

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
CASE NO. 01-14-0002-1065

GULF COOPERATION COUNCIL  
(Claimant)

And

INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
(Respondent)

**INDEX TO DOCUMENTS SUBMITTED WITH ICANN'S RESPONSE TO  
CLAIMANT'S REQUEST FOR EMERGENCY RELIEF**

<b><u>Exhibit</u></b>	<b><u>DESCRIPTION</u></b>
<b>R-ER-1</b>	ICANN Bylaws
<b>R-ER-2</b>	ICANN Accountability Mechanisms Available to the ICANN Community
<b>R-ER-3</b>	New gTLD Application Guidebook (Version 6-4-2012)
<b>R-ER-4</b>	Board Resolutions 2012.04.10.01-04
<b>R-ER-5</b>	The Independent Objector's Comments on Controversial Applications
<b>R-ER-6</b>	NGPC Resolution No. 2013.06.04.NG01
<b>R-ER-7</b>	Annex 1 to NGPC Resolution No. 2013.06.04.NG01
<b>R-ER-8</b>	July 2013 U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting
<b>R-ER-9</b>	NGPC Resolution No. 2013.09.10.NGO3
<b>R-ER-10</b>	Annex 1 to NGPC Resolution No. 2013.09.10.NGO3
<b>R-ER-11</b>	Supplemental Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

<b><u>Exhibit</u></b>	<b><u>DESCRIPTION</u></b>
<b>R-ER-12</b>	UNCITRAL Model Law on International Commercial Arbitration, Art. 17A(1)(b) , <i>available at</i> <i><a href="http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf">http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf</a></i>
<b>R-ER-13</b>	<i>Distributor A v. Manufacturer B</i> , ICC Case No. 10596, Interlocutory Award of 2000, Yearbook Commercial Arbitration, Vol. XXX 68 n.3 (2005).
<b>R-ER-14</b>	<i>Paushok v. Mongolia</i> , Order on Interim Measures of 2 September 2008.
<b>R-ER-15</b>	Ali Yesilirmak, Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008
<b>R-ER-16</b>	Minutes of the 10 September 2013 Meeting of the New gTLD Program Committee
<b>R-ER-17</b>	Ali Yesilirmak, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION, Chapter 5
<b>R-ER-18</b>	<i>Bendoni-Derossi International v Iran</i> , Interim Award, IUSCT Case No. 375 (ITM 40-375-1), 7 June 1984

**Ex. R-ER-1**

[Resources](#)

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

This page is available in: | [Deutsch](#) | [English](#) | [Español](#) | [Français](#) | [Italiano](#) | [日本語](#) | [한국어](#) | [Português](#) | [Русский](#) | [中文](#) |

As amended 30 July 2014

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ANNEX C: [THE SCOPE OF THE ccNSO](#)ARTICLE I: MISSION AND [CORE VALUES](#)**Section 1. MISSION**

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

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

**Section 2. [CORE VALUES](#)**

In performing its mission, the following core values should guide the decisions and actions of [ICANN](#):

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting [ICANN](#)'s activities to those matters within [ICANN](#)'s mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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

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

## ARTICLE II: POWERS

### Section 1. GENERAL POWERS

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

### Section 2. RESTRICTIONS

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

### Section 3. NON-DISCRIMINATORY TREATMENT

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

## ARTICLE III: TRANSPARENCY

### Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and

transparent manner and consistent with procedures designed to ensure fairness.

## **Section 2. WEBSITE**

ICANN shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations, and Advisory Committees; (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN's budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) 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; (vi) announcements about ICANN activities of interest to significant segments of the ICANN community; (vii) comments received from the community on policies being developed and other matters; (viii) information about ICANN's physical meetings and public forums; and (ix) other information of interest to the ICANN community.

## **Section 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, including the Website and various other means of communicating with and receiving input from the general community of Internet users.

## **Section 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 5. MINUTES AND PRELIMINARY REPORTS**

1. All minutes of meetings of the Board and Supporting Organizations (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary for posting on the Website.
2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any resolutions passed by the Board of Directors 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), matters that ICANN 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 preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (as set forth in Articles VIII - X of these Bylaws) and Advisory Committees (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted.
3. 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'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 5.2 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.

4. 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's principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes 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), matters that ICANN 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 6. NOTICE AND COMMENT ON POLICY ACTIONS**

1. 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 shall:

a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and

c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in [Section 6\(1\)\(b\) of this Article](#), prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

## **Section 7. TRANSLATION OF DOCUMENTS**

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

## **ARTICLE IV: ACCOUNTABILITY AND REVIEW**

### **Section 1. PURPOSE**

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set

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

## Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
  - a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
  - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
  - c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
  - a. evaluate requests for review or reconsideration;
  - b. summarily dismiss insufficient requests;
  - c. evaluate requests for urgent consideration;
  - d. conduct whatever factual investigation is deemed appropriate;
  - e. request additional written submissions from the affected party, or from other parties;
  - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
  - g. make a recommendation to the Board of Directors on the merits of the request, as necessary.
4. ICANN shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the

party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:
  - a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
  - b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.
6. To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on the ICANN website. at <http://www.icann.org/en/groups/board/governance/reconsideration>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.
7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.
9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.
10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.
11. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.

12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.
13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.
14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.
15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.
16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN's website.
17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. The Board's decision on the recommendation is final.
18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN's headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.



19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.
20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
  - a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;
  - b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;
  - c. an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and
  - d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

### **Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.



4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
  - a. did the Board act without conflict of interest in taking its decision?;
  - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
  - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.
6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.
7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN.
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
  - b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
  - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
  - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
  - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
  - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.
  13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
  14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.
  15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
  16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.
  17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
  18. The IRP Panel should strive to issue its written declaration no later than six months

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

19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.
20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

#### **Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS**

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

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

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

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

### **ARTICLE V: OMBUDSMAN**

#### **Section 1. OFFICE OF OMBUDSMAN**

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

2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to

renewal by the Board.

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

4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN 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 budget recommended by the ICANN President to the Board. Nothing in this Article 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 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 Reconsideration Policy set forth in [Section 2 of Article IV](#) or the Independent Review Policy set forth in [Section 3 of Article IV](#) 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 community who believe that the ICANN staff, Board or an ICANN 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 staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

## Section 3. OPERATIONS

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of 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 which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;
  2. 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'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;
  3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN 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);
  4. heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN community and online availability;
  5. maintain neutrality and independence, and have no bias or personal stake in an outcome;
- and

6. comply with all ICANN conflicts-of-interest and confidentiality policies.

#### **Section 4. INTERACTION WITH ICANN AND OUTSIDE ENTITIES**

1. No ICANN employee, Board member, or other participant in Supporting Organizations or Advisory Committees shall prevent or impede the Ombudsman's contact with the ICANN community (including employees of ICANN). ICANN employees and Board members shall direct members of the ICANN community who voice problems, concerns, or complaints about ICANN to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

2. ICANN staff and other ICANN participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

3. Contact with the Ombudsman shall not constitute notice to ICANN of any particular action or cause of action.

4. 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.

5. 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 structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies.

#### **Section 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 VI: BOARD OF DIRECTORS**

#### **Section 1. COMPOSITION OF THE BOARD**

The ICANN Board of Directors ("Board") shall consist of sixteen voting members ("Directors"). In addition, four non-voting liaisons ("Liaisons") shall be designated for the purposes set forth in [Section 9 of this Article](#). Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the ICANN Board.

#### **Section 2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIRMAN AND VICE-CHAIRMAN**

1. The Directors shall consist of:

a. Eight voting members selected by the Nominating Committee established by [Article VII of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seats 1 through 8.

- b. Two voting members selected by the Address Supporting Organization according to the provisions of [Article VIII of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seat 9 and Seat 10.
- c. Two voting members selected by the Country-Code Names Supporting Organization according to the provisions of [Article IX of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seat 11 and Seat 12.
- d. Two voting members selected by the Generic Names Supporting Organization according to the provisions of [Article X of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seat 13 and Seat 14.
- e. One voting member selected by the At-Large Community according to the provisions of Article XI of these Bylaws. This seat on the Board of Directors is referred to in these Bylaws as Seat 15.
- f. The President ex officio, who shall be a voting member.

2. In carrying out its responsibilities to fill Seats 1 through 8, the Nominating Committee shall seek to ensure that the ICANN Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in [Section 3 of this Article](#). At no time when it makes its selection shall the Nominating Committee select a Director to fill any vacancy or expired term whose selection would cause the total number of Directors (not including the President) from countries in any one Geographic Region (as defined in [Section 5 of this Article](#)) to exceed five; and the Nominating Committee shall ensure when it makes its selections that the Board includes at least one Director who is from a country in each ICANN Geographic Region ("Diversity Calculation").

For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN Bylaws, 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/her Statement of Interest the country of citizenship or Domicile that he/she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN Bylaws, a person can only have one "Domicile," which shall be determined by where the candidate has a permanent residence and place of habitation.

3. In carrying out their responsibilities to fill Seats 9 through 15, the Supporting Organizations and the At-Large Community shall seek to ensure that the ICANN Board is composed of members that in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in [Section 3 of this Article](#). At any given time, no two Directors selected by a Supporting Organization shall be citizens from the same country or of countries located in the same Geographic Region.

For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN Bylaws, 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/her Statement of Interest the country of citizenship or Domicile that he/she wants the Supporting Organization or the At-Large Community to use for selection purposes. For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN Bylaws, a person can only

have one "Domicile," which shall be determined by where the candidate has a permanent residence and place of habitation.

4. The Board shall annually elect a Chairman and a Vice-Chairman from among the Directors, not including the President.

### **Section 3. CRITERIA FOR SELECTION OF DIRECTORS**

ICANN Directors shall be:

1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;
2. Persons with an understanding of ICANN's mission and the potential impact of ICANN decisions on the global Internet community, and committed to the success of ICANN;
3. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section;
4. Persons who, in the aggregate, have personal familiarity with the operation of gTLD registries and registrars; with ccTLD registries; with IP 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
5. Persons who are able to work and communicate in written and spoken English.

### **Section 4. ADDITIONAL QUALIFICATIONS**

1. 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.
2. No person who serves in any capacity (including as a liaison) on any Supporting Organization Council shall simultaneously serve as a Director or liaison to the Board. If such a person accepts a nomination to be considered for selection by the Supporting Organization Council or the At-Large Community to be a Director, the person shall not, following such nomination, participate in any discussion of, or vote by, the Supporting Organization Council or the committee designated by the At-Large Community relating to the selection of Directors by the Council or Community, until the Council or committee(s) designated by the At-Large Community has selected the full complement of Directors it is responsible for selecting. In the event that a person serving in any capacity on a Supporting Organization Council accepts a nomination to be considered for selection 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 selection process. In the event that a person serving in any capacity on the At-Large Advisory Committee accepts a nomination to be considered for selection 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 Community's selection process.
3. Persons serving in any capacity on the Nominating Committee shall be ineligible for



selection to positions on the Board as provided by [Article VII, Section 8](#).

## **Section 5. INTERNATIONAL REPRESENTATION**

In order to ensure broad international representation on the Board, the selection of Directors by the Nominating Committee, each 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. 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 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": Europe; Asia/Australia/Pacific; Latin America/Caribbean islands; Africa; and North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section shall be reviewed by the Board from time to time (but at least every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

## **Section 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. Each Director shall be responsible for disclosing to ICANN any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the California Nonprofit Public Benefit Corporation Law ("CNPBCL"). In addition, each Director shall disclose to ICANN 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 CNPBCL. The Board shall adopt policies specifically addressing Director, Officer, and 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. 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 and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies.

