: I'm sorry; could you repeat the question?

[Laughter]

JAMIE BAXTER: So the question is what -- I realize in the first round there was a budget to marketing the new gTLD program. If I remember, it was about \$135,000 globally.

Now that we're creating this new vehicle through policy development and there's going to be a lot of interest in new

applicants, what is happening -- and I assume that this is some involvement with ICANN -- to make sure that people know that it's going to happen, even though we don't have a date yet, so that they can start preparing? Because what I'm trying to identify is that some groups will take longer to prepare.

AKRAM ATALLAH:

Sure. Thank you.

So the way it happened last time was through the community process of developing the guidebook, that we also identified a need for awareness. And we -- we did a -- an awareness campaign. We will probably do the same, if the community agrees that this is something that we should be doing as we prepare for the opening of the next window.

Thank you.

RINALIA ABDUL RAHIM:

Thank you, Akram. And thank you, Jamie, for the question.

Brad, another online question?

BRAD WHITE:

Yes. We have a question from Jean Guillaume from France.

REMOTE INTERVENTION: More and more French trademarks want to request their dot brand new gTLD. 2020 is very far away. Can't ICANN create a faster path for these very specific applications?

RINALIA ABDUL RAHIM: Okay. So that's a question that keeps coming up. Anyone wants to respond to that one?

Cherine, go ahead.

CHERINE CHALABY: Thank you, Rinalia.

This question, as Rinalia said, keep on coming up and there is continuous demand on the Board to make some form of decision, put a line in the sand, either to the completion of the current reviews or to say when a special round will start or when will -- another round will start and in what sequence. But I think the Board has all along said this is -- this is really going to be a -- a community decision and not a top-down decision.

I know it is very frustrating for a lot of businesses who wants to plan ahead, who wants to get some certainty, but I think we're not yet in a position to -- to make any -- any sensible announcement.

As you know, the reviews are -- coming to an end at some point in time, and we are encouraging the various reviews to be completed as soon as possible. And as soon as this happens, we will listen to the community and we will be able at that time, then, to make some form of announcement. But until then, we've chosen not to exert a top-down date by the Board.

So I know this is frustrating, but I think this is the most -- most prudent way from our point of view.

Thank you.

RINALIA ABDUL RAHIM: Thank you, Cherine.

And no matter how many people ask the question, the answer will be the same. So may I have the gentleman on the left, please.

SOEREN LAURSEN: Thank you. My name is Soeren Laursen. I'm chair of LGBT Denmark, the national organization for gays, lesbians, bisexual and transgender persons being founded in 1948. LGBT Denmark is one of the oldest LGBT organizations in the world, and we were one of the first LGBT organizations to have consultative status with the United Nations.

I am happy to be able to attend an event like this where it is possible to address the board of the international caretaker of our Internet. This is institutionalized openness. This is democracy in action. This is exactly the kind of characteristics we want in the governance of the internet, which is of such a fundamental and essential part of our everyday life; of yours, of mine, of the hundreds of millions of people who live rich lives in inclusive communities and for the hundreds of millions of people with less fortunate lives living in non-inclusive communities.

I am not, however, amused by the reason I have to address you, which is a case of unequal treatment.

I sent you a letter the other day elaborating on the topics. Authoritative sources, including the Council of Europe and a highly esteemed Yale law professor, have provided a thorough analysis of the evaluation process of the .GAY application and found that the process is flawed; that this application has been subject to other terms and conditions than other similar applications; that it has been subject to other terms and conditions than those stated in the bylaws.

Such unequal treatment is unacceptable and undermines the values enshrined in the bylaws. If we accept unequal treatment, all of this is a travesty.

I have intendedly avoided any speculation about the reason for this unequal treatment, as it can be only exactly that, speculations. I just recognize unequal treatment, and we ought to be able to agree that it is something --

[Timer Sounds]

-- we don't want, but it is your responsibility to see to the enforcement of the bylaws.

The evaluation process of the .GAY application has been lengthy because of an unfair trial. The consequences are loss of money, loss of time, loss of opportunity.

Board, please help making a fair and swift evaluation of.GAY application, and first of all ensure that the values and the rules written down in the bylaws are brought into action.

Thank you.

RINALIA ABDUL RAHIM: Thank you very much. Mike Silber will respond to you.

MIKE SILBER: Thank you. And thank you for the comment.

I just wanted to refer back to what Chris had indicated, is that there have been concerns raised about the community

evaluation process, and J.J. answered before on that. So we're undertaking a complete review.

At the same time, I can't just accept statements about unfairness and deviation in process at face value.

I think that the community evaluation process has, in a number of applications, led to consequences that were not necessarily intended through the policy process, but I don't think that this particular application has been singled out for mistreatment. And I'd be more than happy to engage on that, but I think it's worthwhile just drawing a line in the sand to say this is not the only application. There hasn't been intentional discrimination relating to this application, and we've been very conscious of that because it's very easy for a marginalized group to be discriminated against and to feel that they are discriminated against. So we're very alive to the concerns, but I'm not sure that I'm willing to concede that this is a stand-alone in the various community priority evaluations that are being reviewed at the moment.

RINALIA ABDUL RAHIM: Thank you for the question.

I believe you're the first person from this country to come forward to the mic, and we loved seeing you.

So we'll now have the pleasure to handing over the facilitation role to my colleague, Kaveh Ranjbar.

KAVEH RANJBAR: Thank you very much, and we have about 30 minutes remaining in the session, so I will pass to Brad for a video.

REMOTE INTERVENTION: Yes, we have a question -- first of all, I would like to advise everyone to get their headsets because this question is going to be asked in Spanish. It's from our Venezuelan hub. It's being asked by Pierina Acevedo.

REMOTE HUB: Good morning. I'm Pierina Acevedo. I am in Venezuela. I bring greetings to all of you there. It is a pleasure for us to join you at this meeting.

This is my question. I know that some ISPs are part of the state, especially in Venezuela. What is ICANN doing to provide us end users with the right of connectivity to the Internet?

Thank you.

KAVEH RANJBAR: Lito?

LITO IBARRA: Okay. Thank you for your question. It is not within the remit of ICANN to get in -- to play a role in that regard with respect to the rights to connectivity in a specific country. Of course we are deeply committed to making sure that Internet is used as a development tool, and we want to continue using it in most of the countries, but it is not within ICANN's mission to interact in that field, going beyond our remit as established by our bylaws.

So in that regard, every government, every community in every country has to come up with its own policies and strategies.

Thank you.

KAVEH RANJBAR: Thank you very much, Lito.

I would like to announce the queue is closed because we won't have more time, but as Brad mentioned, there are multiple ways to send these questions and continue.

Please, gentleman on the right.

ELLIOT NOSS: Thank you, Elliot Noss from Tucows. We have spoken a couple of times this week and I have been very happy to see privacy as something that was on the agenda to a greater extent than has

been the case in previous meetings. There have been -- I've made a couple. Volker earlier also noted the need for ICANN to staff a privacy office.

I want to highlight the nature of this problem. Without ICANN staffing a privacy office to look at these issues from a global perspective, things on the ground become extremely difficult. Privacy legislation is national in its nature.

Inside of ICANN, it is the registrant who is the person who is affected by this legislation.

Most registrars have registrants from multiple countries. Many registrars have registrants from all over the world. Yet when ICANN is talking about a waiver program, that applies to the jurisdiction of the registrar.

As a Canadian registrar, I am not entitled to a waiver for the nearly 5 million registrations that we have currently from Europeans. That problem is writ large when you look across hundreds of countries and hundreds of millions of registrants.

So will you immediately, given the impending deadlines coming up, commit to creating a privacy office with a privacy officer to look at these problems through the global lens?

[Timer Sounds]

[Applause]

KAVEH RANJBAR:

Thank you very much. As you know, we have a compliance officer, and we are adding a consumer safeguard person. That's not an answer to your question, I know. And we are aware of all these sensitivities and issues. We are studying the issue, and we will definitely get back to you on that.

Thank you.

Please.

SEBASTIEN DUCOS:

Hi, Sebastien Ducos, geo TLD group. Elliot and I should have prepared a duet. I should be closer. Elliot and I should have prepared a duet. I have exactly the same topic, or related topic.

I thank ICANN for having organized so many meetings that were in relation to data privacy this time. As GeoTLD Group, we raised the awareness on this a year ago, with our first issues appearing from -- to our members from the Netherlands. It's taken a year to get this meeting organized, to have these relationship with the DPAs. It's -- We have barely another year to get ready for the whole program. So I ask now until the next year at every single

ICANN meeting, at least, please do invite the DPAs. Please ensure they are here. Please ensure the conversation is here.

We are having a GDD meeting in two months. I've already spoken with Cyrus briefly. Let's put that on the agenda. Let's talk about it and have this solution.

I'm also a back-end registry provider, NeuStar. I know how long it takes us technicians to go and implement these things, these solutions.

Don't come to us with a solution in a year's time. We won't have time to implement it by May.

We need to know early what we need to do, and we ask the community, we ask ICANN to help us facilitate this.

Thomas Rickert, who has been facilitating other big endeavors in this community, particularly in the last two years has offered his help. I'm offering his -- my help to him. We just would like to see ICANN responding with the same type of answers. Thank you.

[Applause]

KAVEH RANJBAR:

Thank you very much for the comments. I'll pass to Becky.

BECKY BURR: Thanks. I appreciate and have heard both the combination of frustration about getting real traction on the issue and anxiety about ensuring that there is adequate compliance on the compliance state.

I hope that -- you may have heard me say earlier today that the data protection authorities who were here and others have -- are very much engaged and committed. We are actively looking at this, all of the -- I think there's going to have to be a plan in the community and with the board and with org to put it together. It may well be that a privacy officer is either required or appropriate. All of those things are on the table.

We need a bit more time to think about what all of the options are, but we definitely understand that this is a very pressing issue.

SEBASTIEN DUCOS: So we all need a bit more time, not just on this side. On this side, too. Let's all work together to give ourselves as much time as possible.

BECKY BURR: Correct.

KAVEH RANJBAR: Understood. Thank you very much.

I will go back to Brad for an online question.

Before that -- because as I announced, we closed the queue. That's for your convenience because I don't think we will get time. So please send your questions to engage@icann.org -- or engagement.

Brad.

REMOTE INTERVENTION: I have a question from Awal who is an ICANN fellow. When will we see an ICANN meeting without any closed sessions?

KAVEH RANJBAR: Any takers, or should I? Okay. Ah, we have Thomas.

THOMAS SCHNEIDER: Sorry, I have to say this. The GAC, the governments, don't have any closed sessions anymore since last year Marrakech. Thank you.

[Applause]

KAVEH RANJBAR: Okay. I think we will leave it at that.

Please.

ALASTAIR STRACHAN: Good afternoon. Alastair Strachan here as a first-time Fellow and first-time ICANN attendee. The Fellowship scheme is something I wish to express my gratitude towards ICANN for and also emphasize the importance of the scheme.

I'm here with 58 incredibly passionate, talented people who would not have the opportunity to attend without the Fellowship.

[Applause]

We've been told many times there are no stupid questions. And whilst I've challenged that statement quite a few times, I wish to thank the community as a whole being so welcome for being so welcoming to newcomers trying to navigate the labyrinth that is ICANN and the never-ending string of acronyms. So thank you.

[Applause]

KAVEH RANJBAR: Thank you very much. I will pass to Chris.

CHRIS DISSPAIN: Thank you. Speaking entirely personally, although I suspect this feeling is -- much of the board has the same feeling. I just want to say that I think the Fellowship Program is one of the most amazing things that ICANN does. I'm personally incredibly proud to be part of an organization that does it. I think the people who are Fellows and come to these meetings are an extraordinary bunch of people. So I would like to say thank you very much to you for being here at ICANN.

UNKNOWN SPEAKER: And, yes, there is no stupid question.

KAVEH RANJBAR: Thank you very much.

I want to add actually the biggest step from my point of view, my perspective, is when you come up and when newcomers and Fellows come up and ask questions, that's the biggest step to engage. And that's a very good start. So I'm very happy to see that, the newcomers.

With that, I will go to the next question. Please.

OLEKSANDR TSARUK: Hello. My name is Oleksandr. I'm from Ukraine. I am also participant in the Fellowship Program and would say thank you,

ICANN. Firstly, I'm first time asking the question to my board, first time in my life. And I would like to think that you communicate with the public so openly and everyone can come and ask you a question.

I participated in ICANN since ICANN50 and have some ideas to share how to make the change of thoughts and engagement more efficient.

There is good programs of engaging young persons in Fellowship Program and Next Gen Program. But there is a group of people which remain sitting in the Internet and watching after what the people also do. They have awesome ideas. ICANN could engage persons with I.T. background by organizing hackathons on each meeting. And definitely it should be, like, a part of social responsibility program. You should invest your expertise to the constituency because we have -- see that the current leadership pay more attention to the cybersecurity issues and the resilience of the Internet.

There is -- we have billions of Internet users with good ideas. They could probably build startup which could offer the better and faster and more safer Internet for everyone. And it could become a new technology. Maybe some new protocols could be designed in such hackathons.

And the second issue is Open Data Initiative. You should pay more attention in this because probably some guys --

[Timer sounds.]

-- could design the bot which will find the solutions for some problems. So open data initiative is the second issue. Thank you.

KAVEH RANJBAR:

Thank you very much.

I think to give a quick comment on that, Sally might be the best person from ICANN org to give you an answer.

SALLY COSTERTON:

Thank you. Thank you. So for the question about the hackathons, we did do this, in fact, in Hyderabad. And I know that Ram has been very enthusiastic, Ram Mohan, about this process of bringing in Internet users.

I think he was saying, in other words, there were -- how many were there, Ram? 200?

RAM MOHAN:

That's right.

SALLY COSTERTON: And they were mostly under 20 years old, which I think kind of hits two of your target groups.

To the question about how do we have outreach or where is the place for I.T. entrepreneurs, why the tech participants, if that's a better word, so people who are in the technology space but not necessarily in the DNS space already, this is a good question. And it was asked this morning actually in another meeting, and we didn't have the chance to answer it.

Through our business -- for us in engagement, that would sit under our business engagement, our business outreach and potentially our academic outreach, if we have people who are studying engineering or marketing or this sort of thing in universities. So I think we don't -- we see it through different lenses.

But you make an excellent point. Not everybody -- clearly not everybody we need to engage already knows about the domain name system.

So we have to strike that balance between going out and finding, if you'd like, our close relations, who we would like to bring in towards us, without going so far out that we are out of ICANN's mission and scope. Thank you.

OLEKSANDR TSARUK: Thank you. But ICANN has developed a good communication online system. So you could get the people online from different parts of the world each meeting. Thank you.

KAVEH RANJBAR: Thank you very much.

I know you've been waiting a lot, but I have to take one online because we have a ton of questions online.

Brad.

REMOTE INTERVENTION: From Paul Foody: Toward the end of ICANN58's Public Forum Number 1 on Monday, someone at the mic said there had been 300,000 participants at ICANN57 in Hyderabad. Although the host of the public forum attempted to correct him, saying he believed 300,000 was the number of remote participants, the rest of the board remained silent.

Since according to the ICANN57 "By the Numbers" report, the remote participation section lists the total unique participants at just 4,898. Was the board's failure to immediately correct the 300,000 figure a deliberate misrepresentation on the board's part of ICANN's level of public involvement or proof that the

board has no idea of the extent to which ICANN's public outreach initiatives have failed?

Question 2: Following the earlier remote question regarding ICANN's attitude to end users and the answer that ICANN serves the global public interest, is ICANN willing to give members of the public access to ICANN assets, specifically video and audio recordings of its public meetings, such as this one, in order that the public might be better informed as to ICANN's activities? If so, how can I go about requesting such assets?

KAVEH RANJBAR: I will give you to Ram.

RAM MOHAN: Kaveh, thank you.

I was at the ICANN57 meeting in Hyderabad, as were many of you. And I think we can all recognize that the community member who said 300,000 misspoke. Perhaps he meant over 3,000, which would be accurate.

Now, I think our board member who responded, I thought was actually quite diplomatic in saying that if it was -- if 300,000 was a valid number, then the way to account for that would have been if there had been that many people online.

I thought that was actually quite a diplomatic answer that didn't embarrass somebody from our community.

So I actually find it quite -- I don't know what the right word for it is -- undiplomatic, shall we say, to say that this is a deliberate misrepresentation, when I think it was really an attempt to be quite polite and to ensure that we don't embarrass members of our community who are speaking for their first time.

Thank you.

[Applause]

MIKE SILBER:

If I can just take a few seconds from Ram, from what's left on Ram's clock to say that the vast majority of ICANN's so-called assets are available on the meeting archives pages. And you are able to get recordings, videos, transcripts from historical meetings going back many years. And, in fact, for most meetings, I'd encourage you instead of corresponding and requesting, simply visit the meetings archives pages and you'll be able to find the vast majority of that material yourself.

KAVEH RANJBAR:

Excellent. Thank you, Ram. And thank you, Mike.

So please.

CAROLINA MATAMOROS FERRO: Greetings. Carolina Matamoros. I'm a Next Gen from Colombia. I'm based in Berlin. We have all seen how the Internet have come to (indiscernible). Even us, Next Gens, yes, we also saw that happen. We also heard the weird noise we had to go through to enter the Internet. And it's evolution.

So at the beginning, you would say that the first challenge or the most challenging thing that we had to face was to make the system a system, to put it in place. It was much more an infrastructure and kind of outreach process.