## **Section 8. TERMS OF DIRECTORS**

1. The regular term of office of Director Seats 1 through 15 shall begin as follows:
  - a. The regular terms of Seats 1 through 3 shall begin at the conclusion of ICANN's annual meeting in 2003 and each ICANN annual meeting every third year after 2003;
  - b. The regular terms of Seats 4 through 6 shall begin at the conclusion of ICANN's annual meeting in 2004 and each ICANN annual meeting every third year after 2004;
  - c. The regular terms of Seats 7 and 8 shall begin at the conclusion of ICANN's annual meeting in 2005 and each ICANN annual meeting every third year after 2005;
  - d. The terms of Seats 9 and 12 shall continue until the conclusion of ICANN's ICANN's annual meeting in 2015. The next terms of Seats 9 and 12 shall begin at



the conclusion of ICANN's annual meeting in 2015 and each ICANN annual meeting every third year after 2015;

e. The terms of Seats 10 and 13 shall continue until the conclusion of ICANN's annual meeting in 2013. The next terms of Seats 10 and 13 shall begin at the conclusion of ICANN's annual meeting in 2013 and each ICANN annual meeting every third year after 2013; and

f. The terms of Seats 11, 14 and 15 shall continue until the conclusion of ICANN's annual meeting in 2014. The next terms of Seats 11, 14 and 15 shall begin at the conclusion of ICANN's annual meeting in 2014 and each ICANN annual meeting every third year after 2014.

2. Each Director holding any of Seats 1 through 15, including a Director selected 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 selected and qualified or until that Director resigns or is removed in accordance with these Bylaws.

3. At least two months before the commencement of each annual meeting, the Nominating Committee shall give the Secretary of ICANN written notice of its selection of Directors for seats with terms beginning at the conclusion of the annual meeting.

4. At least six months before the date specified for the commencement of the term as specified in paragraphs 1.d-f above, any Supporting Organization or the At-Large community entitled to select a Director for a Seat with a term beginning that year shall give the Secretary of ICANN written notice of its selection.

5. Subject to the provisions of the Transition Article of these Bylaws, no Director may serve more than three consecutive terms. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. (Note: In the period prior to the beginning of the first regular term of Seat 15 in 2010, Seat 15 was deemed vacant for the purposes of calculation of terms of service.)

6. 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 9. NON-VOTING LIAISONS**

1. The non-voting liaisons shall include:

a. One appointed by the [Governmental Advisory Committee](#);

b. One appointed by the Root Server System Advisory Committee established by [Article XI of these Bylaws](#);

c. One appointed by the Security and Stability Advisory Committee established by [Article XI of these Bylaws](#);

d. One appointed by the Internet Engineering Task Force.

2. The non-voting 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 non-voting liaison shall give the Secretary of ICANN written notice of its

appointment.

3. Each non-voting 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.

4. The non-voting 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. Non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization.

## **Section 10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON**

Subject to Section 5226 of the CNPBCL, any Director or non-voting liaison may resign at any time, either by oral tender of resignation at any meeting of the Board (followed by prompt written notice to the Secretary of ICANN) or by giving written notice thereof to the President or the Secretary of ICANN. 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. The successor shall be selected pursuant to [Section 12 of this Article](#).

## **Section 11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON**

1. Any Director may be removed, following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that the Director who is the subject of the removal action shall not be entitled to vote on such an action or be counted as a voting member of the Board when calculating the required three-fourths (3/4) vote; and provided further, that each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director. If the Director was selected by a Supporting Organization, notice must be provided to that Supporting Organization at the same time notice is provided to the Director. If the Director was selected by the At-Large Community, notice must be provided to the At-Large Advisory Committee at the same time notice is provided to the Director.

2. With the exception of the non-voting liaison appointed by the Governmental Advisory Committee, any non-voting liaison may be removed, following notice to that liaison and to the organization by which that liaison was selected, 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 Board may request the Governmental Advisory Committee to consider the replacement of the non-voting liaison appointed by that Committee if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

## **Section 12. VACANCIES**

1. A vacancy or vacancies in the Board of Directors shall be deemed to exist in the case of the death, resignation, or removal of any Director; if the authorized number of Directors is increased; or if a Director has been declared of unsound mind by a final order of court or convicted of a felony or incarcerated for more than 90 days as a result of a criminal conviction or has been found by final order or judgment of any court to have breached a duty under Sections 5230 et seq. of the CNPBCL. Any vacancy occurring on the Board of Directors shall

be filled by the Nominating Committee, unless (a) that Director was selected by a Supporting Organization, in which case that vacancy shall be filled by that Supporting Organization, or (b) that Director was the President, in which case the vacancy shall be filled in accordance with the provisions of [Article XIII of these Bylaws](#). The selecting body shall give written notice to the Secretary of ICANN of their appointments to fill vacancies. A Director selected 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 selected 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.

2. The organizations selecting the non-voting liaisons identified in [Section 9 of this Article](#) are responsible for determining the existence of, and filling, any vacancies in those positions. They shall give the Secretary of ICANN written notice of their appointments to fill vacancies.

### **Section 13. ANNUAL MEETINGS**

Annual meetings of ICANN 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 for ICANN shall be held at the principal office of ICANN, 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 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.

### **Section 15. SPECIAL MEETINGS**

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the members of the Board or by the Chairman of the Board or the President. A call for a special meeting shall be made by the Secretary of ICANN. In the absence of designation, special meetings shall be held at the principal office of ICANN.

### **Section 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 non-voting liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and non-voting liaison at the Director's or non-voting liaison's address as it is shown on the records of ICANN. 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 to the contrary, notice of a meeting need not be given to any Director who signed a waiver of notice or 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 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 18. ACTION BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT**

Members of the Board or any Committee of the Board may participate in a meeting of the Board or Committee of the Board through use of (i) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (ii) electronic video screen communication or other communication equipment; provided that (a) all Directors participating in such a meeting can speak to and hear one another, (b) all Directors are provided the means of fully participating in all matters before the Board or Committee of the Board, and (c) ICANN adopts and implements means of verifying that (x) a person participating in such a meeting is a Director or other person entitled to participate in the meeting and (y) all actions of, or votes by, the Board or Committee of the Board are taken or cast only by the members of the Board or Committee and not persons who are not members. Participation in a meeting pursuant to this Section constitutes presence in person at such meeting. ICANN shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit members of the Board to participate by telephone.

### **Section 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 20. ELECTRONIC MAIL**

If permitted under applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

### **Section 21. RIGHTS OF INSPECTION**

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. ICANN shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

### **Section 22. COMPENSATION**

1. Except for the President of ICANN, who serves ex officio as a voting member of the Board, each of the Directors shall be entitled to receive compensation for his/her services as a Director. The President shall receive only his/her compensation for service as President and shall not receive additional compensation for service as a Director.
2. If the Board determines to offer a compensation arrangement to one or more Directors other than the President of ICANN for services to ICANN as Directors, the Board shall follow a

process that is calculated to pay an amount for service as a Director that is in its entirety Reasonable Compensation for such service under the standards set forth in §53.4958-4(b) of the Treasury Regulations.

3. As part of the process, the Board shall retain an Independent Valuation Expert to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion from such expert regarding the ranges of Reasonable Compensation 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 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.

4. After having reviewed the expert's 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.

5. The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

6. In addition to authorizing payment of compensation for services as Directors as set forth in this Section 22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by non-voting liaisons performing their duties as Directors or non-voting liaisons.

7. As used in this Section 22, the following terms shall have the following meanings:

(a) An "Independent Valuation Expert" means a person retained by ICANN to value compensation arrangements that: (i) holds itself out to the public as a compensation consultant; (ii) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN; (iii) is qualified to make valuations of the type of services involved in any engagement by and for ICANN; (iv) issues to ICANN a Reasoned Written Opinion regarding a particular compensation arrangement; and (v) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (i) through (iv) of this definition.

(b) A "Reasoned Written Opinion" means a written opinion of a valuation expert who meets the requirements of subparagraph 7(a) (i) through (iv) of this Section. To be reasoned, the opinion must be based upon a full disclosure by ICANN 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, and the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding the 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.

(c) "Reasonable Compensation" shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

8. Each of the non-voting liaisons to the Board, with the exception of the Governmental Advisory Committee liaison, shall be entitled to receive compensation for his/her services as a non-voting liaison. If the Board determines to offer a compensation arrangement to one or more non-voting liaisons, the Board shall approve that arrangement by a required three-fourths (3/4) vote.

## **Section 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 of ICANN 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.

## **ARTICLE VII: NOMINATING COMMITTEE**

### **Section 1. DESCRIPTION**

There shall be a Nominating Committee of ICANN, responsible for the selection of all ICANN Directors except the President and those Directors selected by ICANN's Supporting Organizations, and for such other selections as are set forth in these Bylaws.

### **Section 2. COMPOSITION**

The Nominating Committee shall be composed of the following persons:

1. A non-voting Chair, appointed by the ICANN Board;
2. A non-voting Chair-Elect, appointed by the ICANN Board as a non-voting advisor;
3. A non-voting liaison appointed by the ICANN Root Server System Advisory Committee established by [Article XI of these Bylaws](#);
4. A non-voting liaison appointed by the ICANN Security and Stability Advisory Committee established by [Article XI of these Bylaws](#);
5. A non-voting liaison appointed by the [Governmental Advisory Committee](#);
6. Subject to the provisions of the Transition Article of these Bylaws, five voting delegates selected by the At-Large Advisory Committee established by [Article XI of these Bylaws](#);
7. Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization, established by [Article X of these Bylaws](#), as follows:
  - a. One delegate from the Registries Stakeholder Group;
  - b. One delegate from the Registrars Stakeholder Group;

- c. Two delegates from the Business Constituency, one representing small business users and one representing large business users;
  - d. One delegate from the Internet Service Providers Constituency;
  - e. One delegate from the Intellectual Property Constituency; and
  - f. One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.
8. One voting delegate each selected by the following entities:
- a. The Council of the Country Code Names Supporting Organization established by [Article IX of these Bylaws](#);
  - b. The Council of the Address Supporting Organization established by [Article VIII of these Bylaws](#); and
  - c. The Internet Engineering Task Force.
9. 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 3. TERMS

Subject to the provisions of the [Transition Article of these Bylaws](#):

1. 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.
2. The regular term of each voting delegate shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the immediately following ICANN annual meeting.
3. 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 annual meeting.
4. 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.
5. 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 paragraph 4 of this Article, 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 2(9) of this Article.

6. 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 4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES**

Delegates to the ICANN Nominating Committee shall be:

1. 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;
2. Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN;
3. Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;
4. 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;
5. Persons with an understanding of ICANN's mission and the potential impact of ICANN's activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and
6. Persons who are able to work and communicate in written and spoken English.

#### **Section 5. DIVERSITY**

In carrying out its responsibilities to select members of the ICANN Board (and selections to any other ICANN bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing membership of the ICANN Board (and such other bodies), and seek to ensure that the persons selected to fill vacancies on the ICANN Board (and each such other body) shall, to the extent feasible and consistent with the other criteria required to be applied by [Section 4 of this Article](#), make selections guided by Core Value 4 in [Article I, Section 2](#) .

#### **Section 6. ADMINISTRATIVE AND OPERATIONAL SUPPORT**

ICANN shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

#### **Section 7. PROCEDURES**

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

#### **Section 8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE**

No person who serves on the Nominating Committee in any capacity shall be eligible for selection by any



means to any position on the Board or any other ICANN body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

## **Section 9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE**

No person who is an employee of or paid consultant to ICANN (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in [Section 2 of this Article](#).

## **ARTICLE VIII: ADDRESS SUPPORTING ORGANIZATION**

### **Section 1. DESCRIPTION**

1. The Address Supporting Organization (ASO) shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.
2. The ASO shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN and the Number Resource Organization (NRO), an organization of the existing regional Internet registries (RIRs).

### **Section 2. ADDRESS COUNCIL**

1. The ASO shall have an Address Council, consisting of the members of the NRO Number Council.
2. The Address Council shall select Directors to those seats on the Board designated to be filled by the ASO.

## **ARTICLE IX: COUNTRY-CODE NAMES SUPPORTING ORGANIZATION**

### **Section 1. DESCRIPTION**

There shall be a policy-development body known as the Country-Code Names Supporting Organization (ccNSO), which shall be responsible for:

1. developing and recommending to the Board global policies relating to country-code top-level domains;
2. Nurturing consensus across the ccNSO's community, including the name-related activities of ccTLDs; and
3. Coordinating with other ICANN Supporting Organizations, committees, and constituencies under ICANN.

Policies that apply to ccNSO members by virtue of their membership are only those policies developed according to section 4.10 and 4.11 of this Article. However, the ccNSO 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 managers, assisting in skills building within the global community of ccTLD managers, and enhancing operational and technical cooperation among ccTLD managers.

### **Section 2. ORGANIZATION**

The ccNSO shall consist of (i) ccTLD managers that have agreed in writing to be members of the ccNSO (see [Section 4\(2\) of this Article](#)) and (ii) a ccNSO Council responsible for managing the policy-development process of the ccNSO.

### Section 3. ccNSO COUNCIL

1. The ccNSO Council shall consist of (a) three ccNSO Council members selected by the ccNSO members within each of [ICANN's Geographic Regions](#) in the manner described in [Section 4\(7\) through \(9\) of this Article](#); (b) three ccNSO Council members selected by the ICANN Nominating Committee; (c) liaisons as described in [paragraph 2 of this Section](#); and (iv) observers as described in [paragraph 3 of this Section](#).
2. There shall also be one liaison to the ccNSO Council from each of the following organizations, to the extent they choose to appoint such a liaison: (a) the Governmental Advisory Committee; (b) the At-Large Advisory Committee; and (c) each of the Regional Organizations described in [Section 5 of this Article](#). These liaisons shall not be members of or entitled to vote on the ccNSO Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO Council. Appointments of liaisons shall be made by providing written notice to the ICANN Secretary, with a notification copy to the ccNSO 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 Secretary, with a notification copy to the ccNSO Council Chair.
3. The ccNSO Council may agree with the Council of any other ICANN Supporting Organization to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSO Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO Council at any time by providing written notice to the ICANN Secretary, with a notification copy to the ccNSO Council Chair.
4. Subject to the provisions of the [Transition Article of these Bylaws](#): (a) the regular term of each ccNSO Council member shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the third ICANN annual meeting thereafter; (b) the regular terms of the three ccNSO Council members selected by the ccNSO members within each ICANN 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 (c) the regular terms of the three ccNSO Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO 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.
5. A ccNSO Council member may resign at any time by giving written notice to the ICANN Secretary, with a notification copy to the ccNSO Council Chair.
6. ccNSO Council members may be removed for not attending three consecutive meetings of the ccNSO 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 Council.
7. A vacancy on the ccNSO Council shall be deemed to exist in the case of the death,

resignation, or removal of any ccNSO 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 Secretary written notice of its selection, with a notification copy to the ccNSO Council Chair. Vacancies in the positions of the ccNSO Council members selected by ccNSO members shall be filled for the unexpired term by the procedure described in [Section 4\(7\) through \(9\) of this Article](#).

8. The role of the ccNSO Council is to administer and coordinate the affairs of the ccNSO (including coordinating meetings, including an annual meeting, of ccNSO members as described in [Section 4\(6\) of this Article](#)) and to manage the development of policy recommendations in accordance with Section 6 of this Article. The ccNSO Council shall also undertake such other roles as the members of the ccNSO shall decide from time to time.

9. The ccNSO Council shall make selections to fill Seats 11 and 12 on the Board 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 Council then in office. Notification of the ccNSO Council's selections shall be given by the ccNSO Council Chair in writing to the ICANN Secretary, consistent with Article VI, [Sections 8\(4\)](#) and [12\(1\)](#).

10. The ccNSO Council shall select from among its members the ccNSO Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO 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 Council then in office. The term of office of the ccNSO Council Chair and any Vice Chair(s) shall be as specified by the ccNSO Council at or before the time the selection is made. The ccNSO Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.

11. The ccNSO Council, subject to direction by the ccNSO members, shall adopt such rules and procedures for the ccNSO as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO membership and operating procedures adopted by the ccNSO Council shall be published on the Website.

12. Except as provided by [paragraphs 9 and 10 of this Section](#), the ccNSO Council shall act at meetings. The ccNSO Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO Council, meetings may be held in person or by other means, provided that all ccNSO Council members are permitted to participate by at least one means described in [paragraph 14 of this Section](#). Except where determined by a majority vote of the members of the ccNSO Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO Council meetings should be held in conjunction with meetings of the Board, or of one or more of ICANN's other Supporting Organizations.

13. Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO Council shall be provided to each ccNSO 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 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.

14. Members of the ccNSO Council may participate in a meeting of the ccNSO Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (a) all ccNSO Council members participating in the meeting can speak to and hear one another, (b) all ccNSO Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO Council, and (c) there is a reasonable means of verifying the identity of ccNSO Council members participating in the meeting and their votes. A majority of the ccNSO 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 Council members present at any meeting at which there is a quorum shall be actions of the ccNSO Council, unless otherwise provided in these Bylaws. The ccNSO Council shall transmit minutes of its meetings to the ICANN 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 4. MEMBERSHIP

1. The ccNSO shall have a membership consisting of ccTLD managers. Any ccTLD manager that meets the membership qualifications stated in [paragraph 2 of this Section](#) shall be entitled to be members of the ccNSO. For purposes of this Article, a ccTLD manager is the organization or entity responsible for managing an ISO 3166 country-code top-level domain and referred to in the IANA database under the current heading of "Sponsoring Organization", or under any later variant, for that country-code top-level domain.

2. Any ccTLD manager may become a ccNSO member by submitting an application to a person designated by the ccNSO Council to receive applications. Subject to the provisions of the Transition Article of these Bylaws, the application shall be in writing in a form designated by the ccNSO Council. The application shall include the ccTLD manager's recognition of the role of the ccNSO within the ICANN structure as well as the ccTLD manager's agreement, for the duration of its membership in the ccNSO, (a) to adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by the ccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO membership fees established by the ccNSO Council under [Section 7\(3\) of this Article](#). A ccNSO member may resign from membership at any time by giving written notice to a person designated by the ccNSO Council to receive notices of resignation. Upon resignation the ccTLD manager ceases to agree to (a) adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by the ccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO membership fees established by the ccNSO Council under [Section 7\(3\) of this Article](#). In the absence of designation by the ccNSO Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN Secretary, who shall notify the ccNSO Council of receipt of any such applications and notices.

3. Neither membership in the ccNSO nor membership in any Regional Organization described in [Section 5 of this Article](#) shall be a condition for access to or registration in the IANA database. Any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services is not in any way contingent upon membership in the ccNSO.

4. The Geographic Regions of ccTLDs shall be as described in [Article VI, Section 5 of these Bylaws](#). For purposes of this Article, managers of ccTLDs within a Geographic Region that are members of the ccNSO are referred to as ccNSO members "within" the Geographic Region, regardless of the physical location of the ccTLD manager. In cases where the Geographic

Region of a ccNSO member is unclear, the ccTLD member should self-select according to procedures adopted by the ccNSO Council.

5. Each ccTLD manager may designate in writing a person, organization, or entity to represent the ccTLD manager. In the absence of such a designation, the ccTLD manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA database.

6. There shall be an annual meeting of ccNSO members, which shall be coordinated by the ccNSO Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD managers that are not members of the ccNSO as well as other non-members of the ccNSO to address the meeting. To the extent practicable, annual meetings of the ccNSO members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN's other Supporting Organizations.

7. The ccNSO Council members selected by the ccNSO members from each Geographic Region (see [Section 3\(1\)\(a\) of this Article](#)) shall be selected through nomination, and if necessary election, by the ccNSO members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO-member-selected member of the ccNSO Council, or upon the occurrence of a vacancy in the seat of such a ccNSO Council member, the ccNSO Council shall establish a nomination and election schedule, which shall be sent to all ccNSO members within the Geographic Region and posted on the Website.

8. Any ccNSO member may nominate an individual to serve as a ccNSO Council member representing the ccNSO member's Geographic Region. Nominations must be seconded by another ccNSO member from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO Council agree to support the policies committed to by ccNSO members.

9. 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 Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO Council. Otherwise, an election by written ballot (which may be by e-mail) shall be held to select the ccNSO Council members from among those nominated (with seconds and acceptances), with ccNSO 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 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 members within the Geographic Region. The ccNSO Council Chair shall provide the ICANN Secretary prompt written notice of the selection of ccNSO Council members under this paragraph.

10. Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies (a) only address issues that are within scope of the ccNSO according to Article IX, Section 6 and Annex C; (b) have been developed through the ccPDP as described in [Section 6 of this Article](#), and (c) have been recommended as such by the ccNSO to the Board, and (d) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.



11. A ccNSO member shall not be bound if it provides a declaration to the ccNSO Council stating that (a) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in [paragraph 10 of this Section](#)), and (b) failure to implement the policy would not impair DNS operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO Council will provide a response to the ccNSO member's declaration. If there is a ccNSO Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO Council, the response shall state the ccNSO Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSO Council's agreement with the declaration. If the ccNSO Council disagrees, the ccNSO Council shall review the situation after a six-month period. At the end of that period, the ccNSO Council shall make findings as to (a) whether the ccNSO members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in [paragraph 10 of this Section](#)) and (b) whether failure to implement the policy would impair DNS operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO Council shall proceed by consensus, which may be demonstrated by a vote of 14 or more members of the ccNSO Council.

## Section 5. REGIONAL ORGANIZATIONS

The ccNSO Council may designate a Regional Organization for each ICANN Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO 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 Council and shall be subject to review according to procedures established by the Board.

## Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO'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 by use of the procedures of the ccPDP, and shall be subject to approval by the Board.
2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO 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 by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

## Section 7. STAFF SUPPORT AND FUNDING

1. Upon request of the ccNSO Council, a member of the ICANN staff may be assigned to support the ccNSO and shall be designated as the ccNSO Staff Manager. Alternatively, the ccNSO Council may designate, at ccNSO expense, another person to serve as ccNSO Staff Manager. The work of the ccNSO Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO Council, and may include the duties of ccPDP Issue Manager.
2. Upon request of the ccNSO Council, ICANN shall provide administrative and operational support necessary for the ccNSO to carry out its responsibilities. Such support shall not include an obligation for ICANN to fund travel expenses incurred by ccNSO participants for travel to any meeting of the ccNSO or for any other purpose. The ccNSO Council may make provision, at ccNSO expense, for administrative and operational support in addition or as an

alternative to support provided by ICANN.

3. The ccNSO Council shall establish fees to be paid by ccNSO members to defray ccNSO expenses as described in [paragraphs 1 and 2 of this Section](#), as approved by the ccNSO members.