Then it began to change, and the challenge became to actually be able to get to the people, to the communities, to be able to reach every individual and to connect all of them. Even here at the beginning of the ICANN meeting, we had the very successful rates that are hearing their mark. They are almost done. Actually I was -- I think that was the way it was referred to.

So with the evolution of the technology and all -- how the information has changed, the Internet has grown exponentially. And with it, it has also grown in the amount of fake information that is in there. And I think -- and it's maybe just a personal belief -- right now that may be the most challenging thing we may have in front of ourselves. Because before the Internet was a source of information, right now we could say that it is a

source of "the" information. A lot of confusion is going out, out of there.

So I'm wondering from the base of the basic users, the end users, Clement's mother, for example, what can -- what is ICANN doing to defend them so they can actually reach the information and have an open and clear Internet?

KAVEH RANJBAR:

So basically you're talking about the content, correct? Okay. I think I will give it to Cherine.

CHERINE CHALABY:

Thank you. I have the same problem with my children, trust me. I -- ICANN's mission is really -- and I think it's been mentioned before, so this is not going to come to you as a surprise, but our mission is very narrow in relation to the coordination of the naming and addressing system of the Internet. We, unfortunately, don't deal with access to the Internet or the content of the Internet. So it's not something within -- within our remit. So it's -- it's not a good answer, it's not what you want to hear, but it is a limitation on our mission, unfortunately.

CAROLINA MATAMOROS FERRO: I know that's the mission, I'm aware of it. But I also am aware of your commitment with the stability of the net and your willingness to keep it open. So we can also be seeing this as a structural issue. Like how do you frame a library? A library you know where history books are and you know where novels are. You can actually build and make the structure so that the content is more clear. I know it's based on content but the current amount of information is actually demanding that maybe the structure of -- or in itself has to be evaluated. So I'm just reaching the question out because maybe something has to be done about it and the director board and ICANN must think about that.

CHERINE CHALABY: Thank you. I don't think I can say more, but point taken. Thank you very much. Thank you.

KAVEH RANJBAR: Thank you very much for the question. We have another online, Brad?

REMOTE INTERVENTION: From Adiel Sidique from Pakistan a former next-gen ambassador and first-time fellow, but speaking in his personal capacity. "The ICANN board relocated ICANN 57 to Hyderabad for good reasons,

but during the conference people of a certain nationality were taken to police stations for reasons unknown. And might I add, these people were from the privileged group of next-gen ambassadors and fellows. So my request of the board is, either ask the host for the treatment of people beforehand or do not allow meetings at no-so-neutral locations. Thank you."

KAVEH RANJBAR:

Thank you very much. Goran.

GORAN MARBY:

The meetings' location, as you know, is something that is widely discussed and many times and the community has decided upon how we actually conduct those where we do, where we travel around the world. During this meeting and the meeting in Hyderabad, many people have asked me and other parts of the staff that should we take in more things into account. And I -- that is actually a discussion that belongs within the community because we do this to support the multistakeholder model and all discussions about how to move things is actually in your hands. And that's important to realize.

With that said, we see over the world, many countries right now who looks into different Visa rules, prohibits people from entering countries. One of the things we've done -- we cannot

do anything about that underlying problem unless we mention, as you know, we added support and more resources for handling our Visa applications to be better to do that. There is a world that's changing, not always in a good place. And I would encourage the community to continue that discussion. Thank you.

KAVEH RANJBAR: Thank you very much, Chair. Gentleman.

SIVASUBRAMANIAN MUTHUSAMY: My name is Sivasubramanian. My company, Nameshop, based in India, has applied for a top-level domain name with a change request to the string .INTERNET. Nameshop is also one of the three applicants for applicant support. Over the past five years, I've sought the attention of the CEO and board to the evaluation and reconsideration of the TLD application.

Here in Copenhagen, Nameshop met with the GDD to discuss the public interest commitment component of the application for .INTERNET, and a document outlining the commitments has been handed over for the attention of the board and CEO.

I particularly wish to request the attention by the board and CEO to the commitment operate .INTERNET in a responsible manner in tune with DNS industry's best practices with possible

innovations so as to be of value to the DNS and to the Internet.
Thank you.

KAVEH RANJBAR: Thank you very much. I think this is another one for Akram.

CHRIS DISSPAIN: It was the mention of GDD, Akram.

KAVEH RANJBAR: Magic word.

AKRAM ATALLAH: Thank you very much for the question. As we've discussed multiple times, we don't have the ability to grant a different string that has not been applied for originally and we will -- we will continue to -- to discuss to reach something that's agreeable to the applicant and resolve this issue for them. Thank you.

KAVEH RANJBAR: Thank you very much. We have five minutes left. Five minutes left. A lot of online questions, and one in room. I will go get one online, get back to you, and if possible another online. So let's try to be fast and efficient. Brad.

REMOTE INTERVENTION: From Sze Ming, program manager at the Sinar Project. "In the open data initiative session someone mentioned about open data by default, and as our cybersecurity community is always concerned about privacy issues, I want to ask how ICANN can take a balance in between open data by default and privacy by default? What are the efforts of ICANN to facilitate or monitor the privacy while being open and transparent?"

KAVEH RANJBAR: Thank you very much. I think the best person would be -- Goran.

GORAN MARBY: Thank you very much. It's a very good question. And that is something that we always look into. With the -- we discussed this, the -- the appetite for more data is very natural, and that's something that's been discussed during this meeting and actually since I started. And the open data initiative is right now where we go through -- we actually do data mining in the fact that we're trying to find out which data we have. Before we publish that data, one of the things that we actually look into is if it's -- you know against privacy regulation, for instance. Most of the data we have that we are storing have very little value when it comes to privacy. But it's something we look into it.

It is, as was said a couple of times, a longer ambition how we're going to make sure that we stand up to the quality when it comes to transparency for all of data. And during a letter I sent just a couple of days ago to an answer to a letter which you can probably see on the web already now, we try to go through what kind of data we have and how we're going to dispute it. That is also an invitation to many of you to help us also to tell us when and where you need data. I think this is going to be a very -- it's very hard to put a specific point to this one more than the awareness that you raise to us. Thank you.

KAVEH RANJBAR:

Thank you very much. And last question on the floor.

DIRK KRISCHENOWSKI:

Dirk Krischenowski from . BERLIN. I believe following that privacy discussion the whole week there's no way back, we will see a much stricter handling of private data and probably much closer WHOIS in the future in many countries in the world. But I believe we are not alone, so ICANN and the community and the TLDs, and there are out there a lot of good examples already in Euro, for instance, the European .EU managed by EURid, they have closed the WHOIS mainly. And there are other examples like .NL, .AMSTERDAM, .THECATALONS, .FRL, and I think this is a really crystalizing point where CC -- the ccTLD world and the gTLD

world comes together and having similar interests and maybe similar contracts with ICANN and similar obligations -- obligations. Did ICANN thought about of stronger engaging the gTLD space with a ccTLD space on this matter?

[Applause]

KAVEH RANJBAR:

Thank you for the question. I will pass to Becky, but I just want to add that the main value I see, I mean on a meta level, the greatest thing I observe as a mostly technical person is there is a lot of room for deliberation here, and I see a lot of value in that. So getting to a solution is obviously another thing which Becky will talk about.

BECKY BURR:

So actually I think that's exactly right. There are great examples of how ccTLDs around the world, including EU-based ccTLDs have dealt and are dealing with them. There is variation from time to time, but I think Kaveh is exactly right, the community needs to come together and understand collectively the requirements for this and then we proceed from that. So those - - those examples are out there, they are very informative, they are part of the contribution, but we have to -- we have to expeditiously have the baseline requirements conversation.

DIRK KRISCHENOWSKI: Okay. Thank you.

KAVEH RANJBAR: Thank you very much, and we have one final online one before we go to the closing.

REMOTE INTERVENTION: This question is in Spanish, so people may want to grab their headsets. My colleague, Alexandra Dans, will read the question.

Good afternoon. I'm Alexis (saying name) from Venezuela. I'm a fellow, and this is my first participation in person at an ICANN meeting. When I arrived in Denmark I heard the CEO of ICANN saying the following: We are witnessing something that did not exist in the past. This is the Internet. Although now I believe it is very difficult to predict the future, I can say that being here at ICANN 58 today has been the best learning experience about the future that I have had. Thank you for connecting me with this reality of the Internet.

During our participation, we heard about the changes that ICANN is going to implement. It's going to adopt a documentation system, some improvements to the Web site, and also messaging technologies. Don't you think that ICANN

should also implement improvements and enhancements to broaden and diversify the participation of the Internet users so that this will be more effective, verifiable, and outcome-based? Thank you.

KAVEH RANJBAR: Thank you very much. And I guess Goran from ICANN org.

GORAN MARBY: Thank you. Unfortunately, my Spanish is not useful. We talked about diversity and effectiveness of that many times over the last couple of days, and there's little thing to add to it. But just a little bit more thing. We're in the process right now internally and also including the board where we try to -- we've gone from a fairly fast expansion period where we actually went from something that was fairly U.S.-based into something that is more global and internationalized. This is based on the ICANN strategy, what is done by the community. And that is the benchmark we are using for that.

We now are going into a period where we're trying to be more understanding of the local needs, and to figure out a name we call it a demand-driven engagement. And demand-driven engagement is really about -- is our mission to be more understanding of different regions and parts of the world. One

example of that is the engagement we do in Africa. Another one is what we're doing also from Singapore. And it's really about to understand the different parts of the world have different needs. But in the end, we also have to engage with you as a community because you're the ones who are going to tell us how we're going to engage. There are, for instance, in Africa we work very much with governments. In other parts of the world we work more with the civil society.

Will we ever be able to mesh that in an effective way? No, we will not because we're not a company. We don't do this for profit. The only thing we can do that is if see -- we have more participation. And to end that, I'm really proud, and I think the board shares that, I don't think we ever had so many newcomers coming up to the microphone as we had for the last couple of days. Also in the open session we did with the executive team. And I would really thank them, really from my heart, for having the bravery to come up to this sometimes little bit scary environment to ask those questions because you help us. And I think that is the only thing we can say of good effectiveness outreach you're actually here.

[Timer sounds]

So with that I applaud you.

[Applause]

KAVEH RANJBAR: Thank you very much. Without further adieu, I will give you Mr. Cherine, our vice chair of the board.

CHERINE CHALABY: Thank you, everyone. I think we've reached the end of this session, and thank you, Goran, for these -- for these words about welcoming the newcomers and the fellows. It's really been very heartening to see as many coming -- coming to the microphone and participating and engaging in this meeting.

So I would also like to thank -- to thank the board facilitators, the -- and everyone that worked to make this -- this session successful. And all of the participants and all of those that contributed to this session.

So now we're going to take a break. The board meeting will start at 5:00. I do invite you to stay in the room, and you can watch the board voting and deliberating on a few resolutions. So thank you very much, and we'll take a break now. Thank you.

[Applause]

STEVE CROCKER: We're going to start at 5:00. Thank you.

[END OF TRANSCRIPTION]

Exhibit 35

13 DECEMBER 2017

COMMUNICATIONS BETWEEN ICANN ORGANIZATION AND THE CPE PROVIDER

PREPARED FOR JONES DAY





Table of Contents

I.	Introduction.....	1
II.	Executive Summary.....	3
III.	Methodology.....	3
IV.	Background on CPE.....	7
V.	Analysis.....	9
	A. ICANN Organization’s Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.	10
	1. The Vast Majority of the Communications Were Administrative in Nature.....	11
	2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.....	11
	B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.	13
	C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.....	14
	D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.	15
VI.	Conclusion.....	17

I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he

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

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 1 of the CPE Process Review and specifically details FTI's evaluation and findings regarding ICANN organization's interactions with the CPE Provider with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI's review of the written communications and documents described in Section III below and FTI's interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.

III. Methodology

FTI followed the international investigative methodology, which is a methodology codified by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally and which grants certification to members who meet the ACFE's standards of professionalism.⁹ This methodology is used by both law enforcement and private investigative companies worldwide. This methodology begins with the formation of an investigative plan which identifies documentation, communications, individuals and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation. Then, investigators interview individuals who, based upon the preceding review of relevant documents, may have potentially relevant information. Investigators then analyze all the information collected to arrive at their conclusions.

Here, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:

⁹ www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2): <https://newgtlds.icann.org/en/applicants/agb>;
2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
3. CPE Panel Process
Document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
4. CPE Guidelines
document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
7. CPE results and reports:
<https://newgtlds.icann.org/en/applicants/cpe#invitations>;
8. Preparing Evaluators for the New gTLD Application Process:
<https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest:
<https://www.icann.org/news/announcement-2009-02-25-en>;
10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
11. Evaluation Panels Selection Process:
<https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;
12. Application Comments:
<https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request:
<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests:
<https://www.icann.org/resources/pages/accountability/reconsideration-en>;

16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1:
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;
26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;

29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016: <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and
 30. New gTLD Program Implementation Review Report: <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman: <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN organization that were responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel

- Interviewed relevant CPE Provider personnel
- Compared the information obtained from both ICANN organization and the CPE Provider.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹⁰ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹¹ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹²

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹³ In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁴ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.¹⁵ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.

¹⁰ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹¹ See *id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹² *Id.*

¹³ <https://newgtlds.icann.org/en/applicants/agn>.

¹⁴ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁵ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁶

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁷

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant Guidebook and CPE Guidelines. According to the CPE Provider interviewees, each evaluator separately presented his/her findings in a database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated

¹⁶ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁷ *Id.*

that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer questions that arose during the review.¹⁸ The core team would then deliberate and come up with a consensus as to scoring. FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.¹⁹

ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report. Once the CPE Provider completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization. ICANN organization provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls.

V. Analysis

FTI undertook its analysis after carefully studying the materials described above and evaluating the substance of the interviews conducted. The materials and interviews provided FTI with a solid understanding of CPE. The interviews in particular provided FTI with an understanding of the mechanics of the CPE process as well as the roles

¹⁸ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁹ See Applicant Guidebook §4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.").

undertaken both separately and together by ICANN organization personnel and the CPE Provider during the process.

FTI proceeded with its investigation in four parts, which are separately detailed below: (i) analysis of email communications among relevant ICANN organization personnel and between relevant ICANN organization personnel and the CPE Provider (including email attachments); (ii) interviews of relevant ICANN organization personnel; (iii) interviews of relevant CPE Provider personnel; and (iv) analysis of draft CPE reports.

A. ICANN Organization’s Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.

In an effort to ensure the comprehensive collection of relevant materials, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that “hit” on a search term. The search terms were designed to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI’s investigation. In FTI’s experience, it is a best practice to begin with a broader collection and then refine the search for relevant materials as the investigation progresses. As a result, the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. FTI’s Technology Practice worked with ICANN organization to ensure that the materials were collected in a forensically sound manner. In total, ICANN organization provided FTI with 100,701 emails, including attachments, in native format. The time period covered by the emails received dated from 2012 to March 2017.

An initial review of emails produced to FTI confirmed FTI’s expectation that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI’s investigation. As a result, FTI performed a targeted key word search to

identify emails pertinent to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. FTI developed and tested these additional terms using FTI Technology's Ringtail eDiscovery platform, which employs conceptual analysis, duplicate detection, and interactive visualizations to assist in improving search results by grouping documents with similar content and highlighting those that are more likely to be relevant.

Based on FTI's review of email communications provided by ICANN organization, FTI found no evidence that ICANN organization had any undue influence on the CPE reports or engaged in any impropriety in the CPE process. FTI found that the vast majority of the emails were administrative in nature and did not concern the substance or the content of the CPE results. Of the small number of emails that did discuss substance, none suggested that ICANN acted improperly in the process.

1. The Vast Majority of the Communications Were Administrative in Nature.

The email communications that FTI reviewed and which were provided by ICANN organization were largely administrative in nature, meaning that they concerned the scheduling of telephone calls, CPE Provider staffing, timelines for completion, invoicing, and other similar logistical issues. Although FTI was not able to review the CPE Provider's internal emails relating to this work, as indicated above, FTI did interview relevant CPE Provider personnel, and each confirmed that any internal email communications largely addressed administrative tasks.

2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.

Of the email communications reviewed by FTI, only a small number discussed the substance of the CPE process and specific evaluations. These emails generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports. In these communications, however, FTI observed no instances

where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached. Instead, ICANN organization personnel asked the CPE Provider to clarify language contained in draft CPE reports in an effort to avoid misleading or ambiguous wording. In this regard, ICANN organization's correspondence to the CPE Provider largely comprised suggestions on a particular word to be used to capture a concept clearly. FTI observed no instances where ICANN dictated or sought to require the CPE Provider to use specific wording or make specific scoring decisions.

Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation. Based on a plain reading, ICANN organization's questions were clearly intended to ensure that the CPE Provider had engaged in a robust discussion on each CPE criterion in the CPE report.

The third category comprised emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.²⁰

Across all three categories, FTI observed instances where the CPE Provider and ICANN organization engaged in a discussion about using the correct word to capture the CPE Provider's reasoning. ICANN organization also advised the CPE Provider that the CPE Provider's conclusions, as stated in draft reports, at times were not supported by sufficient reasoning, and suggested that additional explanation was needed. However, ICANN organization did not suggest that the CPE Provider make changes in final scoring or adjust the rationale set forth in the CPE report.

Throughout its review, FTI observed instances where ICANN organization and the CPE Provider agreed to discuss various issues telephonically. Emails would then follow

²⁰ The CPE Provider may, at its discretion, provide a clarifying question (CQ) to be issued via ICANN organization to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

these telephone calls and note that the latest drafts reflected the telephone discussions that had occurred. FTI reviewed the drafts as noted in these communications and compared them with prior versions of the draft reports that were exchanged and confirmed that there was no evidence of undue influence or impropriety by ICANN organization, as described further below.