4. Written notices given to the ICANN Secretary under this Article shall be permanently retained, and shall be made available for review by the ccNSO Council on request. The ICANN Secretary shall also maintain the roll of members of the ccNSO, which shall include the name of each ccTLD manager's designated representative, and which shall be posted on the Website.

## ARTICLE X: GENERIC NAMES SUPPORTING ORGANIZATION

### Section 1. DESCRIPTION

There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.

### Section 2. ORGANIZATION

The GNSO shall consist of:

- (i) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in [Section 5 of this Article](#);
- (ii) Four Stakeholder Groups organized within Houses as described in [Section 5 of this Article](#);
- (iii) Two Houses within the GNSO Council as described in [Section 3\(8\) of this Article](#); and
- (iv) a GNSO Council responsible for managing the policy development process of the GNSO, as described in [Section 3 of this Article](#).

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 ICANN Board of Directors.

### Section 3. GNSO COUNCIL

1. Subject to the provisions of [Transition Article XX, Section 5 of these Bylaws](#) and as described in [Section 5 of Article X](#), the GNSO Council shall consist of:
  - a. three representatives selected from the Registries Stakeholder Group;
  - b. three representatives selected from the Registrars Stakeholder Group;
  - c. six representatives selected from the Commercial Stakeholder Group;
  - d. six representatives selected from the Non-Commercial Stakeholder Group; and
  - e. three representatives selected by the ICANN Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO 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 3\(8\) of this Article](#)) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO Council is as diverse as possible and practicable, including considerations of geography, GNSO Constituency, sector, ability and gender.

There may also be liaisons to the GNSO Council from other ICANN Supporting Organizations and/or Advisory Committees, from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO Council by providing written notice to the Chair of the GNSO Council and to the ICANN 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 Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO Council.

2. Subject to the provisions of the [Transition Article XX, and Section 5 of these Bylaws](#), the regular term of each GNSO Council member shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the second ICANN 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 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 Operating Procedures.

3. A vacancy on the GNSO 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 Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO 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 3\(8\) of this Article](#)). Such removal shall be subject to reversal by the ICANN Board on appeal by the affected GNSO Council member.

4. The GNSO Council is responsible for managing the policy development process of the GNSO. It shall adopt such procedures (the "GNSO 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 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 Council, the applicable procedures shall be as set forth in [Section 6 of this Article](#).

5. 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 Council at any given time.

6. The GNSO shall make selections to fill Seats 13 and 14 on the ICANN Board by written ballot or by action at a meeting. Each of the two voting Houses of the GNSO, as described in [Section 3\(8\) of this Article](#), shall make a selection to fill one of two ICANN Board seats, as outlined below; any such selection must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:

- a. the Contracted Party House shall select a representative to fill Seat 13; and
- b. the Non-Contracted Party House shall select a representative to fill Seat 14

Election procedures are defined in the GNSO Operating Procedures.

Notification of the Board seat selections shall be given by the GNSO Chair in writing to the ICANN Secretary, consistent with Article VI, Sections [8\(4\)](#) and [12\(1\)](#).

7. The GNSO Council shall select the GNSO Chair for a term the GNSO Council specifies, but not longer than one year. Each House (as described in [Section 3.8 of this Article](#)) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO Council, for a term the GNSO Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO Operating Procedures. In the event that the GNSO Council has not elected a GNSO Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO Co-Chairs until a successful election can be held.

8. Except as otherwise required in these Bylaws, for voting purposes, the GNSO Council (see [Section 3\(1\) of this Article](#)) shall be organized into a bicameral House structure as described below:

- a. 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 Nominating Committee for a total of seven voting members; and
- b. 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 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 Council.

9. Except as otherwise specified in these Bylaws, [Annex A](#) hereto, or the GNSO Operating Procedures, the default threshold to pass a GNSO 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 actions:

a. Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

b. Initiate a Policy Development Process ("PDP") 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.

c. Initiate a PDP Not Within Scope: requires an affirmative vote of GNSO Supermajority.

d. Approve a PDP Team Charter for a PDP 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.

e. Approve a PDP Team Charter for a PDP Not Within Scope: requires an affirmative vote of a GNSO Supermajority.

f. Changes to an Approved PDP Team Charter: For any PDP Team Charter approved under d. or e. above, the GNSO Council may approve an amendment to the Charter through a simple majority vote of each House.

g. Terminate a PDP: Once initiated, and prior to the publication of a Final Report, the GNSO Council may terminate a PDP only for significant cause, upon a motion that passes with a GNSO Supermajority Vote in favor of termination.

h. Approve a PDP Recommendation Without a GNSO Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

i. Approve a PDP Recommendation With a GNSO Supermajority: requires an affirmative vote of a GNSO Supermajority,

j. Approve a PDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded.

k. Modification of Approved PDP Recommendation: Prior to Final Approval by the ICANN Board, an Approved PDP Recommendation may be modified or amended by the GNSO Council with a GNSO Supermajority vote.

l. A "GNSO Supermajority" shall mean: (a) two-thirds (2/3) of the Council members

of each House, or (b) three-fourths (3/4) of one House and a majority of the other House."

#### Section 4. STAFF SUPPORT AND FUNDING

1. A member of the ICANN staff shall be assigned to support the GNSO, whose work on substantive matters shall be assigned by the Chair of the GNSO Council, and shall be designated as the GNSO Staff Manager (Staff Manager).
2. ICANN shall provide administrative and operational support necessary for the GNSO to carry out its responsibilities. Such support shall not include an obligation for ICANN to fund travel expenses incurred by GNSO participants for travel to any meeting of the GNSO or for any other purpose. ICANN may, at its discretion, fund travel expenses for GNSO participants under any travel support procedures or guidelines that it may adopt from time to time.

#### Section 5. STAKEHOLDER GROUPS

1. The following Stakeholder Groups are hereby recognized as representative of a specific group of one or more Constituencies or interest groups and subject to the provisions of the [Transition Article XX, Section 5 of these Bylaws](#):
  - a. Registries Stakeholder Group representing all gTLD registries under contract to ICANN;
  - b. Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN;
  - c. Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet; and
  - d. Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.
2. Each Stakeholder Group is assigned a specific number of Council seats in accordance with [Section 3\(1\) of this Article](#).
3. Each Stakeholder Group identified in [paragraph 1 of this Section](#) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN 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.
4. 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:
  - a. A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO to carry out its policy-development responsibilities;
  - b. A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;

- c. A recommendation for organizational placement within a particular Stakeholder Group; and
- d. 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.

5. The Board may create new Constituencies as described in [Section 5\(3\)](#) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of [ICANN](#). 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 Council](#) and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

## **Section 6. POLICY DEVELOPMENT PROCESS**

The policy-development procedures to be followed by the [GNSO](#) shall be as stated in [Annex A](#) to these Bylaws. These procedures may be supplemented or revised in the manner stated in [Section 3\(4\) of this Article](#).

## **ARTICLE XI: ADVISORY COMMITTEES**

### **Section 1. GENERAL**

The Board may create one or more Advisory Committees in addition to those set forth in this Article. 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 shall have no legal authority to act for [ICANN](#), but shall report their findings and recommendations to the Board.

### **Section 2. SPECIFIC ADVISORY COMMITTEES**

There shall be at least the following Advisory Committees:

#### **1. Governmental Advisory Committee**

- a. The Governmental Advisory Committee should 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.
- b. Membership in the Governmental 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 through its Chair.
- c. The Governmental Advisory Committee may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the

Website.

d. The chair of the Governmental Advisory Committee shall be elected by the members of the Governmental Advisory Committee pursuant to procedures adopted by such members.

e. Each member of the Governmental Advisory Committee shall appoint one accredited representative to the 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.

f. The Governmental Advisory Committee shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN Nominating Committee.

g. The Governmental Advisory Committee may designate a non-voting liaison to each of the Supporting Organization Councils and Advisory Committees, to the extent the Governmental Advisory Committee deems it appropriate and useful to do so.

h. The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

i. The Governmental 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.

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. 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.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.

## 2. Security and Stability Advisory Committee

a. The role of the Security and Stability Advisory Committee ("SSAC") is to advise the ICANN 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:

1. To communicate on security matters with the Internet technical community and the operators and managers of critical DNS 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 Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS and address allocation and those engaged in operations planning.
2. 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 community accordingly. The Committee shall recommend any necessary audit activity to assess the current status of DNS and address allocation security in relation to identified risks and threats.
3. To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF, RSSAC, 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 Committee shall monitor these activities and inform the ICANN community and Board on their progress, as appropriate.
4. To report periodically to the Board on its activities.
5. To make policy recommendations to the ICANN community and Board.

b. The SSAC's chair and members shall be appointed by the Board. SSAC 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 chair may provide recommendations to the Board regarding appointments to the SSAC. The SSAC chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC is considered for appointment or re-appointment each year. The Board shall also have to power to remove SSAC appointees as recommended by or in consultation with the SSAC. (Note: The first full term under this paragraph shall commence on 1 January 2011 and end on 31 December 2013. Prior to 1 January 2011, the SSAC shall be comprised as stated in the Bylaws as amended 25 June 2010, and the SSAC chair shall recommend the re-appointment of all current SSAC members to full or partial terms as appropriate to implement the provisions of this paragraph.)

c. The SSAC shall annually appoint a non-voting liaison to the ICANN Board according to [Section 9 of Article VI](#).

### 3. Root Server System Advisory Committee

a. The role of the Root Server System Advisory Committee ("RSSAC") is to advise the ICANN 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:

1. Communicate on matters relating to the operation of the Root Servers and their multiple instances with the Internet technical community and the ICANN community. The 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 servers.
2. Communicate on matters relating to the administration of the 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 File.
3. 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.
4. Respond to requests for information or opinions from the ICANN Board of Directors.
5. Report periodically to the Board on its activities.
6. Make policy recommendations to the ICANN community and Board.

b. The RSSAC shall be led by two co-chairs. The RSSAC's chairs and members shall be appointed by the Board.

1. RSSAC 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 chairs shall provide recommendations to the Board regarding appointments to the RSSAC. If the board declines to appoint a person nominated by the RSSAC then it will provide the rationale for its decision. The RSSAC chairs shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC is considered for appointment or re-appointment each year. The Board shall also have to power to remove RSSAC appointees as recommended by or in consultation with the RSSAC. (Note: The first term under this paragraph shall commence on 1 July 2013 and end on 31 December 2015, and shall be considered a full term for all purposes. All other full terms under this paragraph shall begin on 1 January of the corresponding year. Prior to 1 July 2013, the RSSAC shall be comprised as stated in the Bylaws as amended 16 March 2012, and the RSSAC chairs shall recommend the re-appointment of all current RSSAC members to full or partial terms as appropriate to implement



the provisions of this paragraph.)

2. The RSSAC shall recommend the appointment of the chairs to the board following a nomination process that it devises and documents.

c. The RSSAC shall annually appoint a non-voting liaison to the ICANN Board according to Section 9 of Article VI.

#### 4. At-Large Advisory Committee

a. The At-Large Advisory Committee (ALAC) is the primary organizational home within ICANN for individual Internet users. The role of the ALAC shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate. The ALAC, which plays an important role in ICANN's accountability mechanisms, also coordinates some of ICANN's outreach to individual Internet users.

b. The ALAC shall consist of (i) two members selected by each of the Regional At-Large Organizations ("RALOs") established according to paragraph 4(g) of this Section, and (ii) 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 5 of Article VI.

c. Subject to the provisions of the [Transition Article of these Bylaws](#), the regular terms of members of the ALAC shall be as follows:

1. The term of one member selected by each RALO shall begin at the conclusion of an ICANN annual meeting in an even-numbered year.

2. The term of the other member selected by each RALO shall begin at the conclusion of an ICANN annual meeting in an odd-numbered year.

3. 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.

4. The regular term of each member shall end at the conclusion of the second ICANN annual meeting after the term began.

d. The Chair of the ALAC shall be elected by the members of the ALAC pursuant to procedures adopted by the Committee.

e. The ALAC 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, as defined according to [Section 5 of Article VI](#)) to the Nominating Committee.

f. Subject to the provisions of the [Transition Article of these Bylaws](#), the At-Large



Advisory Committee may designate non-voting liaisons to each of the ccNSO Council and the GNSO Council.

g. There shall be one RALO for each Geographic Region established according to [Section 5 of Article VI](#). Each RALO shall serve as the main forum and coordination point for public input to ICANN in its Geographic Region and shall be a non-profit organization certified by ICANN according to criteria and standards established by the Board based on recommendations of the At-Large Advisory Committee. An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN addressing the respective roles and responsibilities of ICANN and the RALO regarding the process for selecting ALAC 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.

h. 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 according to [paragraph 4\(i\) of this Section](#). If so provided by its Memorandum of Understanding with ICANN, a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

i. Membership in the At-Large Community

1. 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 and shall be stated in the Memorandum of Understanding between ICANN and the RALO for each Geographic Region.
2. 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 (as defined in [Section 5 of Article VI](#)) 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.
3. 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.
4. 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.
5. Once the criteria and standards have been established as provided in this Clause i, the ALAC, 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.

6. Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC in its Rules of Procedure, save always that any changes made to the Rules of Procedure in respect of ALS applications shall be subject to review by the RALOs and by the ICANN Board.
  7. 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.
  8. On an ongoing basis, the ALAC may also give advice as to whether a prospective At-Large Structure meets the applicable criteria and standards.
- j. The ALAC is also responsible, working in conjunction with the RALOs, for coordinating the following activities:
1. Making a selection by the At-Large Community to fill Seat 15 on the Board. Notification of the At-Large Community's selection shall be given by the ALAC Chair in writing to the ICANN Secretary, consistent with Article VI, Sections 8(4) and 12(1).
  2. Keeping the community of individual Internet users informed about the significant news from ICANN;
  3. Distributing (through posting or otherwise) an updated agenda, news about ICANN, and information about items in the ICANN policy-development process;
  4. Promoting outreach activities in the community of individual Internet users;
  5. Developing and maintaining on-going information and education programs, regarding ICANN and its work;
  6. Establishing an outreach strategy about ICANN issues in each RALO's Region;
  7. Participating in the ICANN policy development processes and providing input and advice that accurately reflects the views of individual Internet users;
  8. Making public, and analyzing, ICANN's proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;
  9. Offering Internet-based mechanisms that enable discussions among members of At-Large structures; and
  10. Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN decision-making, so interested individuals can share their views on pending ICANN issues.

### Section 3. PROCEDURES

Each Advisory Committee shall determine its own rules of procedure and quorum requirements.

#### **Section 4. TERM OF OFFICE**

The chair and each member of a committee shall serve until his or her successor is appointed, or until such committee is sooner terminated, or until he or she is removed, resigns, or otherwise ceases to qualify as a member of the committee.

#### **Section 5. VACANCIES**

Vacancies on any committee shall be filled in the same manner as provided in the case of original appointments.

#### **Section 6. COMPENSATION**

Committee members shall receive no compensation for their services as a member of a committee. The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by committee members, including Directors, performing their duties as committee members.

### **ARTICLE XI-A: OTHER ADVISORY MECHANISMS**

#### **Section 1. EXTERNAL EXPERT ADVICE**

1. Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN. 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.

2. Types of Expert Advisory Panels.

a. On its own initiative or at the suggestion of any ICANN 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 1\(3\)\(b\) of this Article](#) shall apply.

b. In addition, in accordance with [Section 1\(3\) of this Article](#), the Board may refer issues of public policy pertinent to matters within ICANN's mission to a multinational governmental or treaty organization.

3. Process for Seeking Advice-Public Policy Matters.

a. The Governmental 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.

b. 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 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.

c. 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, with the suggestion that the request be transmitted by the Governmental Advisory Committee to the multinational governmental or treaty organization.

4. 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 1\(2\)\(a\) of this Article](#) 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.

5. Receipt of Expert Advice and its Effect. External advice pursuant to this Section 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 body in carrying out its responsibilities.

6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

## Section 2. TECHNICAL LIAISON GROUP

1. Purpose. The quality of ICANN's work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN's activities. ICANN'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's activities.

2. TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI), the International Telecommunications Union's Telecommunication Standardization Sector (ITU-T), the World Wide Web Consortium (W3C), and the Internet Architecture Board (IAB).

3. Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:

a. In response to a request for information, to connect the Board or other ICANN body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN 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.

b. 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 actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN's mission. This component of the TLG role covers circumstances in which ICANN is unaware of a new development, and would

therefore otherwise not realize that a question should be asked.

4. 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.

5. Technical Work with the IETF. The TLG shall have no involvement with the ICANN's work for the Internet Engineering Task Force (IETF), Internet Research Task Force, or the Internet Architecture Board (IAB), as described in the IETF-ICANN Memorandum of Understanding Concerning the Technical Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000.

6. 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'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 when ICANN does not ask a specific TLG organization directly.

## ARTICLE XII: BOARD AND TEMPORARY COMMITTEES

### Section 1. BOARD COMMITTEES

The Board may establish one or more committees of the Board, which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board. 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 members of the Board; provided, however, that any Director or Directors which are the subject of the removal action shall not be entitled to vote on such an action or be counted as a member of the Board when calculating the required two-thirds (2/3) vote; and, provided further, 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 members of the Board.

### Section 2. POWERS OF BOARD COMMITTEES

1. The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:
  - a. The filling of vacancies on the Board or on any committee;
  - b. The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
  - c. The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;
  - d. The appointment of committees of the Board or the members thereof;

- e. The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CNPBCL;
- f. The approval of the annual budget required by [Article XVI](#); or
- g. The compensation of any officer described in [Article XIII](#).

2. 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 shall be governed by the provisions of [Article VI](#) 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 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 XIII: OFFICERS**

### **Section 1. OFFICERS**

The officers of ICANN shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN 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.

### **Section 2. ELECTION OF OFFICERS**

The officers of ICANN shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chairman of the ICANN 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 3. REMOVAL OF OFFICERS**

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all the members of the Board. 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 4. PRESIDENT**

The President shall be the Chief Executive Officer (CEO) of ICANN 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 member of the Board, and shall have all the same rights and privileges of any Board member. 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 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 6. CHIEF FINANCIAL OFFICER**

The Chief Financial Officer ("CFO") shall be the chief financial officer of ICANN. 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 and shall keep or cause to be kept, in books belonging to ICANN, full and accurate amounts of all receipts and disbursements, and shall deposit all money and other valuable effects in the name of ICANN in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN 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. The CFO shall be responsible for ICANN's financial planning and forecasting and shall assist the President in the preparation of ICANN's annual budget. The CFO shall coordinate and oversee ICANN's funding, including any audits or other reviews of ICANN or its Supporting Organizations. The CFO shall be responsible for all other matters relating to the financial operation of ICANN.

## **Section 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 8. COMPENSATION AND EXPENSES**

The compensation of any Officer of ICANN 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 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.

## **ARTICLE XIV: INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS**

ICANN shall, to maximum extent permitted by the CNPBCL, 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, 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's best interests and not criminal. For purposes of this Article, an "agent" of ICANN includes any person who is or was a Director, Officer, employee, or any

other agent of ICANN (including a member of any Supporting Organization, any Advisory Committee, the Nominating Committee, any other ICANN 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 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 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 would have the power to indemnify the agent against that liability under the provisions of this Article.

## ARTICLE XV: GENERAL PROVISIONS

### Section 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, 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 or to render it liable for any debts or obligations.

### Section 2. DEPOSITS

All funds of ICANN not otherwise employed shall be deposited from time to time to the credit of ICANN in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

### Section 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 shall be signed by such Officer or Officers, agent or agents, of ICANN and in such a manner as shall from time to time be determined by resolution of the Board.

### Section 4. LOANS

No loans shall be made by or to ICANN 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 to its Directors or Officers.

## ARTICLE XVI: FISCAL MATTERS

### Section 1. ACCOUNTING

The fiscal year end of ICANN shall be determined by the Board.

### Section 2. AUDIT

At the end of the fiscal year, the books of ICANN shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

### Section 3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement and a description of any payments made by ICANN to Directors (including reimbursements of



expenses). ICANN shall cause the annual report and the annual statement of certain transactions as required by the CNPBCCL 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's fiscal year.

#### **Section 4. ANNUAL BUDGET**

At least forty-five (45) days prior to the commencement of each fiscal year, the President shall prepare and submit to the Board, a proposed annual budget of ICANN for the next fiscal year, which shall be posted on the Website. The proposed budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item. The Board shall adopt an annual budget and shall publish the adopted Budget on the Website.

#### **Section 5. FEES AND CHARGES**

The Board may set fees and charges for the services and benefits provided by ICANN, with the goal of fully recovering the reasonable costs of the operation of ICANN and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN. 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.

### **ARTICLE XVII: MEMBERS**

ICANN shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law ("CNPBCL"), notwithstanding the use of the term "Member" in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff.

### **ARTICLE XVIII: OFFICES AND SEAL**

#### **Section 1. OFFICES**

The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN 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 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 XIX: AMENDMENTS**

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

### **ARTICLE XX: TRANSITION ARTICLE**

#### **Section 1. PURPOSE**

This Transition Article sets forth the provisions for the transition from the processes and structures defined by the ICANN Bylaws, as amended and restated on 29 October 1999 and amended through 12

February 2002 (the "[Old Bylaws](#)"), to the processes and structures defined by the Bylaws of which this Article is a part (the "[New Bylaws](#)"). [Explanatory Note (dated 10 December 2009): For Section 5(3) of this Article, reference to the Old Bylaws refers to the Bylaws as amended and restated through to 20 March 2009.]