Ultimately, the vast majority of ICANN organization's emails were administrative in nature. FTI found no email communications that indicated that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE Process.

B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

In March 2017, FTI met with several ICANN organization employees in order to learn more about their interactions with the CPE Provider. FTI interviewed the following individuals who interacted with the CPE Provider over time regarding CPE.

- Chris Bare
- Steve Chan
- Jared Erwin
- Cristina Flores
- Russell Weinstein
- Christine Willett

Each of the ICANN organization personnel that FTI interviewed confirmed that the interactions between ICANN organization and the CPE Provider took place via email (including attachments which were primarily comprised of draft reports with comments in red line form) and conference calls.

The interviewees explained that the initial draft reports received from the CPE Provider (particularly for the first four reports) were not particularly detailed, and, as a result,

ICANN organization asked the CPE Provider a lot of “why” questions to ensure that the CPE Provider’s rationale was sufficiently conveyed. The interviewees stated that they emphasized to the CPE Provider the importance of remaining transparent and accountable to the community in the CPE reports. Based on a plain reading of ICANN organization’s comments to draft CPE reports, none of ICANN organization’s comments were mandatory, meaning that ICANN organization never dictated that the CPE Provider take a specific approach. FTI observed no instances where ICANN organization endeavored to change the scoring or outcome of any CPE. This was confirmed by both ICANN organization personnel and CPE Provider personnel in FTI’s interviews. If changes were made in response to ICANN organization’s comments, they usually took the form of the CPE Provider providing additional information to explain its scoring decisions and conclusions.

The CPE reports became more detailed over time. The ICANN organization personnel who were interviewed noted that, over time, the majority of communications took place via weekly conference calls. Most of ICANN organization’s interaction with the CPE Provider consisted of asking for supporting citations to the CPE Provider’s research or that more precise wording be used. ICANN organization personnel noted that they observed robust debate among CPE Provider personnel concerning various criteria, but that the CPE Provider strictly evaluated the applications against the criteria outlined in the Applicant Guidebook and the CPE Guidelines. The interviewees confirmed that ICANN organization never questioned or sought to alter the CPE Provider’s conclusions.

C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI asked to interview relevant CPE Provider personnel involved in the CPE process. The CPE Provider stated that only two CPE Provider staff members remained. In June 2017, FTI interviewed the two remaining staff members, who were members of the core team for all CPEs that were conducted. During the interview, in addition to understanding the CPE process described above, see section IV above, FTI

endeavored to understand the interactions between the CPE Provider and ICANN organization.

The interviewees confirmed that ICANN organization was not involved in scoring the criteria or the drafting of the initial reports, but rather the CPE Provider independently scored each criterion. The interviewees stated that they were strict constructionists and used the Applicant Guidebook as their “bible”. Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

The CPE Provider also stated that ICANN organization provided guidance as to whether or not a particular report sufficiently detailed the CPE Provider’s reasoning. The CPE Provider stated that it never changed the scoring or the results based on ICANN organization’s comments. The only action the CPE Provider took in response to ICANN organization’s comments was to revise the manner in which its analysis and conclusions were presented (generally in the form of changing a word or adding additional explanation). The CPE Provider stated that it also received guidance from ICANN organization with respect to whether a proposed Clarifying Question was permissible under applicable guidelines.

In short, the CPE Provider confirmed that ICANN organization did not impact the CPE Provider’s scoring decisions.

D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI requested and received from the CPE Provider all draft CPE reports, including any drafts that reflected feedback from ICANN organization. ICANN organization provided feedback in redline form. Some draft reports had very few or no comments, while others had up to 20 comments. In some drafts, the comments were just numbered and not attributed to a particular person. As such, at times it was difficult to discern which

comments were made by ICANN organization versus the CPE Provider.²¹ Of the comments that FTI can affirmatively attribute to ICANN organization, all related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions. This is consistent with the information provided by ICANN organization and the CPE Provider during their interviews and in the email communications provided by ICANN organization.

For example, FTI observed comments from ICANN organization personnel suggesting that the CPE Provider include more detailed explanation or explicitly cite resources for statements that did not appear to have sufficient factual or evidentiary support. In other instances, the draft reports reflected an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey. It is clear from the exchanges that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another.

In general, it was not uncommon for the CPE Provider to make revisions in response to ICANN organization's comments. As noted above, these revisions generally took the form of additional information to add further detail to the stated reasoning. However, none of these revisions affected the scoring or results. At other times, the CPE Provider did not make any revisions in response to ICANN organization's comments.

Overall, ICANN organization's comments generally were not substantive, but rather reflected ICANN organization's suggestion that a revision could make the CPE report clearer. Based on FTI's investigation, there is no evidence that ICANN organization ever suggested that the CPE Provider change its rationale, nor did ICANN organization dictate the scoring or CPE results.

²¹ Some comments to draft CPE reports followed verbal conversations between CPE Provider staff and ICANN organization; the CPE Provider stated that it did not possess notes documenting these conversations.

VI. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI found no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider. As such, FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE process.

Exhibit 36

SAN JUAN – ICANN Board Meeting
Thursday, March 15, 2018 – 17:00 to 18:00 AST
ICANN61 | San Juan, Puerto Rico

CHERINE CHALABY: Can we start? Thank you. Welcome, everyone. This is the ICANN regular meeting, regular board meeting, held here in San Juan, Puerto Rico, on 15 March 2018 at 16-and-9 minutes.

I want to start by taking a roll call, then I'm going to ask our secretary, board secretary, to give us confirmation that we have a quorum. Then we will talk about the consent agenda and then the main agenda. So first with the roll call. May I start with Manal?

MANAL ISMAIL: Manal Ismail.

LOUISEWIES VAN DER LAAN: Louisewies van der Laan.

LITO IBARRA: Lito Ibarra.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

BECKY BURR: Becky Burr.

KAVEH RANJBAR: Kaveh Ranjbar.

KHALED KOUBAA: Khaled Koubaa.

SARAH DEUTSCHE: Sarah Deutsche.

CHERINE CHALABY: Cherine Chalaby.

CHRIS DISSPAIN: Chris Disspain.

MAARTEN BOTTERMAN: Maarten Botterman.

RAM MOHAN: Ram Mohan.

RON da SILVA: Ron da Silva.

LEON SANCHEZ: Leon Sanchez.

GEORGE SADOWSKY: George Sadowsky.

MATTHEW SHEARS: Matthew Shears.

AVRI DORIA: Avri Doria.

JONNE SOININEN: Jonne Soininen.

MIKE SILBER: Mike Silber.

GORAN MARBY: Goran Marby.

CHERINE CHALABY: And is Akinori online?

AKINORI MAEMURA: Yes, Akinori Maemura is on the line. Thank you.

CHERINE CHALABY: Thank you very much. Mr. Secretary, do we have a quorum?

JOHN JEFFREY: Yes, we do, Mr. Chairman.

CHERINE CHALABY: Thank you very much. So we will start with the consent agenda. I will read the items on the consent agenda, and when it comes to the thank you notes, thank you parts, I'm going to ask various members of the board to read those. So the consent agenda has 1a, board meeting minutes from 4th of February, 2018. Point 1b, outsource service provider Zensar contract approval. 1c, new GNSO voting thresholds to address post-transition roles and responsibilities of the GNSO as a decisional participant in the empowered community, proposed changes to ICANN bylaws. 1d, initiating the second review of the Country Code Name Supporting Organization, ccNSO. 1e, transfer of the .TD Chad top-level domain to the l'Agence de Developpement des Technologies de l'Information et de la Communication, ADETIC.

Now I'm going to call upon Lito Ibarra to read the first thank you to our local host, item 1f.

LITO IBARRA: Thank you. I will read it in Spanish. Saying to the local host of ICANN61 meeting, the board wishes to extend its thanks to the Honorable Ricardo Rosello Nevares, Governor of Puerto Rico; Oscar Moreno de Ayala, President of the top-level domain of Puerto Rico; Pablo Rodriguez, Vice President of -- Vice President of the top-level domain of Puerto Rico; Carla Vidal, director of Puerto Rico tourism company and the local host and organizer, top-level domain of Puerto Rico. NIC.PR. Cherine, gracias.

CHERINE CHALABY: ... San Juan meeting.

MIKE SILBER: Thanks, Cherine. The board wishes to thank the following sponsors, VeriSign, Claro, Liberty, Canadian Internet Registration Authority, CIRA, Afilias plc and Public Interest Registry and Uniregistry.

CHERINE CHALABY: Thank you, Mike. And I now ask Leon Sanchez to read item 1H, thank you to the interpreters, ICANN org, event and hotel teams of ICANN61.

LEON SANCHEZ: Thank you very much, Cherine. The board expresses its deepest appreciation to the scribes, interpreters, audio visual team, technical teams, and the entire ICANN org team for their efforts in facilitating the smooth operation of this meeting. The board would also like to thank the management and the staff of the Puerto Rico Convention Center for providing a wonderful facility to hold this event. Special thanks are extended to Margaret Colon, sales and marketing director; to Vivian Santana, events director; Gianni Agostini Santiago, senior catering sales manager; Carlos Rosas, IT manager; and Wilson Alers from Media Stage. Thank you very much.

CHERINE CHALABY: That concludes all the items on the consent agenda. I would now like to ask one of the board members to propose a motion to approve all of the eight items on the consent agenda.

UNKNOWN SPEAKER: (Off microphone).

BECKY BURR: So moved.

CHERINE CHALABY: Okay. George will move. Who will second. Becky? Yes, Becky Burr has second. All of those for say aye.

[Chorus of ayes]

Any abstention? Any objection? All right. Thank you. Motion passed.

We're now going to move to the main agenda item. There are five -- there are four items on the main agenda. Each one has a shepherd. I will ask the shepherd to introduce the topic, then pass back to me to call for the vote. But before calling for the vote, each time I'm going to ask if there are any conflicts of interest, if any board members feels conflicted to raise their hand and make themselves known. Thank you very much. So the first item is 2a, and the shepherd is Chris Disspain and the topic next steps in Community Priority Evaluation process review. Chris.

CHRIS DISSPAIN: Thank you, Cherine. So I'm -- I'm going to take the trouble, there -- there's -- this resolution is followed by two others. I'm going to take the trouble to read the whereases because I think that sets out clearly what the resolutions are about, it's worth doing that, and then we'll call for conflicts and then I'll pass back to

you to take the vote. So this one is 2a, next steps in Community Priority Evaluation process review.

Whereas, the board directed the president and CEO, or his designees, to undertake a review of the process by which ICANN organization interacted with the Community Priority Evaluation provider, both generally and specifically, with respect to the CPE reports issued by the CPE provider.

Whereas, the Board Governance Committee determined that the review should also include an evaluation of whether the CPE criteria were applied consistently throughout each CPE report and two, a complication of the research relied upon by the CPE provider to the extent that such research exists for the evaluations that are the subject to pending reconsideration requests relating to the CPE process, collectively the CPE process, and then there's a reference to a link.

Whereas, the BGC determined that the following pending reconsideration requests would be on hold until the CPE process review is completed, and then there are the numbers of the reconsideration requests.

Whereas, the CPE process review was conducted by FTI Consulting Inc.'s global risk and investigations practice and technology practice.

Whereas, on 13 December 2017 ICANN organization published the three reports on the CPE process review.

Whereas, the board accountability mechanisms committee has considered the CPE process review reports, the conclusions to which are set forth in the rationale to this resolution, and has provided recommendations to the board of the next steps in the CPE process review.

Whereas, the board has considered the three CPE process review reports and agrees with the BAMC's recommendations.

Resolved, the board acknowledges and accepts the findings set forth in the three CPE process review reports. The board concludes that as a result of the findings of the CPE process review reports no overhaul or change to the CPE process for this current round of the new gTLD program is necessary.

Resolved, the board declares that the CPE process review has been completed.

And resolved, the board directs the board accountability mechanisms committee to move forward with the consideration of the remaining reconsideration requests relating to the CPE process that were placed on hold pending completion of the CPE process review in accordance with the transition process of

reconsideration responsibilities from the BGC to the BAMC document.

So I hope that makes it pretty clear what we're doing, and Cherine, I -- I'm going to hand it back to you, if you want to call for conflicts.

CHERINE CHALABY: Right. So two things. First of all, I'd like to call for conflicts. Any board member conflicted with regard to this resolution. Becky?

BECKY BURR: Yes. Neustar is the back-end registry service provider for some of the applicants who are relevant in this review and/or for applicants who may be in contention sets with those applicants.

CHERINE CHALABY: Thank you. Ram Mohan.

RAM MOHAN: Thank you. My employer Afiliis is in a similar situation as Becky's employer.

CHERINE CHALABY: Anybody else? George?

GEORGE SADOWSKY: Yes. Same reason as Becky.

CHERINE CHALABY: Thank you. Now I'm going to ask for someone to propose, someone to second, then I'm going to open it up for discussion, if anybody wishes to discuss. And then if anybody wishes to abstain on this resolution, please, if you wish to make a comment, please do so. So first of all, who would like to propose? Chris Disspain. Who would like to second? Khaled Koubaa. Any further discussion on this resolution?

AVRI DORIA: This is Avri. I will be making an abstention statement.

CHERINE CHALABY: Okay. Thank you. So I'll take the vote. Once we finish the call. I'll take a vote and then I'll ask you afterwards to make the abstention statement. Any further discussion on this resolution? No. Okay. So all of those for, say aye.

[Chorus of ayes]

Anyone against? Someone said aye in the background.

UNKNOWN SPEAKER: It's Akinori.

CHERINE CHALABY: Oh. Did he say aye or aye? Again. Anyone against? Any abstention? Avri.

AVRI DORIA: Thank you. Yes. I am abstaining from the vote on the acceptance of the report from FTI Consulting due to the fact that while I accept the path forward as defined in the motion, I cannot accept the report itself.

From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. In scope 2, the analysis of the application of criteria, while they described a rigorous methodology, the documentation describes their inability to fully apply that methodology. The report indicates that they were not able to obtain all of the required documentation from the CPE provider necessary for the full application of the process they had defined. Any scientific method, when the method cannot be rigorously applied, the results be viewed as, at best, tentative and should be treated with caution. Though FTI Consulting reports that there is no evidence of differential application of criteria, they cannot claim with certainty that

there was no differential application in the absence of full and rigorous application of their chosen methodology.

It also appears in the report that only a portion of the evaluators were interviewed. In fact, the report states that FTI consulting only interviewed two of the evaluators from a larger set of evaluators. This appears to me to be another flaw in the application of their methodology.

Any definitive determination that there was no conclusive differential application of criteria would require a further in-depth study of all CPE applications and would require not only the missing documentation but also require interviewing all of the evaluators and not just the two remaining employees of the evaluation teams.

At this point, it does not seem possible for a more in-depth study to be done, yet it is important that the process of resolving the contention set moves forward.

I, therefore, abstain from this motion.

Thank you.

CHERINE CHALABY: Thank you very much, Avri.

Mr. Secretary, we have one abstention, two voting members who have recused themselves, and one Board liaison who has recused himself.

Do we have a majority to pass this resolution?

JOHN JEFFREY: Yes, we do, Mr. Chairman.

CHERINE CHALABY: Thank you. The resolution is, therefore, passed.

I will now move on to the second resolution, item 2b. Chris Disspain is again the shepherd. Chris, take us through the resolution, please.

CHRIS DISSPAIN: Thank you, Cherine this resolution is in regard to .PERSIANGULF, and once again I'm going to read the whereas because I think it sets out clearly what it's about.

Whereas, ICANN org received the final declaration in the Gulf Cooperation Council v. ICANN Independent Review Process and the final declaration as to costs in the IRP.

Whereas, among other things, the IRP panel declared that the GCC is the prevailing party, and ICANN shall reimburse the GCC

the sum of \$107,924.16 upon the demonstration by the GCC that these incurred costs have been paid.

Whereas, the panel recommended that the Board take no further action on the .PERSIANGULF gTLD application, and in specific not to sign the Registry Agreement with Asia Green or any other entity in relation to the .PERSIANGULF gTLD. Whereas, in accordance with Article IV, Section 3.21 of the applicable version of the bylaws the Board considered the final declaration and the costs declaration at its meeting on the 16th of March 2017 and determined that further consideration and analysis was needed.

Whereas, the Board Accountability Mechanisms Committee conducted the requested further consideration analysis and has recommended that, 1, the Board treat the statement in the Governmental Advisory Committee Durban communique regarding .PERSIANGULF as if it were nonconsensus advice pursuant to the second advice option in module 3.1 subparagraph 2 of the Applicant Guidebook.

Or is that 11? It may be 11 of the Applicant Guidebook.

And, 2, the Board directs the BAMC to review and consider the materials related to the .PERSIANGULF matter, including the materials identified by the panel in the final declaration, and to

provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

Resolved, the Board accepts that the panel declared the following: The GCC is the prevailing party in the Gulf Cooperation Council versus ICANN IRP, and, 2, ICANN shall reimburse the GCC the sum of \$107,924.16 upon demonstration by the GCC that these incurred costs have been paid.

Resolved, the Board directs the president and CEO or his designee to take all steps necessary to reimburse the GCC in the same amount in furtherance of the IRP panel's costs declaration upon demonstration by the GCC that these incurred costs have been paid.