## Section 2. BOARD OF DIRECTORS

1. For the period beginning on the adoption of this Transition Article and ending on the Effective Date and Time of the New Board, as defined in [paragraph 5 of this Section 2](#), the Board of Directors of the Corporation ("Transition Board") shall consist of the members of the Board who would have been Directors under the Old Bylaws immediately after the conclusion of the annual meeting in 2002, except that those At-Large members of the Board under the Old Bylaws who elect to do so by notifying the Secretary of the Board on 15 December 2002 or in writing or by e-mail no later than 23 December 2002 shall also serve as members of the Transition Board. Notwithstanding the provisions of [Article VI, Section 12 of the New Bylaws](#), vacancies on the Transition Board shall not be filled. The Transition Board shall not have liaisons as provided by [Article VI, Section 9 of the New Bylaws](#). The Board Committees existing on the date of adoption of this Transition Article shall continue in existence, subject to any change in Board Committees or their membership that the Transition Board may adopt by resolution.
2. The Transition Board shall elect a Chair and Vice-Chair to serve until the Effective Date and Time of the New Board.
3. The "New Board" is that Board described in [Article VI, Section 2\(1\) of the New Bylaws](#).
4. Promptly after the adoption of this Transition Article, a Nominating Committee shall be formed including, to the extent feasible, the delegates and liaisons described in [Article VII, Section 2 of the New Bylaws](#), with terms to end at the conclusion of the ICANN annual meeting in 2003. The Nominating Committee shall proceed without delay to select Directors to fill Seats 1 through 8 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for those Seats in [Article VI, Section 8\(1\)\(a\)-\(c\) of the New Bylaws](#), and shall give the ICANN Secretary written notice of that selection.
5. The Effective Date and Time of the New Board shall be a time, as designated by the Transition Board, during the first regular meeting of ICANN in 2003 that begins not less than seven calendar days after the ICANN Secretary has received written notice of the selection of Directors to fill at least ten of Seats 1 through 14 on the New Board. As of the Effective Date and Time of the New Board, it shall assume from the Transition Board all the rights, duties, and obligations of the ICANN Board of Directors. Subject to Section 4 of this Article, the Directors ([Article VI, Section 2\(1\)\(a\)-\(d\)](#)) and non-voting liaisons ([Article VI, Section 9](#)) as to which the ICANN Secretary has received notice of selection shall, along with the President ([Article VI, Section 2\(1\)\(e\)](#)), be seated upon the Effective Date and Time of the New Board, and thereafter any additional Directors and non-voting liaisons shall be seated upon the ICANN Secretary's receipt of notice of their selection.
6. The New Board shall elect a Chairman and Vice-Chairman as its first order of business. The terms of those Board offices shall expire at the end of the annual meeting in 2003.
7. Committees of the Board in existence as of the Effective Date and Time of the New Board shall continue in existence according to their existing charters, but the terms of all members of those committees shall conclude at the Effective Date and Time of the New Board. Temporary

committees in existence as of the Effective Date and Time of the New Board shall continue in existence with their existing charters and membership, subject to any change the New Board may adopt by resolution.

8. In applying the term-limitation provision of [Section 8\(5\) of Article VI](#), a Director's service on the Board before the Effective Date and Time of the New Board shall count as one term.

### Section 3. ADDRESS SUPPORTING ORGANIZATION

The Address Supporting Organization shall continue in operation according to the provisions of the [Memorandum of Understanding originally entered on 18 October 1999](#) between ICANN and a group of regional Internet registries (RIRs), and [amended in October 2000](#), until a replacement Memorandum of Understanding becomes effective. Promptly after the adoption of this Transition Article, the Address Supporting Organization shall make selections, and give the ICANN Secretary written notice of those selections, of:

1. Directors to fill Seats 9 and 10 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for each of those Seats in [Article VI, Section 8\(1\)\(d\) and \(e\) of the New Bylaws](#); and
2. the delegate to the Nominating Committee selected by the Council of the Address Supporting Organization, as called for in [Article VII, Section 2\(8\)\(f\) of the New Bylaws](#).

With respect to the ICANN Directors that it is entitled to select, and taking into account the need for rapid selection to ensure that the New Board becomes effective as soon as possible, the Address Supporting Organization may select those Directors from among the persons it previously selected as ICANN Directors pursuant to the Old Bylaws. To the extent the Address Supporting Organization does not provide the ICANN Secretary written notice, on or before 31 March 2003, of its selections for Seat 9 and Seat 10, the Address Supporting Organization shall be deemed to have selected for Seat 9 the person it selected as an ICANN Director pursuant to the Old Bylaws for a term beginning in 2001 and for Seat 10 the person it selected as an ICANN Director pursuant to the Old Bylaws for a term beginning in 2002.

### Section 4. COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

1. Upon the enrollment of thirty ccTLD managers (with at least four within each Geographic Region) as members of the ccNSO, written notice shall be posted on the Website. As soon as feasible after that notice, the members of the initial ccNSO Council to be selected by the ccNSO members shall be selected according to the procedures stated in [Article IX, Section 4\(8\) and \(9\)](#). Upon the completion of that selection process, a written notice that the ccNSO Council has been constituted shall be posted on the Website. Three ccNSO Council members shall be selected by the ccNSO members within each Geographic Region, with one member to serve a term that ends upon the conclusion of the first ICANN annual meeting after the ccNSO Council is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN annual meeting after the ccNSO Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN annual meeting after the ccNSO Council is constituted. (The definition of "ccTLD manager" stated in [Article IX, Section 4\(1\)](#) and the definitions stated in [Article IX, Section 4\(4\)](#) shall apply within this Section 4 of Article XX.)
2. After the adoption of [Article IX of these Bylaws](#), the Nominating Committee shall select the three members of the ccNSO Council described in [Article IX, Section 3\(1\)\(b\)](#). In selecting three individuals to serve on the ccNSO Council, the Nominating Committee shall designate

one to serve a term that ends upon the conclusion of the first ICANN annual meeting after the ccNSO Council is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN annual meeting after the ccNSO Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN annual meeting after the ccNSO Council is constituted. The three members of the ccNSO Council selected by the Nominating Committee shall not take their seats before the ccNSO Council is constituted.

3. Upon the ccNSO Council being constituted, the At-Large Advisory Committee and the Governmental Advisory Committee may designate one liaison each to the ccNSO Council, as provided by [Article IX, Section 3\(2\)\(a\) and \(b\)](#).

4. Upon the ccNSO Council being constituted, the Council may designate Regional Organizations as provided in [Article IX, Section 5](#). Upon its designation, a Regional Organization may appoint a liaison to the ccNSO Council.

5. Until the ccNSO Council is constituted, Seats 11 and 12 on the New Board shall remain vacant. Promptly after the ccNSO Council is constituted, the ccNSO shall, through the ccNSO Council, make selections of Directors to fill Seats 11 and 12 on the New Board, with terms to conclude upon the commencement of the next regular term specified for each of those Seats in [Article VI, Section 8\(1\)\(d\) and \(f\) of the New Bylaws](#), and shall give the ICANN Secretary written notice of its selections.

6. Until the ccNSO Council is constituted, the delegate to the Nominating Committee established by the New Bylaws designated to be selected by the ccNSO shall be appointed by the Transition Board or New Board, depending on which is in existence at the time any particular appointment is required, after due consultation with members of the ccTLD community. Upon the ccNSO Council being constituted, the delegate to the Nominating Committee appointed by the Transition Board or New Board according to this Section 4(9) then serving shall remain in office, except that the ccNSO Council may replace that delegate with one of its choosing within three months after the conclusion of ICANN's annual meeting, or in the event of a vacancy. Subsequent appointments of the Nominating Committee delegate described in [Article VII, Section 2\(8\)\(c\)](#) shall be made by the ccNSO Council.

## **Section 5. GENERIC NAMES SUPPORTING ORGANIZATION**

1. The Generic Names Supporting Organization ("GNSO"), upon the adoption of this Transition Article, shall continue its operations; however, it shall be restructured into four new Stakeholder Groups which shall represent, organizationally, the former Constituencies of the GNSO, subject to ICANN Board approval of each individual Stakeholder Group Charter:

- a. The gTLD Registries Constituency shall be assigned to the Registries Stakeholder Group;
- b. The Registrars Constituency shall be assigned to the Registrars Stakeholder Group;
- c. The Business Constituency shall be assigned to the Commercial Stakeholder Group;
- d. The Intellectual Property Constituency shall be assigned to the Commercial Stakeholder Group;

e. The Internet Services Providers Constituency shall be assigned to the Commercial Stakeholder Group; and

f. The Non-Commercial Users Constituency shall be assigned to the Non-Commercial Stakeholder Group.

2. Each GNSO Constituency described in paragraph 1 of this subsection shall continue operating substantially as before and no Constituency official, working group, or other activity shall be changed until further action of the Constituency, provided that each GNSO Constituency described in paragraph 1 (c-f) shall submit to the ICANN Secretary a new or revised Charter inclusive of its operating procedures, adopted according to the Constituency's processes and consistent with these Bylaws Amendments, no later than the ICANN meeting in October 2009, or another date as the Board may designate by resolution.

3. Prior to the commencement of the ICANN meeting in October 2009, or another date the Board may designate by resolution, the GNSO Council shall consist of its current Constituency structure and officers as described in [Article X, Section 3\(1\) of the Bylaws](#) (as amended and restated on 29 October 1999 and amended through 20 March 2009 (the "Old Bylaws")). Thereafter, the composition of the GNSO Council shall be as provided in these Bylaws, as they may be amended from time to time. All committees, task forces, working groups, drafting committees, and similar groups established by the GNSO Council and in existence immediately before the adoption of this Transition Article shall continue in existence with the same charters, membership, and activities, subject to any change by action of the GNSO Council or ICANN Board.

4. Beginning with the commencement of the ICANN Meeting in October 2009, or another date the Board may designate by resolution (the "Effective Date of the Transition"), the GNSO Council seats shall be assigned as follows:

a. The three seats currently assigned to the Registry Constituency shall be reassigned as three seats of the Registries Stakeholder Group;

b. The three seats currently assigned to the Registrar Constituency shall be reassigned as three seats of the Registrars Stakeholder Group;

c. The three seats currently assigned to each of the Business Constituency, the Intellectual Property Constituency, and the Internet Services Provider Constituency (nine total) shall be decreased to be six seats of the Commercial Stakeholder Group;

d. The three seats currently assigned to the Non-Commercial Users Constituency shall be increased to be six seats of the Non-Commercial Stakeholder Group;

e. The three seats currently selected by the Nominating Committee shall be assigned by the Nominating Committee as follows: one voting member to the Contracted Party House, one voting member to the Non-Contracted Party House, and one non-voting member assigned to the GNSO Council at large.

Representatives on the GNSO Council shall be appointed or elected consistent with the provisions in each applicable Stakeholder Group Charter, approved by the Board, and sufficiently in advance of the October 2009 ICANN Meeting that will permit those representatives to act in their official capacities at the start of said meeting.

5. The GNSO Council, as part of its Restructure Implementation Plan, will document: (a) how vacancies, if any, will be handled during the transition period; (b) for each Stakeholder Group, how each assigned Council seat to take effect at the 2009 ICANN annual meeting will be filled, whether through a continuation of an existing term or a new election or appointment; (c) how it plans to address staggered terms such that the new GNSO Council preserves as much continuity as reasonably possible; and (d) the effect of Bylaws term limits on each Council member.

6. As soon as practical after the commencement of the ICANN meeting in October 2009, or another date the Board may designate by resolution, the GNSO Council shall, in accordance with [Article X, Section 3\(7\)](#) and its GNSO Operating Procedures, elect officers and give the ICANN Secretary written notice of its selections.

## Section 6. PROTOCOL SUPPORTING ORGANIZATION

The [Protocol Supporting Organization referred to in the Old Bylaws](#) is discontinued.

## Section 7. ADVISORY COMMITTEES AND TECHNICAL LIAISON GROUP

1. Upon the adoption of the New Bylaws, the Governmental Advisory Committee shall continue in operation according to its existing operating principles and practices, until further action of the committee. The Governmental Advisory Committee may designate liaisons to serve with other ICANN bodies as contemplated by the New Bylaws by providing written notice to the ICANN Secretary. Promptly upon the adoption of this Transition Article, the Governmental Advisory Committee shall notify the ICANN Secretary of the person selected as its delegate to the Nominating Committee, as set forth in [Article VII, Section 2 of the New Bylaws](#).

2. The organizations designated as members of the Technical Liaison Group under [Article XI-A, Section 2\(2\) of the New Bylaws](#) shall each designate the two individual technical experts described in [Article XI-A, Section 2\(6\) of the New Bylaws](#), by providing written notice to the ICANN Secretary. As soon as feasible, the delegate from the Technical Liaison Group to the Nominating Committee shall be selected according to [Article XI-A, Section 2\(7\) of the New Bylaws](#).

3. Upon the adoption of the New Bylaws, the [Security and Stability Advisory Committee](#) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Security and Stability Advisory Committee shall notify the ICANN Secretary of the person selected as its delegate to the Nominating Committee, as set forth in [Article VII, Section 2\(4\) of the New Bylaws](#).

4. Upon the adoption of the New Bylaws, the [Root Server System Advisory Committee](#) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Root Server Advisory Committee shall notify the ICANN Secretary of the person selected as its delegate to the Nominating Committee, as set forth in [Article VII, Section 2\(3\) of the New Bylaws](#).

5. At-Large Advisory Committee

a. There shall exist an Interim At-Large Advisory Committee until such time as ICANN recognizes, through the entry of a Memorandum of Understanding, all of



the Regional At-Large Organizations (RALOs) identified in [Article XI, Section 2\(4\) of the New Bylaws](#). The Interim At-Large Advisory Committee shall be composed of (i) ten individuals (two from each ICANN region) selected by the ICANN Board following nominations by the At-Large Organizing Committee and (ii) five additional individuals (one from each ICANN region) selected by the initial Nominating Committee as soon as feasible in accordance with the principles established in [Article VII, Section 5 of the New Bylaws](#). The initial Nominating Committee shall designate two of these individuals to serve terms until the conclusion of the ICANN annual meeting in 2004 and three of these individuals to serve terms until the conclusion of the ICANN annual meeting in 2005.

b. Upon the entry of each RALO into such a Memorandum of Understanding, that entity shall be entitled to select two persons who are citizens and residents of that Region to be members of the At-Large Advisory Committee established by [Article XI, Section 2\(4\) of the New Bylaws](#). Upon the entity's written notification to the ICANN Secretary of such selections, those persons shall immediately assume the seats held until that notification by the Interim At-Large Advisory Committee members previously selected by the Board from the RALO's region.

c. Upon the seating of persons selected by all five RALOs, the Interim At-Large Advisory Committee shall become the At-Large Advisory Committee, as established by [Article XI, Section 2\(4\) of the New Bylaws](#). The five individuals selected to the Interim At-Large Advisory Committee by the Nominating Committee shall become members of the At-Large Advisory Committee for the remainder of the terms for which they were selected.

d. Promptly upon its creation, the Interim At-Large Advisory Committee shall notify the ICANN Secretary of the persons selected as its delegates to the Nominating Committee, as set forth in [Article VII, Section 2\(6\) of the New Bylaws](#).

## **Section 8. OFFICERS**

ICANN officers (as defined in [Article XIII of the New Bylaws](#)) shall be elected by the then-existing Board of ICANN at the annual meeting in 2002 to serve until the annual meeting in 2003.

## **Section 9. GROUPS APPOINTED BY THE PRESIDENT**

Notwithstanding the adoption or effectiveness of the New Bylaws, task forces and other groups appointed by the ICANN President shall continue unchanged in membership, scope, and operation until changes are made by the President.

## **Section 10. CONTRACTS WITH ICANN**

Notwithstanding the adoption or effectiveness of the New Bylaws, all agreements, including employment and consulting agreements, entered by ICANN shall continue in effect according to their terms.

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## **Annex A: GNSO Policy Development Process**

The following process shall govern the GNSO policy development process ("PDP") until such time as modifications are recommended to and approved by the ICANN Board of Directors ("Board"). The role of the GNSO is outlined in Article X of these Bylaws. If the GNSO is conducting activities that are not

intended to result in a 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 Policies as defined within ICANN contracts, and any other policies for which the GNSO Council requests application of this Annex A:

- a. Final Issue Report requested by the Board, the GNSO Council ("Council") or 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 Recommendations contained in the Final Report, by the required thresholds;
- g. PDP Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council]; and
- h. Board approval of PDP Recommendations.

## Section 2. **Policy Development Process Manual**

The GNSO shall maintain a Policy Development Process Manual (PDP Manual) within the operating procedures of the GNSO maintained by the GNSO Council. The PDP Manual shall contain specific additional guidance on completion of all elements of a PDP, including those elements that are not otherwise defined in these Bylaws. The PDP 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 Article X, Section 3.6.

## Section 3. **Requesting an Issue Report**

*Board Request.* The Board may request an Issue Report by instructing the GNSO Council ("Council") to begin the process outlined the PDP Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO 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 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 Request.* An 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 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 Council; or (iii) a properly supported motion from an 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, if known;
- e) The opinion of the ICANN General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the ICANN's mission, policy process and more specifically the role of the GNSO as set forth in the Bylaws.
- f) The opinion of ICANN Staff as to whether the Council should initiate the PDP on the issue

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the ICANN website for a public comment period that complies with the designated practice for public comment periods within ICANN.

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 Council for consideration for initiation of a PDP.

## Section 5. **Initiation of the PDP**

The Council may initiate the PDP as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP Manual, shall initiate a PDP. No vote is required for such action.

GNSO Council or Advisory Committee Requests: The Council may only initiate the PDP by a vote of the Council. Initiation of a PDP requires a vote as set forth in [Article X, Section 3, paragraph 9\(b\) and \(c\)](#) in favor of initiating the PDP.

## Section 6. **Reports**

An Initial Report should be delivered to the GNSO Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN, which time may be extended in accordance with the PDP 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 Manual.

The Council approval process is set forth in [Article X, Section 3, paragraph 9\(d\) through \(g\)](#), as supplemented by the PDP Manual.

## Section 8. Preparation of the Board Report

If the PDP recommendations contained in the Final Report are approved by the GNSO Council, a Recommendations Report shall be approved by the GNSO Council for delivery to the ICANN Board.

## Section 9. Board Approval Processes

The Board will meet to discuss the GNSO 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 Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any PDP Recommendations approved by a GNSO 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 community or ICANN. If the GNSO Council recommendation was approved by less than a GNSO 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 community or ICANN.
- b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO Supermajority Vote or less than a GNSO Supermajority vote is not in the best interests of the ICANN community or ICANN (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 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 community or ICANN. For any Supplemental Recommendation approved by less than a GNSO 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 community or ICANN.

## 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 staff to work with the GNSO Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO 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, from policy suggestion to a final decision by the Board, ICANN will maintain on the Website, a status web page detailing the progress of each PDP issue. Such status page will outline the completed and upcoming steps in the PDP process, and contain links to key resources (e.g. Reports, Comments Fora, WG Discussions, etc.).

## Section 12. Additional Definitions

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN on which notifications and comments regarding the PDP 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 Council.

"Staff Manager" means an ICANN staff person(s) who manages the PDP.

"GNSO 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. If the Council determines that any ongoing PDP cannot be feasibly transitioned to these updated procedures, the PDP shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

## Annex B: ccNSO Policy-Development Process (ccPDP)

The following process shall govern the ccNSO policy-development process ("PDP").

### 1. Request for an Issue Report

An Issue Report may be requested by any of the following:

- a. *Council*. The ccNSO 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 ICANN 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 recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- d. *ICANN Supporting Organization or Advisory Committee*. An ICANN Supporting Organization or an ICANN 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.* The members of the ccNSO may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO 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 (in which case the costs of the Issue Manager shall be borne by ICANN) or such other person or persons selected by the Council (in which case the ccNSO 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;
- e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP for this issue (the "Manager Recommendation"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN General Counsel regarding whether the issue is properly within the scope of the ICANN policy process and within the scope of the ccNSO. In coming to his or her opinion, the General Counsel shall examine whether:

- 1) The issue is within the scope of ICANN's mission statement;
- 2) Analysis of the relevant factors according to [Article IX, Section 6\(2\)](#) and [Annex C](#) affirmatively demonstrates that the issue is within the scope of the ccNSO;

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 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 ([Annex C](#)) shall be within the scope of ICANN and the ccNSO.

In the event that General Counsel is of the opinion the issue is not properly within the scope of

the ccNSO Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Article IX, Section 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 shall inform the Issue Manager accordingly. General Counsel and the ccNSO 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 then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSO 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 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, a proposed time line for conducting each of the stages of PDP outlined herein (PDP Time Line).

g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the ICANN 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.

### 3. Initiation of PDP

The Council shall decide whether to initiate the PDP 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. 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 shall be required to initiate the PDP provided that the Issue Report states that the issue is properly within the scope of the ICANN mission statement and the ccNSO Scope.

### 4. Decision Whether to Appoint Task Force; Establishment of Time Line

At the meeting of the Council where the PDP 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 Time Lines 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 [Article IX, Section 6](#)) 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 and, following formal request for GAC participation in the Task Force, accept up to two Representatives from the Governmental 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, 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 Time Line.

## 6. Public Notification of Initiation of the PDP and Comment Period

After initiation of the PDP, ICANN shall post a notification of such action to the Website and to the other ICANN Supporting Organizations and Advisory Committees. A comment period (in accordance with the PDP Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD managers, other Supporting Organizations, 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 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 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;
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 [Article IX, Section 3\(14\)](#) 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 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 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 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 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 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 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 Supporting Organizations and 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 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 Time Line.
- b. The Council may, in its discretion, take other steps to assist in the PDP, 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 Time Line.
- c. The Council shall formally request the Chair of the GAC 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 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 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 managers, other Supporting Organizations, 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 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 Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC Chair an invitation to the GAC 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 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 Time Line, the ccNSO 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 Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO 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 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 members, will be employed if at least 50% of the ccNSO 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 Recommendation.

### 14. Board Report

The Issue Manager shall within seven days after a ccNSO Recommendation being made in accordance with Item 13 incorporate the ccNSO 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 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 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 Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.
  1. In the event that the Board determines not to act in accordance with the ccNSO Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO 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 Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO 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 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 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 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 Recommendation or ccNSO Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN 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 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 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 shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

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## Annex C: The Scope of the ccNSO

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's policy-development role. As provided in [Article IX, Section 6\(2\)](#) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO's authority and responsibilities must recognize the complex relation between ICANN and ccTLD managers/registries with regard to policy issues. This annex shall assist the ccNSO, the ccNSO Council, and the ICANN Board and staff in delineating relevant global policy issues.

### *Policy areas*

The ccNSO's policy role should be based on an analysis of the following functional model of the DNS:

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD name servers.

Within a TLD 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 (Name Server Function).

These two core functions must be performed at the ccTLD registry level as well as at a higher level (IANA function and root servers) and at lower levels of the DNS hierarchy. This mechanism, as RFC 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 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)

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 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 registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC 1591.