And finally, resolved, the Board directs the BAMC, 1, to follow the steps required as if the GAC provided nonconsensus advice to the Board pursuant to module 3.1, subparagraph 11, of the Applicant Guidebook regarding .PERSIANGULF; 2, to review and consider the relevant materials related to the .PERSIANGULF matter, and, 3, to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

CHERINE CHALABY: Thank you, Chris. Before I call for someone to propose and someone to second, I would like to call for conflicts of interest. Any conflicts of interests?

No? Okay. Who would like to propose this resolution? Mike? Who would like to second? Leon. Sorry, Sarah; he beat you to it.

Okay. Any further discussion on this resolution.

No? Okay. We're now we're going to call for the vote. All of those for, say aye.

MULTIPLE VOICES: Aye.

CHERINE CHALABY: Anyone against?

Any abstention?

Thank you. Resolution passed.

We now move to item 2.c, Chris Disspain again.

Chris.

CHRIS DISSPAIN: Thank you, Cherine.

This one is in respect to .HALAL and.ISLAM. Whereas, the final declaration of the Asia Green I.T. Systems Bilgisayar San. ve Tic. Ltd. -- I'm not going to keep saying that. AGIT I'm going to say. The ICANN Independent Review Process was issued on the 30th of November 2017. Whereas, among other things, the IRP panel declared that AGIT is the prevailing party and ICANN shall reimburse AGIT the sum of \$93,918.83. Whereas, in the final declaration, the panel recommended that in order to be consistent with the Core Value 8, the Board needs to promptly make a decision on the applications one way or another with integrity and fairness and noted that nothing as to the substance of the decision should be inferred by the parties from the panel's opinion in this regard. The decision whether yes-or-no is for the ICANN Board. Whereas, the Board Accountability Mechanisms Committee has recommended that the Board direct the BAMC to re-review the Governmental Advisory Committee nonconsensus advice as defined in Section 3.1 subparagraph 11 of the Applicant Guidebook, as well as the subsequent communications from or with objecting and supporting parties in light of the final declaration and provide a recommendation to the Board as to whether or not the applications for .HALAL and.ISLAM should proceed. And whereas, in accordance with Article IV, Section 3.21 of the applicable version of the bylaws, the Board has considered the final declaration.

Resolved, the Board accepts that the panel declared the following: AGIT is the prevailing party in the matter; 2,

ICANN shall reimburse AGIT the sum of \$93,918.83.

Resolved, the Board directs the president and CEO or his designee to take all steps necessary to reimburse AGIT in that amount in furtherance of the panel's final declaration. And resolved, the Board directs the BAMC to re-review the GAC nonconsensus advice as defined in the guidebook as well as the subsequent communications from or with objecting and supporting parties in light of the final declaration and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.

CHERINE CHALABY:

Thank you, Chris. Any conflict of interest?

No?

Okay.

Two board members have already said they want to propose and second before anybody else raised their hands.

Khaled Koubaa will propose, and Sarah will second.

Any further discussion?

No? I'll call for the vote.

All of those for, say aye.

MULTIPLE VOICES: Aye.

CHERINE CHALABY: Anyone against?

Any abstention?

Resolution passed.

And now I'm going to move on to the fourth and final resolution.
Lousewies.

LOUSEWIES VAN DER LAAN: Thank you very much, and I do realize I'm standing between people and their drinks. So being -- but I do think it's a very important point because we have to appoint the independent auditor for the fiscal year ending 30th of June 2018. And this is, of course, an annual exercise and an extremely important one because it is the independent auditor that gives both the Board but also the community the assurance that money, most of it which I would consider public money, your money, is being well spent and that there is no instances of fraud or losses.

The Audit Committee, which consists of Mike Silber, Sarah Deutsch, Akinori Maemura and myself, had the option of either reappointing the existent auditors, BDO, or changing the partner in that firm or appointing a new firm. We are recommending to the Board that we will continue with the current firm, BDO, at this point. They have -- will be doing it for the fifth time. There is no legal obligation to change, even though there is a suggestion of best practice that after five to eight years, one should consider changing either the partner or the audit firm.

So we are recommending to the Board that we will use the same audit firm for fiscal year '18, and that's -- I'm not going to read the resolution out because that's exactly what it says and that we're going to make sure we mandate the CEO and his designees to start the procedure with BDO.

Thank you.

CHERINE CHALABY:

Thank you, Lousewies.

Again, I am going to call for any conflicts with the firm of auditors we intend to appoint. Anyone conflicted by making this decision?

No?

Okay.

Who would like to propose? Lito was very quick.

Who would like to second? Mike. Ah, ooh. Three hands at the same time. I'll take Mike. Somebody should.

Thank you. Any further discussion?

Okay. I'm going to call for the vote. All of those for, say aye?

MULTIPLE VOICES: Aye.

CHERINE CHALABY: Aye.

Anyone against?

Any abstention?

Okay. Resolution passed.

Thank you all very much.

Now the last item on the agenda, any other business.

May I start from Goran.

GORAN MARBY: I would like to add a thanks to the any other business.

CHERINE CHALABY: Please do.

GORAN MARBY: First of all, I would like to thank Duncan, our communication senior V.P. This is his last meeting. He's going to go for another job. And I would like to recognize his efforts and his hard work and his friendship during the four years he's been here. I wish him the best of luck in his new jobs.

[Applause]

I have one more.

AVRI DORIA: Can I have a comment to that?

GORAN MARBY: I can't stop you, Avri.

AVRI DORIA: The chair could stop me. I wanted to add a comment that I had a brief conversation with Duncan during the break, and there is a

realization that just because someone leaves the staff doesn't mean they can't become a participant.

GORAN MARBY: Thank you.

CHERINE CHALABY: Duncan, did you hear this? When are you coming back?

GORAN MARBY: Despite this is the formal board meeting, I want to be personal for a second.

We have a person who is leaving us who is really the embodiment of the multistakeholder model. She's been with us for 18 years. She's in the org and the community, one of the most important people.

Since I had the pleasure to join ICANN, she every day has told me how to behave.

She is, in many ways, a spiritual advisor for me and a very good friend. Diane, I would like to give you very big applause and thank you for your hard work as this is your last ICANN meeting.

[Applause]

CHERINE CHALABY: Thank you, Goran. And so that you know, when I joined in in 2010, I was a newbie and totally lost. Diane Schroeder adopted me and she looked after me for a number of years until I was really able to feel comfortable with ICANN. So, Diane, we will miss you, and you've made a great, great contribution to ICANN. Thank you so much.

Thank you.

CHRIS DISSPAIN: May I say something?

CHERINE CHALABY: Yes, Chris wants to say something.

CHRIS DISSPAIN: Diane, may I have my printer back, please?

[Laughter]

I have to explain for those that don't know. Diane and I first met in Melbourne in 2001 at an ICANN meeting, and ICANN was a slightly smaller organization than it is now. And we were -- I was asked if I could lend ICANN a printer, because they didn't have one. So I did. And it was the only printer I had as well, so my printer disappeared into the ICANN meeting and on the last day when everyone was wrapping up I wandered into an office and

said -- found my printer and started to unplug it and there was a woman sitting there who stood up and said, excuse me, what do you think you're doing? And I said I'm taking my printer away. And we've been very close friends ever since.

So thank you, Diane.

[Laughter]

CHERINE CHALABY: I see Manal wants to say something. Manal.

MANAL ISMAIL: Yes, just to also thank Diane. I really consider her the institutional memory. She's been here for so long time, and I do recommend you make some backup before she leaves.

[Laughter]

Yeah, I really -- We've been -- We know each other a long time ago, and I really consider her the institutional memory of ICANN.

Thank you.

CHERINE CHALABY: Thank you, Manal. We hope you become the institutional memory now.

[Laughter]

Okay. Any other business?

CHRIS DISSPAIN: Where are we with the drinks?

CHERINE CHALABY: No. So -- oh, Lousewies.

LOUSEWIES VAN DER LAAN: Thank you. Before we came to Puerto Rico we had a discussion in the Board as to whether we should do anything for the reconstruction efforts, and we decided it's not our mandate, it's not our mission to do something besides come here and spend lots of money on hotels, which is extremely helpful as well, but I have been incredibly impressed and touched by how many parts of the community have done things. I only know of a couple, but I know at various parties, T-shirts were sold, money was raised, and I know a lot of people have done personal things. Wendy's husband is an electrician. He brought his stuff to go fix the electricity. There's so many wonderful initiatives, and I find it really heart warming to see that and to be part of that.

Thank you.

CHERINE CHALABY: Thank you. Before closing, I want to say thank you to the entire community, to staff, and to my Board colleagues for all the effort for making ICANN61 very successful. I now declare the board meeting closed. I declare ICANN61 closed.

See you in Panama, but before that, please go to the wrap-up cocktail at 6:00. So thank you very much.

CHRIS DISSPAIN: It's now 5:00, not 6:00, because it was far too long to wait until 6:00 so the cocktails are now starting at 5:00. Thank you.

CHERINE CHALABY: Thank you! What fantastic news.

[Applause]

All right. Thank you, everybody, and see you later!

[END OF TRANSCRIPTION]

Exhibit 37

November 15, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Council of Europe Report DGI (2016)17 - .GAY TLD

Dear Chairman Crocker and Board of Directors,

dotgay LLC (“**dotgay**”) writes to request that the ICANN Board (“**Board**”) add to the materials it is reviewing in connection with dotgay’s application the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (“**CoE Report**”).¹ The CoE is Europe’s leading human rights organization, with 47 member states (28 of which are also members of the European Union),² all of which are members of the European Convention on Human Rights. The CoE has observer status within ICANN’s Governmental Advisory Committee (GAC).

The CoE Report, standing alone, and certainly when taken together with the following materials, makes it abundantly clear that the EIU erred in its evaluation of dotgay’s application and that the Board is obligated to grant community priority status to dotgay’s application for the .GAY TLD:

¹ See Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

² See <http://www.coe.int/en/>.

- (i) the former ICANN Ombudsman Chris LaHatte's Report;³
- (ii) the ICC Expert's Determination regarding .LGBT;⁴
- (iii) the Expert Opinion of Professor William N. Eskridge of Yale Law School;⁵
- (iv) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts;⁶ and
- (v) the Dot Registry IRP Decision.⁷

The CoE Report identifies a long list of human rights principles, which the Board cannot avoid giving effect in evaluating dotgay's application. The Report amply supports the conclusions reached by the ICANN Ombudsman and the two independent expert reports submitted to ICANN on 13 September and 17 October 2016.

³ Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html> (determining that “[t]he board should grant the community application status to the applicant . . . [and] comply [] with its own policies and well established human rights principles”).

⁴ *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliads Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf> (finding that the .GAY application “is designed to serve the gay community”).

⁵ Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf> (explaining how Prof. Eskridge shows that “the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement”).

⁶ Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf> (explaining how Prof. Badgett demonstrates that “withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community”).

⁷ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> (holding that the Board Governance Committee (“BGC”) “must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination”).

The CoE Report Applies Human Rights Principles to .GAY

The CoE Report affirms that human rights principles apply to ICANN.⁸ The Report's discussion of human rights and community applications shows that the Board should independently approve dotgay's .GAY application. To assist the Board with its analysis of the CoE Report, we attach particularly relevant excerpts of it, the import of which should be self-evident:

ICANN Must Protect Public Interest Values through Community TLDs

- Community TLDs should protect “vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.”⁹
- Community TLDs should protect “[p]luralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.”¹⁰

⁸ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

⁹ *Id.*, p. 34.

¹⁰ *Id.* (emphasis added).

ICANN's Commitment to Human Rights Requires that It Support Community gTLDs

- The Right to Freedom of Expression: “For Internet users at large, domain names represent an important way to find and access information on the Internet. . . . A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. *A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.* Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.”¹¹
- The Right to Freedom of Assembly and Association: “Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests. As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.”¹²

ICANN's gTLD Program Improperly Fails to Conform with Human Rights Principles

- The Right to Procedural Due Process: “ICANN's gTLD program, including community-based applications, needs to be based on procedural due process. . . . Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus

¹¹ *Id.*, p. 19 (emphasis added).

¹² *Id.*, p. 22.

access to justice, which is generally considered a human right or at least a right at the constitutional level.”¹³

- The Right to Non-Discrimination: “The general principle of equality and non-discrimination is a fundamental element of international human rights law. . . . ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority.”¹⁴

Through its discussion of these human rights, the CoE Report confirms the ICANN Ombudsman’s determination that ICANN has a commitment to human rights and that dotgay represents a community that “is real, does need protection and should be supported” by awarding dotgay community priority status.¹⁵ It further supports the Expert Opinion of Prof. M.V. Lee Badgett, which states that ICANN should provide a safe space on the Internet for the gay community to engage in economic activity and social change.¹⁶

The BGC and the EIU failed to uphold these basic human rights when it considered dotgay’s application for the .GAY TLD. In light of the CoE Report’s recent findings, the ICANN Ombudsman’s determination, the expert opinions submitted to ICANN, and the clearly incorrect determination by the EIU, the Board should correct this error by individually considering the .GAY application in accordance with Article 5.1 of the AGB and awarding the .GAY TLD to dotgay.

The CoE Report Further Recognizes Problems with the EIU and the CPE Process

In addition to human rights considerations, the CoE Report confirms the significant problems with the EIU’s CPE of the .GAY gTLD, corroborating the Expert Opinion of

¹³ *Id.*, p. 25.

¹⁴ *Id.*, p. 26.

¹⁵ Ombudsman Report, <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

¹⁶ See Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

Prof. Eskridge of Yale Law School.¹⁷ The EIU clearly made fundamental errors of inconsistency and discrimination in following and applying its guidelines. The CoE Report criticizes the EIU for these inconsistencies, specifically highlighting the following issues with the EIU's consideration of .GAY:

The EIU's Inconsistent Acts during the CPE Process Raises Issues of Human Rights Violations, Unfairness, and Discrimination¹⁸

- “*First*, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to avoid any ‘double-counting’. . . . However, the EIU appears to double count ‘awareness and recognition of the community amongst its member’ twice.”¹⁹
- “*Second*, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others. The EIU appears to have been inconsistent in its interpretation of ‘Nexus’ Under Criterion 2 of the CPE process. *The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.* There is no evidence provided of the relative small and ‘more than small’ segments of the identified communities

¹⁷ See Letter to ICANN Board from A. Ali enclosing the Eskridge Report (13 Sept. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

¹⁸ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), pp. 9, 45, 49, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹⁹ *Id.*, p. 49 (emphasis added).

which justified giving a score of 0 to one applicant and 2 to another.”²⁰

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a *majority* of the community. . . . ***By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.***”²¹
- “***Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.***”²²
- “***Third***, the EIU changed its own process as it went along.”²³
- “***Fourth***, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. ***An example***

²⁰ *Id.*, pp. 49-50 (emphasis added).

²¹ *Id.*, p. 51 (emphasis added).

²² *Id.* (emphasis added).

²³ *Id.* (emphasis added).

that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.”²⁴

- *Fifth*, “[t]here are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. . . . It would seem that the EIU prefers to award full points on 4A[, the Support prong of ‘Community Endorsement,’] for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”²⁵

ICANN Improperly Accepts EIU Determinations without Question and without Possibility of Appeal

- “The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) ‘failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its

²⁴ *Id.*, pp. 51-52 (emphasis added).

²⁵ *Id.*, p. 57.

transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).’ The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws.”²⁶

- “ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN. This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a ‘decision’ which it will not question. Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.”²⁷

The CPE Process does not Conform with ICANN’s Core Principles, including Human Rights Principles

- “*In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.* Here, he took to task the fact that the BGC has ‘a very narrow view of its own jurisdiction in considering reconsideration requests.’ He points out that ‘it has always been open to ICANN to reject an EIU

²⁶ *Id.*, p. 60 (quoting *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016)).

²⁷ *Id.*, p. 64.

recommendation, especially when public interest considerations are involved.’ *As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it ‘has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency’. We endorse his view and hope that our report will strengthen the argument behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.*”²⁸

- “As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate. However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN’s mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in.”²⁹

As evidenced by these inconsistencies, the EIU clearly failed to “respect[] the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB.”³⁰ The BGC’s own failure to exercise its independent judgment when evaluating the EIU’s CPE in light of these principles, which it must do according to the Dot Registry Declaration, “must be corrected.”³¹

²⁸ *Id.*, pp. 69-70 (quoting Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>) (emphasis added).

²⁹ *Id.*, p. 31.

³⁰ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34.

³¹ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 60.

ICANN Must Proceed to Contracting with dotgay for .GAY

In light of the above considerations, we believe that there are more than sufficient grounds for the Board to act under Article 5.1 of the AGB and award the .GAY TLD to dotgay. The Board should grant dotgay's community priority application without any further delay and proceed to enter into a registry agreement with dotgay, which remains dedicated and enthusiastic about operating the .GAY registry.

Sincerely,



Arif Hyder Ali
Partner

Exhibit 38

ARIF HYDER ALI

Contact Information Redacted

September 13, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay's
Community Priority Application**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“dotgay”), to submit an independent expert opinion of Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, to the ICANN Board (“Board”) with the goal to assist the Board in evaluating dotgay’s reconsideration request (16-3) on September 15, 2016.¹ Prof. Eskridge is a world renowned expert both in legal interpretation and in sexuality, gender, and the law, and was recently ranked as one of the ten most-cited legal scholars in American history. Prof. Eskridge’s independent expert report explains, step-by-step, fundamental errors in the EIU’s reasons for denying dotgay’s community status.

Pursuant to the Independent Review Panel’s recent findings in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) (“Dot Registry Declaration”), which was accepted by the Board by way of its Resolutions 2016.08.09.11 and 2016.08.09.13 on August 9, 2016, it is imperative that the Board carefully reviews and considers Prof. Eskridge’s expert report prior to deciding dotgay’s reconsideration request (16-3).

First, the Board Governance Committee’s (“BGC”) June 26, 2016, recommendation to the Board to deny dotgay’s reconsideration request (16-3) was

¹ Expert Report of Professor William N. Eskridge Jr., dated September 12, 2016, Exhibit 1

premised on a standard that was subsequently rejected by the Dot Registry Declaration. Specifically, the BGC rejected dotgay's request for reconsideration because dotgay did not "identify any misapplication of policy or procedure by the EIU that materially or adversely affected [dotgay], and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information." The Dot Registry Declaration, however, rejected this standard for reconsideration and held that "in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB."² At no point in dotgay's recourse to ICANN's accountability processes from 2014 to date has the Board scrutinized the CPE Report for consistency with the principles of fairness, transparency and non-discrimination; as Prof. Eskridge's Report demonstrates, the CPE Report would fail even the most lenient examination.

Second, the BGC's June 26, 2016 Recommendation improperly declined to consider dotgay's May 15, 2016, presentation and written summary of arguments because "the Presentation focused on the merits of the Second CPE Report." According to the Dot Registry Declaration, "the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations."³ The BGC's failure to recognize its responsibility to ensure the EIU's compliance with these principles infected its decision to exclude from consideration whether the EIU had in fact been correct in its application of the Articles, Bylaws and AGB. This is troubling because, as explained by Prof. Eskridge in his report, the EIU failed to comply with ICANN's Articles and Bylaws.

Specifically, Prof. Eskridge explains that the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement between the applied-for string (.GAY) and the LGBTQIA community: (1) interpretive errors by misreading the explicit criteria laid out in ICANN's Applicant Guidebook ("AGB") and ignoring ICANN's mission and core values; (2) errors of inconsistency and discrimination by failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application

² *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration, p. 34 (29 July 2016).

³ *Id.* at p.34.

when compared with other applications; and (3) errors of fact, namely, a misstatement of important empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities. Prof. Eskridge's report, after discussing EIU's egregious reasoning behind rejecting dotgay's application, concludes that the EIU "engaged in a reasoning process that remains somehow mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory."

Finally, as dotgay has amply demonstrated in its submissions to the ICANN Board, it is entitled to the full two points in relation to community endorsement,⁴ since it has the support of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) – a global human rights organization focused on the gay community with member organizations in 125 countries.

Accordingly, pursuant to the Board's obligation to exercise due diligence, due care, and independent judgment in reaching reconsideration decisions, we sincerely hope that the Board: (1) will review and agree with Prof. Eskridge's independent expert opinion that the EIU's evaluation of dotgay's community priority application was flawed, and (2) grant dotgay's community priority application without any further delay.

Sincerely,



Arif Hyder Ali
Partner, Co-Chair of International Arbitration Group

⁴ See dotgay letter to ICANN Board of Directors (September 8, 2016) pp. 5-9. See also dotgay presentation to the Board Governance Committee (May 17, 2016) pp. 7-9 and Statement of Renato Sabbadini (May 17, 2016).

EXPERT REPORT

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

II. QUALIFICATIONS OF THE EXPERT

III. BACKGROUND AND GOVERNING RULES

- A. DOTGAY'S APPLICATION**
- B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK**
- C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY**
- D. THE CPE REPORT'S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT (CRITERION #2)**

IV. FUNDAMENTAL ERRORS IN THE CPE REPORT'S REASONING

A. THE CPE REPORT MISREAD ICANN'S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

- 1. THE CPE REPORT SUBSTANTIALLY IGNORED THE PRIMARY TEST: IS THE PROPOSED STRING A "WELL KNOWN SHORT-FORM OR ABBREVIATION OF THE COMMUNITY"?**
- 2. THE CPE REPORT CREATED AN "UNDER-REACH" CRITERION NOT FOUND IN OR SUPPORTED BY THE APPLICANT GUIDEBOOK AND APPLIED THE NOVEL CRITERION TO CREATE A LIBERUM VETO INCONSISTENT WITH ICANN'S RULES AND BYLAWS**
- 3. THE CPE REPORT IGNORED AND IS INCONSISTENT WITH ICANN'S BYLAWS**

B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION

- 1. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES**
- 2. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S PREVIOUS REPORTS**

C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY'S APPLICATION

- 1. FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER NONCONFORMISTS, AS WELL AS A TERM FOR HOMOSEXUAL MEN**
- 2. “GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND “ALLIED” PERSONS**

V. CONCLUSION AND SIGNATURE

APPENDICES

**APPENDIX 1. CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER
PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL**

**APPENDIX 2. SURVEY METHODOLOGIES FOLLOWED FOR EACH FIGURE DEPICTED IN THE
EXPERT REPORT**

I. EXECUTIVE SUMMARY

Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU) recommended that the application be denied; the major reason was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender. The CPE Report is fundamentally erroneous. The Report’s fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States. In short, the CPE Report and its recommendations should be rejected, and dotgay should be awarded full credit (4 of 4 points) for establishing the nexus of its string with the community.

II. QUALIFICATIONS OF THE EXPERT

1. I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent legal opinion on the validity of the ICANN Community Priority

Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), evaluating dotgay's community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string ".gay".

2. I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,¹ leading monographs,² and dozens of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.³
3. My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN's gTLD Applicant Guidebook (AGB), especially Module 4.2.3, "Criterion #2: Nexus Between Proposed String and Community"; (iii) the history of the terminology in dispute, especially the term "gay" and its applicability to the community of sexual and

¹ William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its third edition, with the fourth edition out next year). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, "by far," ever published in the field of legislation and suggesting that it would "alter the law school curriculum").

² For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

³ According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (viewed September 8, 2016).

gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND

A. DOTGAY'S APPLICATION

4. Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN).

B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK

5. The governing legal materials include ICANN's Bylaws and its Applicant Guidebook. The Bylaws establish ICANN's mission “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.” ICANN Bylaws, Art. I, § 1. One of ICANN's “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).
6. Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

7. ICANN's Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay's application. See AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant "community," nexus between the proposed string and the community, registration policies, and community endorsement. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The CPE Panel of EIU awarded dotgay a score of 10 of 16 points, including a score of 0 of 4 points for Criterion #2, the nexus requirement that will be the focus of this Expert Report.

C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY

8. Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay's application. Dotgay's petition lost 4 of 4 possible points on Criterion #2, and I shall focus on that criterion, "Nexus Between Proposed String and Community (0-4 Points)." More particularly, I shall focus on the nexus requirement, which is responsible for 3 of the 4 points. (A uniqueness requirement accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)
9. An application merits **3 points** for the nexus requirement if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means "the established name by which the community is commonly known by others." AGB, 4-13. "[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, 4-13.

10. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.

11. An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, 4-13.

D. THE CPE REPORT’S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT

12. In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus requirement. CPE Report, 4-6. Because dotgay secured 10 points from the remaining Criteria and needed 14 points for approval, Criterion #2 was the critical reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.

13. Recall that an application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, 5.

14. The CPE Report does not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not a “well known short-form or abbreviation of the community” defined in dotgay’s application, but it does read into the explicit requirement (“well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement is taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation.

15. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender,

intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

16. The Report did not identify the methodology the EIU followed to support these sweeping empirical statements. Instead, the Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, 5 note 12.
17. Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The CPE Report conceded this point (CPE Report, 7) but nevertheless claimed that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are “many similar transgender stories in the media where ‘gay’ is not used to identify the subject.” CPE Report, 6-7 and note 14.
18. The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, 7. The EIU Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, 7 and note 19.

19. The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, 8.
20. Based upon this reasoning, the CPE Report awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the CPE Report awarded 0 of 1 point for uniqueness. CPE Report, 8.

IV. FUNDAMENTAL ERRORS IN THE CPE REPORT’S REASONING

21. The CPE Report compiled by the EIU Panel is fundamentally incorrect in its approach to the nexus criterion and in its evaluation of the evidence of community nexus. The fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world.

A. THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

22. Recall the requirements ICANN has set forth, explicitly, for the nexus requirement in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’ AGB, 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
23. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.
24. As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁴ As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes.

1. The CPE Report Substantially Ignored The Primary Test: Is the Proposed String a “well known short-form or abbreviation of the community”?

⁴ The proposition in text is explained and defended in Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

25. To begin with, a major problem is that the EIU Panel systematically ignored the Applicant Guidebook's focus on whether the proposed string (".gay") is "a well known short-form or abbreviation of **the community**" (3 points) or "closely describes **the community**" (2 points) (emphasis added in both quotations). Notice the precise language, especially the language I have set **in bold**. The proposed string does not have to be "**the only** well known short-form or abbreviation of the community" and does not have to be "**the only term that** closely describes the community" (bold type for language I am adding for contrast). More important, the primary focus is "the community," not just "community members" (who are an alternative focus for the 2-point score).

26. The overall community is sexual and gender nonconformists. This is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely embraced natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. "Gay" is a "well known short-form or abbreviation of the community" (the requirement for 3 points) and also "closely describes the community" (the requirement for 2 points). There is no requirement that "gay" must be the only umbrella term for the community or even that it be the most popular term—but in fact "gay" remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that "gay" has been a popular word for more than a century, but also demonstrates that once "gay rights" became ascendant in the 1990s, the term's dominance increased and consolidated.

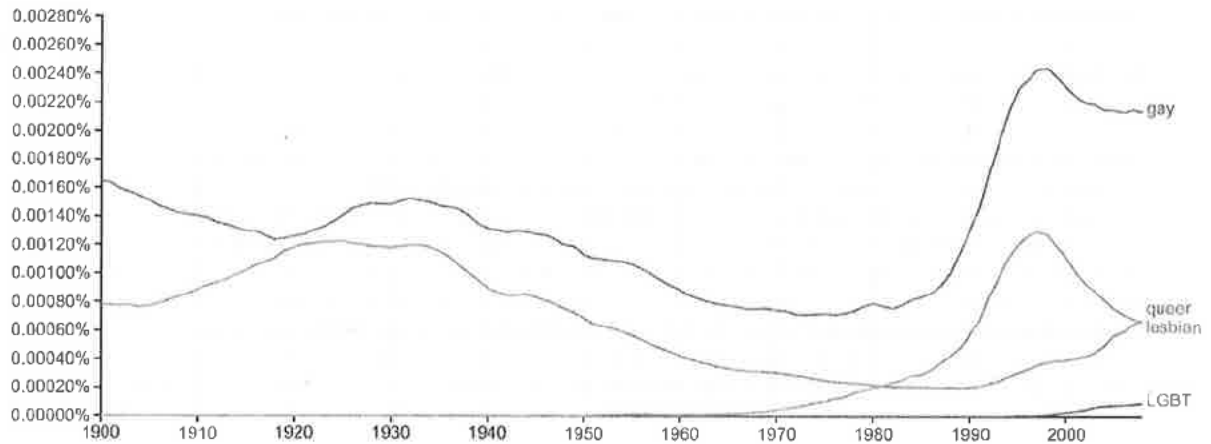


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

2. The CPE Report Created an “Under-Reach” Criterion Not Found in or Supported by the Applicant Guidebook and Applied the Novel Criterion to create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws

27. In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus criteria. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The CPE Report created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some**

members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, 5 (emphasis added).

28. Where did this *Liberum Veto* come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, 4-12, nor was it taken from the Guidebook’s Definitions of “Name” or “Identify,” AGB 4-13. Yet the EIU Panel quoted the Applicant Guidebook for its statement of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake.

29. According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, 5 (quoting the AGB). Notice that the first part [1] of the CPE Report’s requirement is taken from the Guidebook’s nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so the Panel ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a *Liberum Veto*.

30. Moreover, the EIU Panel's Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that the Guidebook defines "Identify" to mean that "the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**" AGB, 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application, like this:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that's not the concern identified by the EIU Panel's Liberum Veto analysis, which claims that the applied-for string ("gay") "under-reaches" substantially short of the whole community. The Panel's "under-reaching" concern flips the "over-reaching" concern of the Applicant Guidebook. The Panel's worry that the applied-for string is much narrower than the community defined in the application, looks like this:

EIU Panel Concern: Applied-For String < Community Defined in Application

31. Although I shall document how the EIU Panel is mistaken in its application of its "under-reaching" analysis, note that this analysis and the Liberum Veto are errors by the EIU Panel and are contrary to the ordinary meaning of ICANN's Applicant Guidebook. The "under-reaching" analysis and the Liberum Veto are also inconsistent with the CPE Guidelines, Version 2.0, prepared by the EIU itself. See EIU, CPE Guidelines, 7-8 (Version 2.0), analyzed below.

3. The CPE Report Ignored and Is Inconsistent with ICANN's Bylaws

32. Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN's mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support "broad, informed participation reflecting the * * * cultural diversity of the Internet." ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.
33. There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—.gay—is ideally suited for these purposes.
34. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), "suicide.gay" (one of the community-operated websites proposed in the application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Expert Report) would think "suicide.gay" before they would think "suicide.lgbt" or "suicide.lgbtqia." See Figure 1, above. Indeed, many educated people (including the author of this Expert Report) cannot easily remember the correct order of the letters in the latter string ("lgbtqia"). Does a

Liberum Veto make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). Figure 2, below, is a dramatic illustration of this point: “gay suicide” is a common locution; the search of books published between 1950 and 2008 does not register significant usage for “LGBT suicide” or “LGBTQIA suicide.”

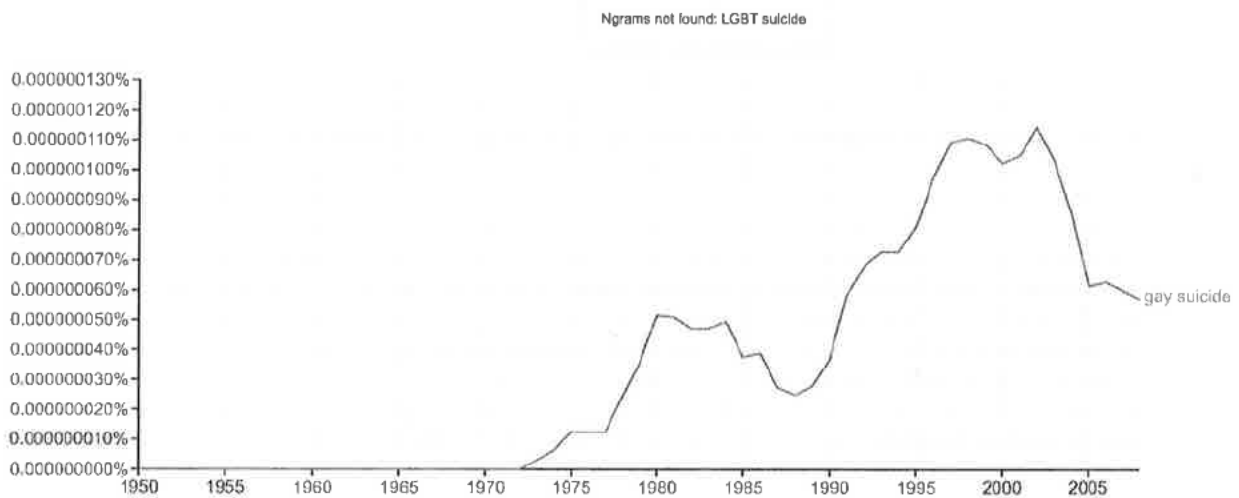


Figure 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the Corpus of Books published between 1950 and 2008

35. Not least important, recall that “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU has arbitrarily created an “under-reaching” test or requirement, without any notice in its own guidelines. Needless to say, other EIU Panel evaluations have ignored that criterion in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian

manner, namely, creating a Libervum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION

1. The CPE Report Is Inconsistent with the EIU's Own Guidelines

36. Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string "identifies" the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full (3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application "identified" the community.
37. "Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string "must 'closely describe the community or the community members', i.e., the applied-for string is what 'the typical community member would naturally be called.'" CPE Report, 5.
38. Based upon this revision of the ICANN criterion, the CPE Report "determined that more than a small part of the applicant's defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus." CPE Report, 5. Specifically, the EIU Panel "determined that the applied-for string does not sufficiently identify some members of the

applicant’s defined community, in particular transgender, intersex, and ally individuals.”
CPE Report, 5-6.

39. As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Indeed, this CPE Report’s unauthorized test is also directly inconsistent with the EIU’s own published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the EIU’s Guidelines quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

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

EIU, CPE Guidelines, Version 2.0, at 7 (emphasis added). The EIU’s Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

40. The EIU Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, at 8 (emphasis in original).

41. Given these Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE Report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka”. “Members of the community are defined as those who are within the Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, 2.
42. The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to this application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka probably self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. *Liberum Veto?*
43. Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular AirBnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” Dotgay CPE Report, 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

44. I must say that this kind of Libero Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for “.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the Dotgay CPE Report.

45. By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of 3 points for nexus. Osaka CPE Report, 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, 4. Yes, but the applicant defined the community much, much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Libero Veto in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

2. The CPE Report Is Inconsistent with the EIU’s Own Previous Reports

46. Dotgay’s application may not have been the first time the EIU has performed a nexus analysis suggesting an “under-reach” of an applied-for string, compared with the identified

community. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

47. An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether “.hotel” should be approved as a top-level domain. The EIU Panel may have performed a kind of “under-reach” analysis—but it was nothing as critical as that which it performed for dotgay’s application, even though the “.hotel” name was a much more dramatic illustration of “under-reach.”
48. The applicant wanted a domain that would serve the “global Hotel Community.” It defined its community in this way: “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Hotel CPE Report, 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.
49. In the discussion of the nexus requirement, the EIU Panel observed that “the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s

sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

50. The EIU’s “under-reach” analysis of the Hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the Panel’s tolerant analysis in the Hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the dotgay CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in the current Expert Report (reported below).

51. Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 points, including 4 of 4 points for nexus and uniqueness. Like the “.hotel” applicant, the “.spa” applicant has more significant problems of “under-reach” than dotgay’s application has.

52. The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, 2. The EIU Panel awarded the

applicant 4 of 4 points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa” and would not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY’S APPLICATION

53. Assume, contrary to any sound analysis, that the CPE Report correctly stated the Applicant Guidebook’s requirements for Criterion #2 (community nexus and uniqueness). Even under the EIU Panel’s excessively restrictive understanding of ICANN’s requirements, dotgay’s application would merit 4 of 4 points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

54. Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community

described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

55. The CPE Report makes no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor does it identify the methodology the EIU Panel followed to support these sweeping empirical statements. The remainder of this Expert Report will attempt to do that. The analyses contained in Appendix 2 will explain the methodology my research team and I followed for each of the Figures used below.

1. From Stonewall to Madrid: “Gay” as an Umbrella Term for Sexual and Gender Minorities, as Well as a Term for Homosexual Men

56. In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”⁵ European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.⁶

⁵ E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

⁶ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, 46-49.

57. Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he describes as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common is that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological, feminine woman) and procreative sexual practices that were socially expected in this country. See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908). Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.
58. Most of these terms were at least somewhat derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.
59. An early literary example is Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicts a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a

woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed or posed as a man. (Such an explicit book would have been subject to immediate censorship.) Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

60. Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. (As the twentieth century progressed, meaning (1) has been almost completely eclipsed by meanings (2) and (3).) There was in this early, closeted era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity.

61. An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sends his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asks why the handsome leading man is thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line highly amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.⁷

62. In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. See Figure 1, above. Indeed, in many countries, "queer" to this day carries more negative connotations than "gay," which continues to make "queer" a less attractive generic term.

⁷ For a provocative analysis of the bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

63. A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City's Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the "Gay Revolution."⁸ Sympathetic accounts of the Stonewall riots mobilized the popular term "gay" to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the "Gay Revolution." For example, Carter's account reports that this "Gay Revolution" began when a "butch dyke" punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that "special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * * A common theme links those who resisted first and fought the hardest, and that is gender transgression."⁹

64. Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts almost universally described as a "gay bar." The patrons of the gay bar included homosexual and bisexual men who were insisting they be called "gay" and not the disapproved Greek terms ("homosexual" and "bisexual") that had been devised by the doctors. Many of the people in the "gay bar" were not homosexual men, but were lesbians,

⁸ David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

⁹ *Id.* at 261; see *id.* at 150-51 (describing the first punch thrown by the "butch dyke," who floored a police officer).

gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends of these gender and sexual nonconformists.¹⁰

65. Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”¹¹ In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other “gay” groups. These groups included “gay” men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

66. Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many times since, Katz’s *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called “hermaphrodites” and “man-women”;¹² poet Walt Whitman, who celebrated “the love of

¹⁰ See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

¹¹ Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

¹² *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

comrades,” which he depicted as male bonding and intimate friendships;¹³ “male harlots,” or prostitutes, on the streets of New York;¹⁴ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;¹⁵ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.¹⁶ More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.¹⁷

67. Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.
68. Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as “LGB” (lesbian, gay, and bisexual) persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and

¹³ Id. at 509-12 (Whitman).

¹⁴ Id. at 68-73 (male prostitutes, called “harlots” in a contemporary report).

¹⁵ Id. at 317-90 (dozens of women who “passed” as men, many of whom marrying women).

¹⁶ Id. at 118-27 (Smith), 787-97 (Goldman).

¹⁷ Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of “Gay Los Angeles”); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the “gay male world” bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community. I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgendered people.”¹⁸ Although many readers were taken aback that “gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

69. In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

70. Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? Not at all. Recall that the requirement for the nexus requirement

¹⁸ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“gay”) “is a well-known short-form or abbreviation of the community.” AGB, 4-12.

There are many, many specific examples indicating that it is.

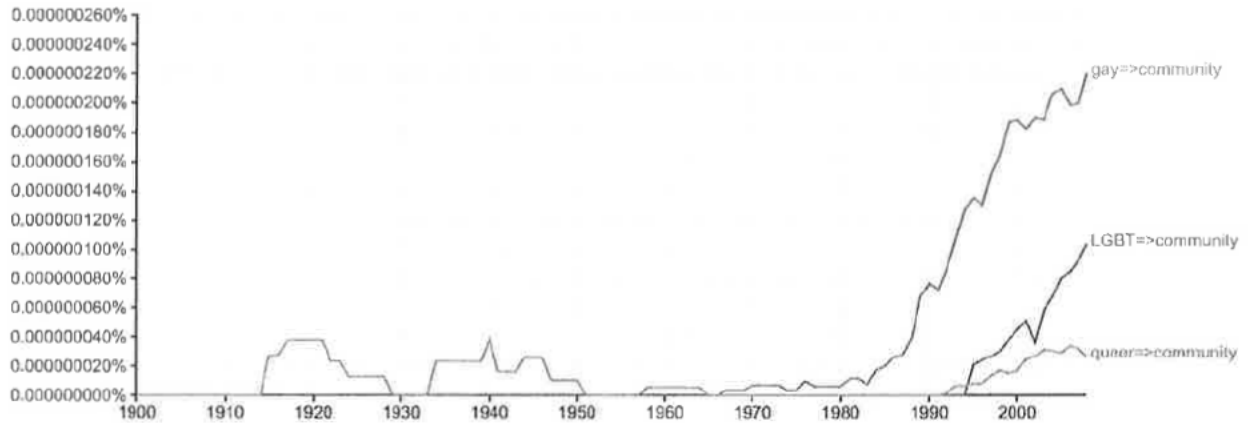


Figure 3. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

71. Figure 3, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (As with the other Figures, the methodology for the search is contained in Appendix 2.)

72. There are other corpuses that can be searched, and we have done so to check the reliability of the data in Figure 3. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed

Sept. 9, 2016). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. Specifically, we had 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

73. Does “gay community” generate a comparable number of hits? In our search of the BYU Corpus, we found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3A provides an illustration of these results.

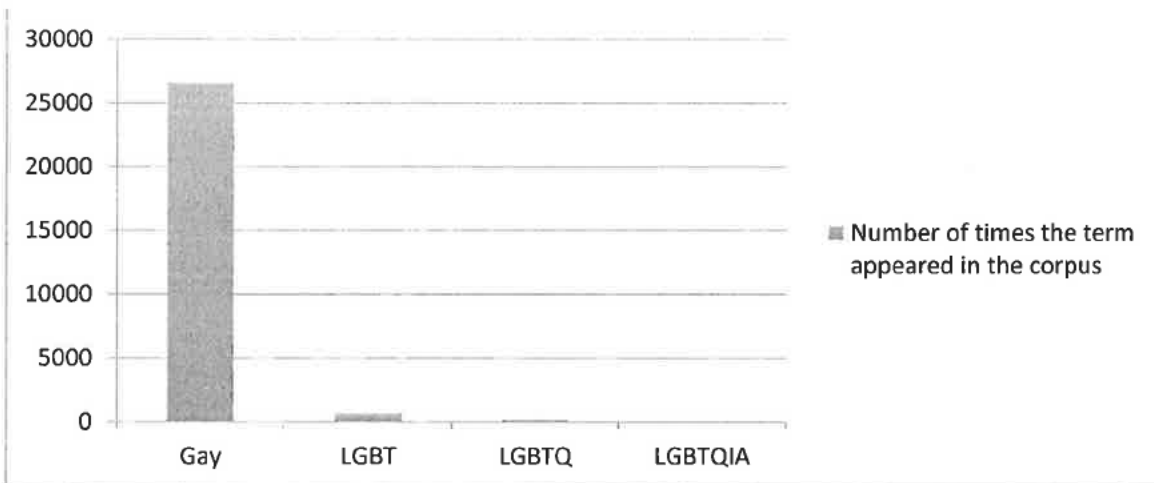


Figure 3A. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

74. How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points

for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

75. Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this unprecedented mass assault by a single person on American soil.¹⁹ Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and “allies,” as well as many gay men.

76. Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁰ Most of the victims were

¹⁹ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

²⁰ For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed 9/2/16).

homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

77. Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”²¹

78. Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events”

²¹ E.g., *Highlights from New York's Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

all over the world, <https://www.nighttours.com/gaypride/> (viewed Sept. 9, 2016). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

79. There are also international gay pride events. In 2017, it will be World Pride Madrid, celebrating Spain's leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid's annual pride celebration was voted "best gay event in the world" by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as "Gay World Pride."²² Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use "gay" **both** as a generic, umbrella term for sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

2. "Gay" Is an Umbrella Term for the Community That Includes Transgender, Intersex, and "Allied" Persons

80. As illustrated by the accounts of the Orlando "gay bar" and the world-wide "gay pride" events, the term "gay" remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that "gay people," the generic term, remains the most popular use of the term "gay," with "gay men" and "gay women" also popular, but much less so.

²² E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

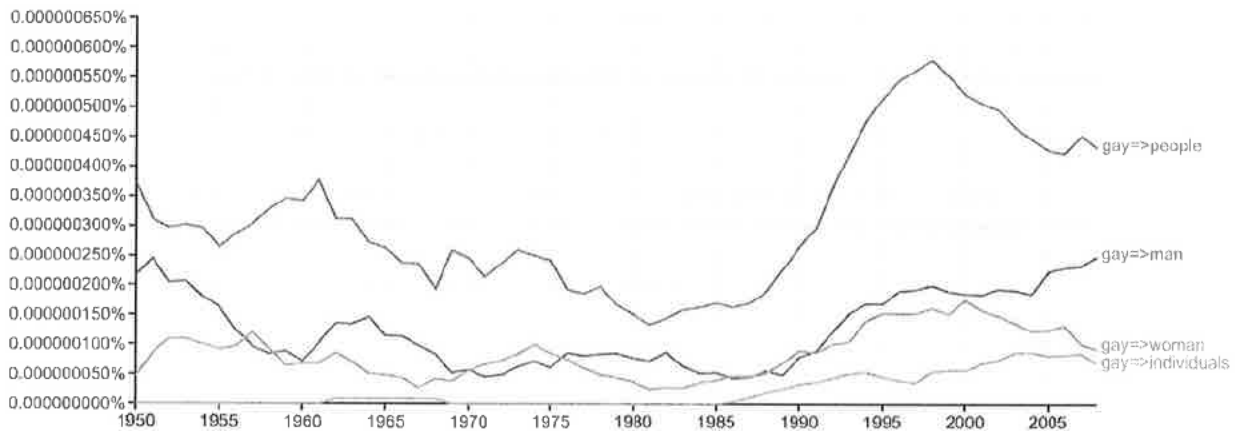


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

81. The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition, aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing. As I shall show, the EIU Panel did not browse very extensively.
82. To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term

makes it perfect for an Internet domain (".gay") for the community that consists of sexual and gender minorities.

83. Thus, almost all of the CPE Report's examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay's claim that "gay" is a "well known short-form or abbreviation for the community." The EIU Panel objected that dotgay's analysis "fails to show that when 'gay' is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities." CPE Report, 7. Although I do not believe the EIU Panel fairly characterized dotgay's application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

84. Consider the famous "Gay Games," an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. The stated purpose of the Gay Games is to foster "self-respect of lesbian, gay, bisexual, transgender, and all sexually-fluid or gender-varient individuals (LGBT+) throughout the world."²³ The mission of the Federation is "to promote equality through the organization of the premiere international LGBT and LGBT-friendly sports and cultural event known as the Gay Games."²⁴ Notice how the Federation uses the term "gay" as both a generic, umbrella term ("Gay Games") and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly,

²³ Federation of Gay Games, *Purpose and Mission Statement*, ¶ 1, <https://gaygames.org/wp/about-the-fgg/about-the-federation/purpose-and-mission-statement-2/> (viewed Sept. 9, 2016).

²⁴ *Id.*, ¶ 2.

LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

85. Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

86. The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy.²⁵ “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted

²⁵ CPE Report, 7; *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (viewed Sept. 9, 2016) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”²⁶

87. In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.²⁷ *Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.²⁸

88. Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’ * * *. But, as she affirms, there is a

²⁶ E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

²⁷ Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

²⁸ Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

panoply of identities from which to choose in an expansive **gay L.A.**”²⁹ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

89. Consider another recent example, James Franco. He is a famous actor who is as coy about his sexual orientation and gender identity as he is friendly and “allied” with the gay community. He is often asked whether he is “gay,” and his characteristic (and current) answer is that, yes, he is “gay,” even though he does not have sex with men and is neither transgender nor intersex.³⁰ In a March 2015 interview with himself, “Gay James Franco” said this: “Well, I like to think that I’m gay in my art and straight in my life. Although, I’m also gay in my life up to the point of intercourse, and then you could say I’m straight.”³¹ James Franco is a friend, an ally, a co-explorer with sexual and gender nonconformists of all sorts. Like Raquel Gutierrez, he is part of a larger “gay community.” Both people illustrate how “gay” can be **both** a popular term referring to sexual orientation and activity **and** a generic, umbrella term referring to a sensibility or a community whose members do not conform to traditional gender and sexual norms.

²⁹ Faderman & Timmons, *Gay L.A.*, 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

³⁰ *Understanding James Franco*, Rolling Stone, April 7, 2016 (account and quotations in text).

³¹ J. Bryan Lowder, *James Franco Is Gay—Well, At Least Half of Him Is*, Slate, March 16, 2015.

Another example is Miley Cyrus, an announced “pansexual” who has recently been sporting clothes with the slogan “Make America Gay Again.”³²

90. As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. My research associates and I have run a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” becomes associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

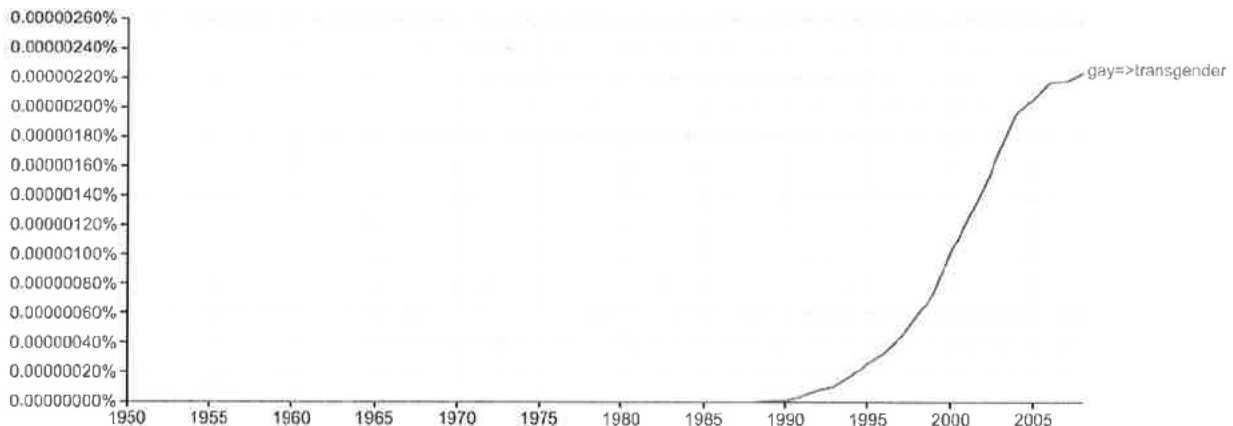


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

³² Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (viewed Sept. 9, 2016).

91. The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer and still-mysterious term, and it is not clear how many acknowledged intersex persons there are in the world. Most discussion of intersexuality in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon.

92. Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.³³

93. Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website,

³³ Federation of Gay Games, “Gender in Sport,” <https://gaygames.org/wp/sport/sports-policiesd/gender/> (viewed Sept. 9, 2016).

Everyone Is Gay.³⁴ The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁵ While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

V. CONCLUSION AND SIGNATURE

94. Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “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.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

95. Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly,

³⁴ *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (viewed Sept. 9, 2016).

³⁵ E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (viewed Sept. 9, 2016).

ICANN's requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay's application. Indeed, dotgay's application more than meets the requirements actually laid out in the Applicant Guidebook.

96. Moreover, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And ICANN "and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN Bylaws, Art. III, § 1.

97. Evaluating dotgay's application, the EIU has not acted in a completely "open and transparent manner," nor has it followed "procedures designed to ensure fairness." To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

98. Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and to grant dotgay's application, for it legitimately deserves at least 14 of 16 points (i.e., including 4 of 4 points for Criterion #2, the community nexus requirement).

Respectfully submitted,

Date, September 13, 2016



William N. Eskridge Jr.

John A. Garver Professor of Jurisprudence
Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995

Stanford, 1995

Toronto, 1999, 2001

Vanderbilt, 2003

Columbia, 2003

Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011

Fordham, 2008

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998

Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 - 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

"Dishonorable Passions": Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

Dynamic Statutory Interpretation (Harvard 1994)

Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

Legislation: Statutes and the Creation of Public Policy (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

(Selected) Articles

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 *Hous. L. Rev.* 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 *Tex. L. Rev.* 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 *B.U.L. Rev.* 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 *Wis. L. Rev.* 411

“The New Textualism and Normative Canons,” 113 *Colum. L. Rev.* 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 *NYU Rev. L. & Soc. Change* 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 *St. Louis U.L. Rev.* 865 (2012)

“Vetogates and American Public Law,” *J.L. Econ. & Org.* (April 2012), available online at <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.abstract>

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 *Geo. L.J.* 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 *Ga. L. Rev.* 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 *Washburn L.J.* 1 (2010)

“*Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 *Colum. L. Rev.* 1727 (2010) (with Connor N. Raso)

"The California Proposition 8 Case: What Is a Constitution For," 98 Calif. L. Rev. 1235 (2010)

"Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign," 57 UCAL L. Rev. 1333 (2010)

"The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy," Calif. L. Rev. (2009)

"A Pluralist Theory of Equal Protection," U. Pa. J. Const'l L. (2009)

"Constitutional Horticulture: Deliberation-Respecting Judicial Review," 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

"Vetogates, Preemption, *Chevron*," 83 Notre Dame L. Rev. 1441 (2008)

"The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*," 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

"America's Statutory 'Constitution,'" 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

"No Frills Textualism," 119 Harv. L. Rev. 2041 (2006) (book review)

"*Chevron* and Agency Norm Entrepreneurship," 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

"Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

"Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics," 114 Yale L.J. 1279 (2005)

"*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism," 2 Int'l J. Const'l L. 555 (2004)

"*Lawrence's* Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics," 88 Minn. L. Rev. 1021 (2004)

"Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," 100 Mich. L. Rev. 2062 (2002)

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- "Equality Practice: Reflections on the Jurisprudence of Civil Unions," 64 Alb. L.J. 853 (2001) (Sobota Lecture)
- "January 27, 1961: The Birth of Gaylegal Equality Arguments," 58 NYU Ann. Survey Am. Law 39 (2001)
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- "Destabilizing Due Process and Evolutive Equal Protection," 47 UCLA L. Rev. 1183 (2000)
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- "The Circumstances of Politics and the Application of Statutes," 100 Colum. L. Rev. 558 (2000)
- "Multivocal Prejudices and Homo Equality," 100 Ind. L.J. 558 (1999) (Harris Lecture)
- "Norms, Empiricism, and Canons in Statutory Interpretation," 66 U. Chi. L. Rev. 671 (1999)
- "*Hardwick* and Historiography," 1999 U. Ill. L. Rev. 631 (Baum Lecture)
- "Relationships Between Formalism and Functionalism in Separation of Powers Cases," 22 Harv. J.L. & Pub. Pol'y 21 (1998)
- "Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?," 66 Geo. Wash. L. Rev. 1301 (1998)
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- "A Jurisprudence of 'Coming Out': Religion, Sexuality, and Liberty/Equality Collisions in Public Law," 106 Yale L.J. 2411 (1997)
- "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," 24 Fla. St. U.L. Rev. 703 (1997) (Mason Ladd Lecture)
- "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981," 25 Hofstra L. Rev. 817 (1997) (Visiting Scholar in Residence Lecture)
- "Willard Hurst, Master of the Legal Process," 1997 Wis. L. Rev. 1181
- "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," 82 Iowa L. Rev. (1997) (Murray Lecture)
- "Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," 68 U. So. Cal. L. Rev. 1447 (1995) (co-authored with Jenna Bednar)
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"The Elastic Commerce Clause: A Political Theory of American Federalism," 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

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"The Economics Epidemic in an AIDS Perspective," 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

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"A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda," 102 *Yale L.J.* 333 (1992) (review essay)

"Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

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"Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale L.J.* 331 (1991)

"Making the Deal Stick: Enforcing the Original Constitutional Understanding," *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

"Reneging on History? Playing the Court/Congress/President Civil Rights Game," 79 *Calif. L. Rev.* 613 (1991)

"The New Public Law Movement: Moderation as a Postmodern Cultural Form," 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

"The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases)," 88 Mich. L. Rev. 2450 (1990)

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"Gadamer/Statutory Interpretation," 90 Colum. L. Rev. 609 (1990)

"The New Textualism," 37 UCLA L. Rev. 621 (1990)

"Statutory Interpretation as Practical Reasoning," 42 Stan. L. Rev. 321 (1990) (co-authored with Philip Frickey)

"Spinning Legislative Supremacy," 78 Geo. L.J. 319 (1989)

"Public Values in Statutory Interpretation," 137 U. Pa. L. Rev. 1007 (1989)

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"Legislation Scholarship & Pedagogy in the Post-Legal Process Era," 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

"*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem," 25 Va. J. Int'l L. 281 (1985)

"One Hundred Years of Ineptitude," 70 Va. L. Rev. 1083 (1984)

"The Iranian Nationalization Cases," 22 Harv. Int'l L.J. 525 (1981)

"*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA," 86 Yale L.J. 885 (1977) (student note)

ENDOWED LECTURES

Henry J. Miller Lecture, Georgia State University College of Law, "Marriage Equality, 1967-2017," September 15, 2016

Frankel Lecture, University of Houston Law Center, "Marriage Equality as a Testing Ground for Original Meaning," November 2014, published as "Marriage Equality and Original Meaning," 52 Hous. L. Rev. 1057 (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, "Marriage Equality's Cinderella Moment," September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, "Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012," November 15, 2012, published as "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," 93 B.U.L. Rev. 275 (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as "Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?"

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as "Noah's Curse and Paul's Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty"

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, "Administrative Constitutionalism," March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as "America's Statutory constitution," U.C. Davis L. Rev. (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as "The Supreme Court's Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)," 86 Geo. L.J. (2008)

Center for Religious Studies at Princeton University, November 2005, "Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia"

Lockhart Lecture at University of Minnesota School of Law, "Same-Sex Marriage and Equality Practice," October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as "Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," Fla. L. Rev. (2005)

President's Lecture at Davidson College, March 2004, "The Case for Same-Sex Marriage"

Brennan Lecture at Oklahoma City University School of Law, March 2004, "*Lawrence v. Texas* and Constitutional Regime Shifts"

Dean's Diversity Lecture at Vanderbilt University School of Law, February 2000, "Prejudice and Theories of Equal Protection"

Steintrager Lecture at Wake Forest University, February 1999, "Jeremy Bentham and No Promo Homo Arguments"

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as "Multivocal Prejudices and Homo Equality," *Ind. L.J.* (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, "Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law"

Baum Lecture at the University of Illinois School of Law, November 1997, published as "*Hardwick* and Historiography," 1998 *U. Ill. L. Rev.*

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981," 25 *Hofstra L. Rev.* 817 (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as "Privacy Jurisprudence and the Apartheid of the Closet," 24 *Fla. St. U.L. Rev.* 703 (1997)

Murray Lecture at the University of Iowa, January 1996, published as "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," *Iowa Law Review* (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as "The Many Faces of Sexual Consent," 37 *Wm. & Mary L. Rev.* 47 (1995)

Donley Lectures at West Virginia University School of Law, published as "Public Law from the Bottom Up," 97 *W. Va. L. Rev.* 141 (1994)

Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

H.R. 1283, The Fairness in Asbestos Compensation Act, House Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1st Sess. (1993)

Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

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Statutory Interpretation and the Uses of Legislative History, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990)

Adjustable Rate Mortgages (ARMs), Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98th Cong., 2d Sess. (1984)

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008*

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the English Corpus of Books published in the United States from 1950 to 2008

This Figure is a comparison of the frequency of “gay suicide” and “LGBT suicide” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/uniforms in the sample of books, what percentage of them are “gay suicide” and what percentage of them are “LGBT suicide.”

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 3. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”*

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

Exhibit 39

ARIF HYDER ALI

Contact Information
Redacted

January 20, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: ICANN Board Determination Regarding dotgay

Dear Members of the ICANN Board:

We write on behalf of our client, dotgay LLC (“**dotgay**”) with reference to our letter of 15 January 2018, in which we requested that the ICANN Board take no action with respect to the conclusions set out in FTI Consulting reports prior to receiving dotgay’s detailed comments on the reports’ methodological and substantive flaws.

We further request that before the Board places any reliance on the FTI reports, it carefully review and consider dotgay’s previous submissions prior to making a decision relating to dotgay’s community application and Reconsideration Request 16-3.¹ We direct the Board, in particular, to the following – which independently and collectively confirm the arbitrary and discriminatory manner in which dotgay’s application was treated by the EIU and ICANN:

- (i) the Council of Europe’s Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective;”²
- (ii) the ICANN Ombudsman Chris LaHatte’s Report;³

¹ Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

² Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

³ Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

- (iii) the ICC Expert's Determination regarding .LGBT;⁴
- (iv) the Expert Opinion of Professor William N. Eskridge of Yale Law School;⁵ and
- (v) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts.⁶

Dotgay reserves all of its rights in law and equity in any forum worldwide.

Sincerely,



Arif Hyder Ali
Partner

⁴ *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliat Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf>.

⁵ Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

⁶ Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

Exhibit 40

Dotgay's Presentation to the Board Governance Committee

15 May 2016

Dechert
LLP

The EIU Contradicted ICANN's Policies in Evaluating Dotgay's Application

EIU is Bound by the AGB

- **Bylaws, Art. I, § 2(8)**

- “Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”

- **CPE Guidelines, p. 1**

- “The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.”

- **AGB, Module 1**

- “This Applicant Guidebook is the implementation of the Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

EIU Egregiously Misapplied the AGB (I)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to truly consider whether the applied for string “matches the name of the community” as the “name by which the community is commonly known by **others.**”
- The EIU **misapplied Module 4.2.3 of the AGB** by failing to consider whether the applied-for string “closely describes **the community**” and not “the community members.”
- The EIU **misapplied Module 4.2.3 of the AGB** by adding a non-established nexus requirement, i.e., by requiring that the name of the community apply to each community member.

EIU Egregiously Misapplied the AGB (II)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to distinguish the “community” from the “community members”, making clear that the string need not be applied to each community member, but simply “match the community name’ for a score of 3, or alternatively, closely “describe the community” for a score of 2.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community endorsement criterion to require that the endorsing organization have community recognition beyond membership.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community opposition criterion to include a local community center as an organization of non-negligible size when this community center is merely one out of hundreds of community centers that are members of a global organization that endorsed the Dotgay application.
- The EIU **misapplied Module 4.2.3 of the AGB** in relation to the letter of opposition filed by the Q Center, even though the Center had been influenced by a competing applicant for .GAY, and the EIU should have discounted it as “filed for the purpose of obstruction” within the meaning of the AGB.

EIU is Prohibited from Discriminating

- **Bylaws, Art. II, § 3**

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

- **CPE Guidelines, p. 22**

- “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and **non-discrimination**. Consistency of approach in scoring Applications will be of particular importance.”
- *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Discriminated against Dotgay (I)

- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the EIU had found sufficient in other instances that a member self-identify as having a tie to the community. [E.g., .OSAKA]
- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the inclusion of other members “not automatically associated with the gTLD” did not prevent the EIU from establishing nexus in other instances. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by rejecting the ILGA as a representative organization when the EIU had found in other instances that a community may have more than one such organization. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by accepting that a local community center is an organization of non-negligible size when the EIU had found in the instance of the International Radio Emergency Support Coalition that it was not. [E.g., .RADIO]

EIU Discriminated against Dotgay (II)

- The EIU **discriminated against Dotgay** by deeming it had insufficiently representative support despite support from equivalent organizations being sufficient for other community strings:
 - The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is a global organization dedicated to promoting gay rights composed of over 1,100 member organizations covering countless individuals in 125 countries. It is recognized by the United Nations. [.GAY]
 - The International Hotel & Restaurant Association (IH&RA) is an umbrella trade organization that is composed of national hotel and trade organizations for the hotel and restaurant industries in over 100 countries. It is recognized by the United Nations. [.HOTEL]
 - The World Broadcasting Unions (WBU) is an umbrella organization that is composed of eight regional broadcasting organizations and is dedicated to coordinating international broadcasting. [.RADIO]

EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (I)

- The EIU would have granted Dotgay Community Priority Status had it applied the same standard to .GAY that it applied to other Community Applications with equivalent facts:
 - .OSAKA received the maximum score for nexus despite the fact that the community was identified not only as those who are within the OSAKA geographical area, but those “who self-identify as having a tie to OSAKA, or the culture of OSAKA.” In the case of .GAY, the EIU applied a new and heightened standard for nexus in requiring the name of the community apply to each specific individual or sub-group to that may self-identify and use the applied-for string. It is irrelevant to the analysis that OSAKA is a geographic region.
 - .HOTEL was found to “closely describe the community, without overreaching substantially” despite the fact that the hotel community included entities that “may not be automatically associated with the gTLD,” such as marketing associations. If the same standard had been applied to .GAY, the outcome would have been different. The BGC cannot accept the EIU's conclusion that “more than a small part” of the community would not be automatically associated with .GAY without further due diligence. It is clear that the EIU did not ask the right questions and made no efforts to quantify the part of the community that supposedly is not described as gay.

EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (II)

- .RADIO was found to “closely describe[s] the community, without overreaching substantially beyond the community” despite the EIU acknowledging that “the community, as defined in the application, also includes some entities that are only tangentially related to radio, such as companies providing specific services or products to radio broadcasting organizations.” The EIU further accepted that these companies “would not likely be associated with the word RADIO. However, these entities are considered to comprise only a small part of the community and . . . public will generally associate the string with the community as defined by the applicant.” If the EIU had asked whether the public generally associated the string with the community as defined by the applicant, .GAY would have been as successful as .RADIO.

EIU is Bound to Act Fairly and Openly

- **Bylaws Art. I, § 2(8)**
 - “Making decisions by **applying documented policies [i.e. the AGB] neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. III, § 1**
 - “ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”
- **CPE Guidelines, p. 22**
 - “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.”
 - *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Acted Unfairly and Opaquely (I)

- The EIU **ignored the ICC Expert Determination** that found the name of the string .GAY matches Dotgay's definition of the gay community.
- The EIU **did not disclose any due diligence**, including any research, it may have conducted when evaluating the Application **nor did ICANN provide documents from the EIU in response to Dotgay's DIDP Requests.**
- The EIU presented no support for and made no quantification effort to justify its finding that the alleged overreach extends to “more than a small part” of the identified community.

EIU Acted Unfairly And Opaquely (II)

- The EIU **asked only one clarifying question** unrelated to Nexus or Community Support/Opposition Criteria and **thus denied Dotgay the opportunity** to address EIU misunderstandings and mistakes.
- The EIU involved the same personnel in the Second CPE as in the First CPE, raising serious doubts as to who evaluated the application and giving rise to a potential **conflict of interest**.
- ICANN's refusal to disclose the names of the evaluators based on a confidentiality provision is not consistent with **ICANN's and the EIU's transparency obligations**.

The Duties of the Board Governance Committee

The Bylaws Demand the BGC to Ensure Correct Application of the AGB and Correct Finding of Material Facts

- **Bylaws, Art. IV, §2(1)**

“Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by: (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.”

The Bylaws Demand the AGB to Independently Assess the CPE Report and Make a Recommendation to the Board

- **Bylaws, Art. IV. §2(3)**

“The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to: (a) evaluate requests for review or reconsideration; (b) summarily dismiss insufficient requests; (c) evaluate requests for urgent consideration; (d) conduct whatever factual investigation is deemed appropriate; (e) request additional written submissions from the affected party, or from other parties; (f) make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and (g) make a recommendation to the Board of Directors on the merits of the request, as necessary.”

The Bylaws Demand that the BGC Conduct its Review with Care and Independent Judgment

- Duty to evaluate the due diligence performed by the EIU and independently conduct due diligence as appropriate.
- **Bylaws Art. I, § 2(8)**

“Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. IV, § 3(4)(b)**

“did the Board exercise **due diligence and care** in having a reasonable amount of facts in front of them?”
- **Bylaws, Art. IV, § 3(4)(c)**

“did the Board members exercise **independent judgment** in taking the decision... ?”

IRP Panel Confirmed the BGC's Duty to Review Underlying Facts and Ensure Correct Application of ICANN policies

- *Despegar* IRP Panel, ¶ 69

“The Panel agrees that **if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied.** It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. **The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.**”

The BGC Must Ensure the Correct Application of the AGB and Correct Finding of Material Facts (I)

- Duty to **correct the EIU's misapplication** of the AGB in requiring the name of the community to apply to each community member in order for nexus to be established.
- Duty to ensure that the EIU determined nexus in **the precise manner** set out in the AGB and by **applying the standard set out in the AGB**.
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from an organization with “reciprocal recognition on the part of the community members of the organization’s authority to represent them” beyond membership in the organization.
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from a “single [] organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.”

The BGC Must Ensure Correct Application of the AGB and Correct Finding of Material Facts (II)

- Duty to **independently assess** the Determination of the ICC Expert, which found that the string .GAY matches Dotgay's definition of the gay community.
- Duty to **independently assess** whether a local gay community is an organization of "non-negligible size," particularly when the organization is a member of a global organization that supported the application, and to assess whether its opposition raises serious conflict of interest issues.

The BGC Has the Duty to Ensure Non-Discrimination

- The BGC must ensure **non-discriminatory treatment** by applying the same standard for community support applied by other CPE Panels (e.g., .OSAKA, .HOTEL, .RADIO) for Dotgay.
- **Bylaws, Art. II, § 3**

“ICANN shall not apply its standards, policies, procedures, or practices **inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.”
- ***Despegar* IRP Panel, ¶¶ 146-147**

“**ICANN itself has no quality review or control process**The Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations **[T]here needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.**”

The BGC Must Ensure Procedural Fairness

- Duty to **ensure fairness in the CPE process** in light of the findings of the ICC Independent Expert that the string .GAY matches Dotgay’s definition of the gay community.
- ***ILGA v. Afilias* Expert Determination, ¶ 13:**

“ILGA's standing has not been doubted by Afilias and is not to be doubted. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), i.e. with a group that is publicly recognized as a community at a local **and/or** global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). **The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior** and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.”

ICANN Has a Duty to Foster Diversity and Safety of the Internet Community

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate **for the benefit of the Internet community as a whole**”

- **Bylaws Art. III, § 1**

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

The Denial of a .GAY Community gTLD will Undermine Diversity and Public Interest

- ICANN has a **positive obligation to foster diversity** on the Internet. The Community gTLD program is an attempt to fulfil that obligation.
- This includes ensuring vulnerable and deserving communities are empowered and protected in the public interest.
- Dotgay is the **only applicant** for the **.GAY gTLD with Public Interest Commitments**, including:
 - Pledging to provide a minimum of **67% profits** from domain name registrations to a separate foundation to support gay community initiatives.
 - Appropriate **Authentication Policies** to ensure community-appropriate material.
 - Reserving key domain names as a community resource and support websites: **Rights.gay; HIV.gay; Safe.gay; Suicide.gay; Health.gay; Ally.gay; Transgender.gay, Lesbian.gay; Queer.gay; Pride.Gay.**

The Bylaws and Articles Demand That the BGC Ensure Transparency

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate for the benefit of the Internet community . . . **through open and transparent processes**”

- **Bylaws Art. III, § 1**

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

IRP Panel and ICANN Board Confirmed Transparency Duty

- *Despegar* IRP Panel, ¶ 145

“The Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and objects to be achieved by ICANN, transparency and administrative due process should be applicable.”

- **Board Resolution dated 19 March 2016**

“Board accepts the findings of the Panel’s Final Declaration . . . The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes”

The BGC Must Ensure Transparency

- EIU and ICANN staff **have not disclosed** the underlying materials from the EIU analysis.
- The EIU withheld documents from both the BGC and Dotgay, preventing Dotgay from knowing how its Application was treated and the BGC from independently reviewing whether the principles of fairness and non-discrimination were satisfied.

Exhibit 41



National LGBT Chamber of Commerce

March 1, 2018

Via E-Mail

ICANN Board of Directors
c/o Mr. Cherine Chalaby, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Support for dotgay LLC's Community Priority Application

Dear Members of the ICANN Board:

The National LGBT Chamber of Commerce ("NGLCC") submits this letter to the ICANN Board in order to express its support for dotgay LLC's ("dotgay") community priority application for the .GAY gTLD.

NGLCC is the largest global nonprofit organization creating economic opportunities for the lesbian, gay, bisexual, and transgender (LGBT) business owners and entrepreneurs. And while our organization and our partners represent a vast array of sexual orientations and gender identities, colloquially we are sometimes referred to as the "gay" community. We are the voice for the 1.4 million business owners that would be served by the .GAY gTLD in the United States, and the \$1.7 trillion that their enterprises add to the national economy each year. Over 190 corporations - including esteemed businesses such as IBM, Intel, and Ernst & Young - and prominent executive leaders support our organization and its goals.

Our members and we work to promote the gay community both in and out of the business world and thus support the promotion of the LGBT community in the Internet domain space. Dotgay plans to use the .GAY TLD to provide a form of self-empowerment for the LGBT community. The unique online space proposed by dotgay would be designed, governed, and managed by those it serves in order to protect and advocate for a population historically discriminated against around the world. We believe that dotgay will promote our community's interests by operating the .GAY gTLD in the Internet domain space and by providing a common, safe platform for NGLCC's constituents, and their businesses, to communicate and network. If dotgay does not manage .GAY, there simply exists no guarantee that the gay community's online experience can improve.

We have been following dotgay's application before ICANN with considerable interest, and indeed disappointment, by the manner in which it has been handled by ICANN. Despite the significant benefits that the .GAY gTLD will provide to the gay community, we understand that dotgay's application has not received community priority status, notwithstanding the considerable evidence that supports such status. As Professor William Eskridge explains in his Second Expert Opinion, ICANN has denied dotgay's community priority application in spite of the clear support that it received from LGBT organizations around the world, recognizing the clear nexus between the term "gay" and the LGBT community. As an application designed for, vetted by, and globally



endorsed by the LGBT community, dotgay's application for the .GAY gTLD clearly meets all of the requirements for a community priority application.

We are therefore surprised that FTI Consulting, Inc. ("FTI") found no inconsistencies in any of the CPEs - especially dotgay's CPE. FTI's independent review of the CPE process, which was supposed to be a thorough and fair analysis of the CPEs, is clearly unreliable and underscores the seemingly discriminatory fashion in which dotgay's application has been treated. We have reviewed FTI's three reports (the "FTI Reports") and determined that: (1) FTI's first report is one-sided, as it only examined documents from ICANN and the CPE Provider; (2) FTI's second report concludes that there was no discrimination in the CPEs *without* performing any substantive evaluation or outreach to subject matter experts like the NGLCC; and (3) FTI's third report serves no function other than a cursory cite-checking exercise. As such, FTI's independent review of the CPE process is inherently flawed and their conclusions regarding dotgay's community application must be rejected by ICANN.

We urge the ICANN Board to comply with dotgay's request to (1) review and agree with Professor Eskridge's Second Expert Opinion; (2) reject the findings made by FTI in the FTI Reports; and (3) grant dotgay's community priority application.

Sincerely,

Justin G. Nelson
Co-Founder & President

Chance Mitchell
Co-Founder & CEO

Exhibit 42



P.O. Box 1233 * Milford, PA 18337 * seroproject.com * 646-642-4915

February 18, 2018

SENT VIA EMAIL

Mr. Cherine Chalaby
ICANN Board Chair
12025 Waterfront Drive, Ste 300
Los Angeles, CA 90094

RE: dotgay LLC Application for .GAY

Dear ICANN Board Directors,

Sero would like to express our ongoing support of dotgay LLC's community application for .GAY and also express our frustration with the inexplicable complacency and lack of action on the demonstrative evidence surrounding discriminatory treatment .GAY has received.

Sero is a U.S.-based network of people living with HIV and allies fighting for freedom from HIV-related stigma and injustice. Sero is also a founding partner in the HIV Justice Worldwide consortium, a network of HIV-related human rights organizations around the globe.

In Sero's quest to address HIV-related homophobia, stigma and injustice we combat ignorance and indifference. Sometimes it is rooted in misplaced fear, other times it is simply the unwillingness of leadership to take action that may embarrass, disrupt or expose unfair practices within their purview. Our voice helps to ensure facts and data are properly considered in order to better inform reactions and decisions.

Our support for the dotgay LLC community application (.GAY) remains strong. Since *gay* is unequivocally a globally utilized and recognized term for the community of LGBTQIA persons, having community operation and oversight of the .GAY domain is imperative. Knowing the tremendous disadvantage and marginalization continuing to face the global gay community, it is astonishing that ICANN is complicit in preventing .GAY from its proper stewardship in the hands of the LGBTQIA community and dotgay LLC.

As Executive Director of Sero, I have remained engaged in dotgay LLC's pursuit of accountability at ICANN. I assumed that the facts and analysis presented in the initial report from Professor William Eskridge would lead ICANN to understand and acknowledge the manner in which dotgay LLC has been mishandled.

Describing the process and repeated assertions of *no wrongdoing* by FTI Consulting does not address the glaring mistreatment and discriminatory treatment of .GAY. Dotgay

LLC was clearly cheated of points and burdened by standards beyond other community applications and requirements of the Applicant Guidebook.

To ignore such obvious facts and refuse to even acknowledge the many shortcomings of the FTI Consulting reports only implicates the ICANN Board further.

As a network of longtime advocates that stand up against injustice, we request that the ICANN Board act within its empowered authority and be the interruption required in the mistreatment of dotgay LLC. The Board needs to end what has amounted to no less than egregious inconsistencies in CPE scoring and award community priority status to .GAY. Doing the right thing is never a liability, especially when the facts support it.

Sincerely,

A handwritten signature in blue ink that reads "Sean Strub". The signature is written in a cursive, slightly slanted style.

Sean Strub
Executive Director

Exhibit 43

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review
Concerning ICANN Board Action re
Determination of the Board Governance Committee
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

TABLE OF CONTENTS

I. Introduction	2
A. Internet Corporation for Assigned Names and Numbers (ICANN)	2
B. Board Governance Committee (BGC)	4
C. Dot Registry LLC (Dot Registry)	5
D. The Economist Intelligence Unit (EIU)	6
II. Procedural History	10
A. Community Priority Evaluation and Reconsideration	10
B. History of Independent Review Process	12
III. Submissions of the Parties	18
A. Dot Registry	18
B. ICANN	24
IV. Declaration of Panel	26
A. Applicable Principles of Law	26
B. Nature of Declaration	29
C. The Merits	31
1. The EIU, ICANN Staff, and the BGC were obligated to follow ICANN's Articles and Bylaws in Performing Their Work in this Matter	31
2. The Relevant Provisions of the Articles and Bylaws and Their Application	39
D. Conclusion	60

I. INTRODUCTION

A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, 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." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of ^{EIU Contact Information Redacted}
EIU Contact Information Redacted of the EIU
(hereinafter ^{EIU Contact Information Redacted} Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. ^{EIU Contact Information Redacted} declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” ^{EIU Contact Information Redacted} Declaration, ¶3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12th 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

II. PROCEDURAL HISTORY

A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution ("ICDR"), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC ("Dot Registry") no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit ("EIU") to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU's responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel's order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN's possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel's request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry's Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel's request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
 - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the “Board,” and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties’ stipulations that the term “local law” as used in Article 4 of ICANN’s Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation’s Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, “[t]he Panel designate[d] the place of these proceedings as New York, New York.”

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of ^{EIU Contact Information Redacted} of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

III. SUBMISSIONS OF THE PARTIES

A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13).

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶21, at 8, and ¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel’s question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to “respect the principles of fairness, transparency and . . . non-discrimination.” ICANN’s Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California’s business judgment rule applies to ICANN and “requires deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests of’ the corporation, and ‘exercised discretion clearly within the scope of its authority.’” Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 265 (1999).

IV. DECLARATION OF PANEL

A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN’s Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are “relevant principles of international law and applicable international conventions” that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: ***

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN _DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

2) The Relevant Provisions of the Articles and Bylaws and Their Application

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. Articles of Incorporation, Art. 4

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

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. Emphasis added.

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 *** I
3 will tell you that the Board Governance
4 Committee is aided by the Office of General
5 Counsel, which also consults with Board
6 staff.

7 The Office of General Counsel does
8 submit recommendations to the Board
9 Governance Committee, and of course, those
10 documents are privileged. For that reason,
11 we did not turn them over. We don't rely on
12 them in issuing the Board Governance
13 Committee reports, we don't cite them, and we
14 don't produce them because they are prepared
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee
14 had the EIU, the three EIU reports, and it
15 had the lengthy challenge submitted by Dot
16 Registry regarding those reports. As I've
17 said before, the Board Governance Committee
18 does not go out and obtain separate
19 substantive advice, because the nature of its
20 review is not a substantive review.
21 So I don't know what else it would
22 need, but my understanding is that apart from
23 privileged communication, what it had before
24 it was the materials that I've just
25 referenced, EIU's reports and Dot Registry's
1 reconsideration requests, which had attached
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that
4 request and the CPE panel report, would it be
5 correct to say that the diligence and care
6 the Board Governance Committee took in having
7 a reasonable amount of facts in front of it,
8 were those two submissions an [sic] inquiry of
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did
12 the Board Governance Committee go about
13 exercising its independent judgment in taking
14 the decisions it took on the reconsideration
15 requests? Again, with as much specificity as
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I
18 obviously have to refer you to is the report,
19 the 23-page report of the Board Governance
20 Committee. I, I don't have other materials
21 that I have tendered to the panel to say that
22 the Board members exercised their independent
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by
25 point through the complaints that Dot
1 Registry asserted, evaluated each of those
2 points independently, and reached the
3 conclusions that they reached.
4 MR. DONAHEY: Were there drafts of
5 that 23-page report?
6 MR. LEVEE: Yes.
7 MR. DONAHEY: And were those
8 produced?
9 MR. LEVEE: They were not.
10 MR. DONAHEY: And was that because
11 they were privileged?
12 MR. LEVEE: Yes.
13 MR. KANTOR: Mr. LeVee, what exists
14 in the record before this panel to show that
15 the Board Governance Committee exercised its
16 judgment independent from that of ICANN's
17 staff, including office [of] general counsel?
18 MR. LEVEE: The record is simply
19 that the six voting members of the Board
20 Governance Committee authorized this
21 particular report after discussing the
22 report. I cannot give you a length of time
23 that it was discussed. I don't have a record
24 of that, but I can tell you, as reflected in
25 many other situations where similar questions
1 have been asked, that the voting members of
2 the Board take these decisions seriously.
3 They are then reflected in minutes of the
4 Board Governance Committee which are
5 published on ICANN's website.
6 Candidly, I'm not sure what else I
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. *** I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.

D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "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." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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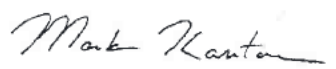
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor". The signature is written in black ink and is positioned above a horizontal line.

Mark Kantor

M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2018

For the Panel Majority

Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", written over a horizontal line.

M. Scott Donahey, Chair

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”¹ because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*²
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

¹ AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

² ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.³

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*⁴

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,⁵ but ICANN clarified that staff conduct is not reviewable in an IRP,⁶ and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.⁷ The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”⁸ The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.⁹ Despite the Declaration’s statement to the contrary,¹⁰ I cannot

³ I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

⁴ Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

⁵ *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

⁶ *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

⁷ *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

⁸ Declaration ¶ 152. (Emphasis added.)

⁹ *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

¹⁰ *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"¹¹ the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."¹² This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

These core values are deliberately expressed in very general terms, so that

¹¹ Declaration ¶ 151.

¹² See Declaration ¶¶ 149–50.

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

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.¹³ Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements¹⁴ and a 96-page expert report to reargue the merits of its CPE Applications,¹⁵ none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”¹⁶
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”¹⁷
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”¹⁸
- Dot Registry introduced a fact witness to testify at the hearing¹⁹ in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

¹³ See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

¹⁴ See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

¹⁵ See Expert Report of Michael A. Flynn dated 13 July 2015.

¹⁶ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

¹⁷ See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

¹⁸ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

¹⁹ See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."²⁰ In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

* * *

13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.²¹ Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

Discrimination

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.²² A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."²³ A review of Dot Registry's three Reconsideration Requests

²⁰ Declaration ¶ 20.

²¹ See Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20-21.

²² See Declaration ¶¶ 98-100, 103-04, 122.

²³ Declaration ¶¶ 47-48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*²⁴

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),²⁵ and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,²⁶ but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP²⁷ — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

²⁴ See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

²⁵ See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

²⁶ See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

²⁷ See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.²⁸ The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.²⁹ (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”³⁰ The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”³¹ My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”³² The BGC disposed of Dot Registry’s argument as follows:

The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.³³

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

²⁸ Declaration ¶¶ 94–99, 106, 111, 115–22.

²⁹ Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

³⁰ Declaration ¶¶ 96–99.

³¹ Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

³² Declaration ¶ 95.

³³ Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”³⁴

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”³⁵ In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”

[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).³⁶

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

³⁴ Declaration ¶ 122.

³⁵ ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

³⁶ See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”³⁷ but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

Independent Judgment

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”³⁸ It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”³⁹ Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.⁴⁰ The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.⁴¹ In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”⁴² Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.⁴³

³⁷ See Declaration ¶¶ 117–21.

³⁸ Declaration ¶ 126.

³⁹ Declaration ¶¶ 127, 147.

⁴⁰ Declaration ¶¶ 126, 140, 147.

⁴¹ Declaration ¶¶ 127, 147.

⁴² Declaration ¶ 141.

⁴³ Declaration ¶¶ 126, 147, 150.

25. The Declaration⁴⁴ relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

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

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

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."⁴⁵
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.⁴⁶ ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)⁴⁷ that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.⁴⁸ The Panel, nonetheless, deems ICANN's position "simply not credible."⁴⁹ Credibility determinations have no place in this IRP, especially in relation to counsel.⁵⁰ The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

⁴⁴ See Declaration ¶¶ 128, 142, 149–50.

⁴⁵ Declaration ¶ 149.

⁴⁶ See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

⁴⁷ See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

⁴⁸ See Attestation of Elizabeth Le dated 17 June 2015.

⁴⁹ Declaration ¶ 151.

⁵⁰ Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”⁵¹ make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.⁵² Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*⁵³

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”⁵⁴ The Declaration summarily dismisses those

⁵¹ Declaration ¶ 128.

⁵² See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

⁵³ *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

⁵⁴ See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”⁵⁵ Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.

32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

Privilege

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

⁵⁵ Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.⁵⁶ It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.⁵⁷

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.⁵⁸ Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.⁵⁹ As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.⁶⁰ This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

⁵⁶ Declaration ¶¶ 133, 135-37, 143, 148-50.

⁵⁷ Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

⁵⁸ *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

⁵⁹ *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

⁶⁰ *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?

MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar

liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.*⁶¹

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.⁶² The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.⁶³ Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.⁶⁴ In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

⁶¹ Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

⁶² *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

⁶³ ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

⁶⁴ ICANN Bylaws, Article IV.3.21.

29 July 2016

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