### *Respective Roles with Regard to Policy, Responsibilities, and Accountabilities*

It is in the interest of ICANN and ccTLD managers to ensure the stable and proper functioning of the domain name system. ICANN and the ccTLD registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO cannot be established without reaching a common understanding of the allocation of authority between ICANN and ccTLD 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 with regard to developing policies. The scope is limited to the policy role of the ccNSO 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, RSSAC (ICANN)

Executive role: Root Server System Operators

Accountability role: RSSAC (ICANN), (US DoC-ICANN MoU)

##### Level 2: ccTLD Registry Name Servers in respect to interoperability

Policy role: ccNSO Policy Development Process (ICANN), for best practices a ccNSO process can be organized

Executive role: ccTLD Manager

Accountability role: part ICANN (IANA), part Local Internet Community, including local government

##### Level 3: User's Name Servers

Policy role: ccTLD Manager, IETF (RFC)

Executive role: Registrant

Accountability role: ccTLD Manager

#### *Data Entry Function (as to ccTLDs)*

##### Level 1: Root Level Registry

Policy role: ccNSO Policy Development Process (ICANN)

Executive role: ICANN (IANA)

Accountability role: ICANN community, ccTLD Managers, US DoC, (national authorities in some cases)

##### Level 2: ccTLD Registry

Policy role: Local Internet Community, including local government, and/or ccTLD Manager according to local structure

Executive role: ccTLD Manager

Accountability role: Local Internet Community, including national authorities in some cases

##### Level 3: Second and Lower Levels

Policy role: Registrant

Executive role: Registrant

Accountability role: Registrant, users of lower-level domain names

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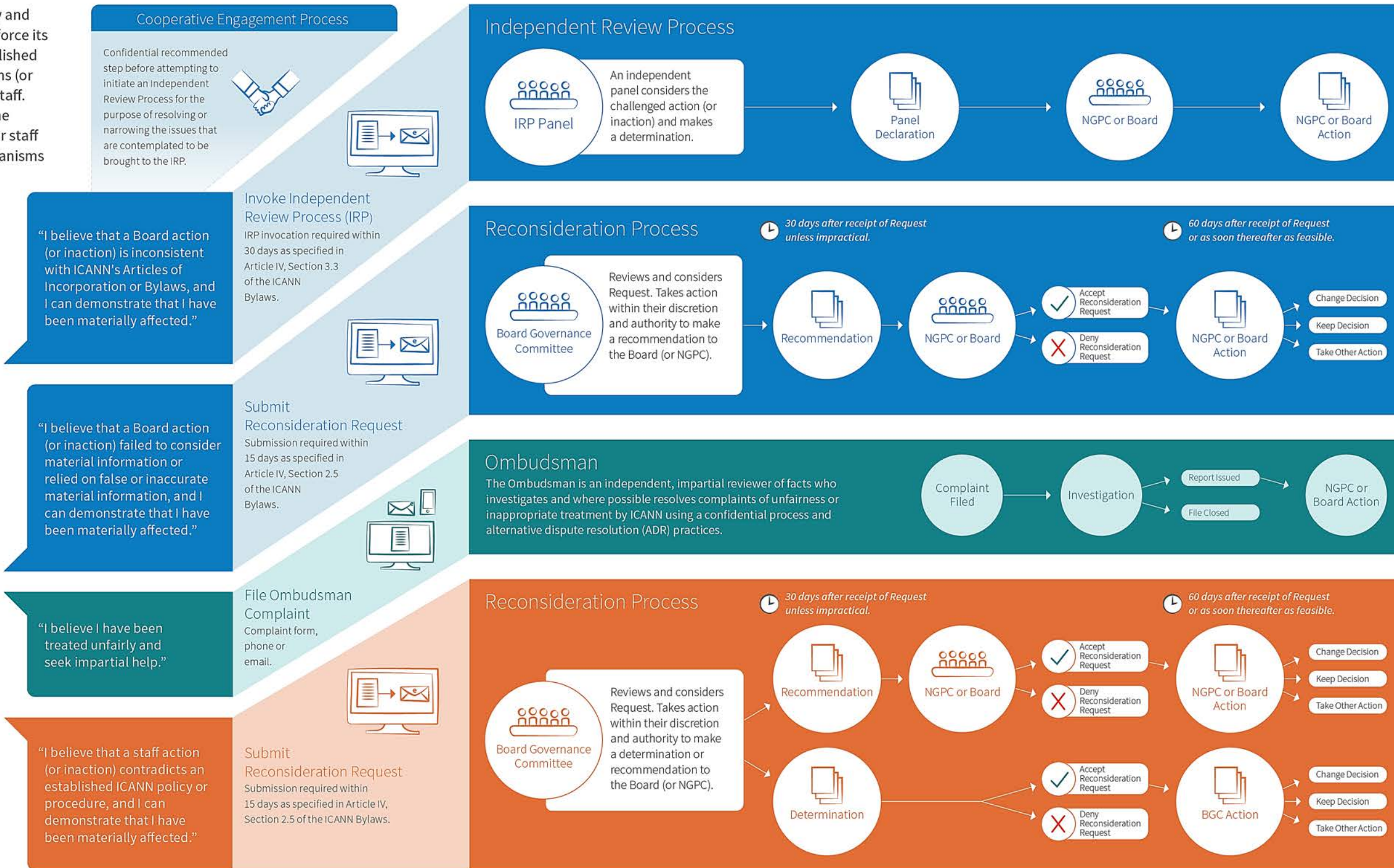
**Ex. R-ER-2**



# ICANN Accountability Mechanisms Available to the ICANN Community

ICANN has a proven commitment to accountability and transparency in all of its practices. In order to reinforce its transparency and accountability, ICANN has established accountability mechanisms for the review of actions (or inactions) taken by ICANN's Board of Directors or staff. When a member of the community believes that the member has been materially affected by a Board or staff action (or inaction), there are accountability mechanisms available to the member. The correct mechanism to use is based on the nature or basis of the complaint and whether the challenged action (or inaction) was taken by the Board or staff.

For more details on ICANN's accountability mechanisms, please refer to Articles IV and V of the ICANN Bylaws.



**IRP (INDEPENDENT REVIEW PROCESS) PANEL**

A group of independent subject matter experts convened as part of any Independent Review Process that is charged with comparing the challenged action (or inaction) 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.

**BGC: BOARD GOVERNANCE COMMITTEE**

The BGC is comprised of ICANN Board members and is responsible for a variety of Board-related activities that are identified in its Charter. The BGC is responsible for, among other things, considering and responding to Reconsideration Requests submitted to the Board pursuant to ICANN's Bylaws.

**NGPC: NEW gTLD PROGRAM COMMITTEE**

The NGPC is comprised of ICANN Board members and has all the powers of the Board, subject to any limitations in law, the Articles of Incorporation, Bylaws, or ICANN's Conflicts of Interest Policy. The NGPC is responsible for making strategic and financial decisions relating to ICANN's New gTLD Program for the current round of the Program and as related to the Applicant Guidebook.

Ex. R-ER-3

# gTLD Applicant Guidebook

Version 2012-06-04



4 June 2012



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# Preamble

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## *New gTLD Program Background*

New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS.

Currently the namespace consists of 22 gTLDs and over 250 ccTLDs operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. The gTLDs are served by over 900 registrars, who interact with registrants to perform domain name registration and other related services. The new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market. When the program launches its first application round, ICANN expects a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe.

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008. A thorough brief to the policy process and outcomes can be found at <http://gnso.icann.org/issues/new-gtlds>.

ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval. This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook. In parallel, ICANN has established the resources needed to successfully launch and operate the program. This process concluded with the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.



# gTLD Applicant Guidebook

(v. 2012-06-04)

## Module 1

4 June 2012



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# Module 1

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## *Introduction to the gTLD Application Process*

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required, and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the stages of the application life cycle.

Prospective applicants are encouraged to read and become familiar with the contents of this entire module, as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

For the complete set of the supporting documentation and more about the origins, history and details of the policy development background to the New gTLD Program, please see <http://gns0.icann.org/issues/new-gtlds/>.

This Applicant Guidebook is the implementation of 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.

### *1.1 Application Life Cycle and Timelines*

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This section provides a description of the stages that an application passes through once it is submitted. Some stages will occur for all applications submitted; others will only occur in specific circumstances. Applicants should be aware of the stages and steps involved in processing applications received.

#### *1.1.1 Application Submission Dates*

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The user registration and application submission periods open at **00:01 UTC 12 January 2012**.

The user registration period closes at **23:59 UTC 29 March 2012**. New users to TAS will not be accepted beyond this

time. Users already registered will be able to complete the application submission process.

Applicants should be aware that, due to required processing steps (i.e., online user registration, application submission, fee submission, and fee reconciliation) and security measures built into the online application system, it might take substantial time to perform all of the necessary steps to submit a complete application. Accordingly, applicants are encouraged to submit their completed applications and fees as soon as practicable after the Application Submission Period opens. Waiting until the end of this period to begin the process may not provide sufficient time to submit a complete application before the period closes. Accordingly, new user registrations will not be accepted after the date indicated above.

The application submission period closes at **23:59 UTC 12 April 2012**.

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the close of the application submission period.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

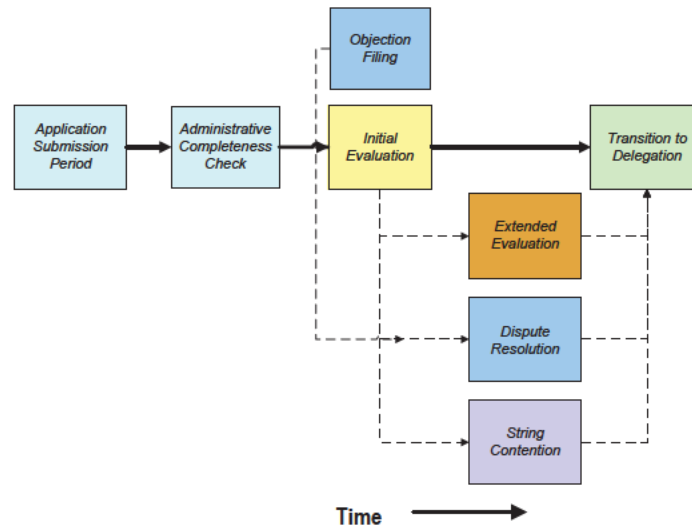
ICANN has gone to significant lengths to ensure that the online application system will be available for the duration of the application submission period. In the event that the system is not available, ICANN will provide alternative instructions for submitting applications on its website.

### ***1.1.2 Application Processing Stages***

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This subsection provides an overview of the stages involved in processing an application submitted to ICANN. Figure 1-1 provides a simplified depiction of the process. The shortest and most straightforward path is marked with bold lines, while certain stages that may or may not be

applicable in any given case are also shown. A brief description of each stage follows.



**Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.**

#### *1.1.2.1 Application Submission Period*

At the time the application submission period opens, those wishing to submit new gTLD applications can become registered users of the TLD Application System (TAS).

After completing the user registration, applicants will supply a deposit for each requested application slot (see section 1.4), after which they will receive access to the full application form. To complete the application, users will answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability. The supporting documents listed in subsection 1.2.2 of this module must also be submitted through the online application system as instructed in the relevant questions.

Applicants must also submit their evaluation fees during this period. Refer to Section 1.5 of this module for additional information about fees and payments.

Each application slot is for one gTLD. An applicant may submit as many applications as desired; however, there is no means to apply for more than one gTLD in a single application.

Following the close of the application submission period, ICANN will provide applicants with periodic status updates on the progress of their applications.

#### *1.1.2.2 Administrative Completeness Check*

Immediately following the close of the application submission period, ICANN will begin checking all applications for completeness. This check ensures that:

- All mandatory questions are answered;
- Required supporting documents are provided in the proper format(s); and
- The evaluation fees have been received.

ICANN will post the public portions of all applications considered complete and ready for evaluation within two weeks of the close of the application submission period. Certain questions relate to internal processes or information: applicant responses to these questions will not be posted. Each question is labeled in the application form as to whether the information will be posted. See posting designations for the full set of questions in the attachment to Module 2.

The administrative completeness check is expected to be completed for all applications in a period of approximately 8 weeks, subject to extension depending on volume. In the event that all applications cannot be processed within this period, ICANN will post updated process information and an estimated timeline.

#### *1.1.2.3 Comment Period*

Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.

ICANN will open a comment period (the Application Comment period) at the time applications are publicly posted on ICANN's website (refer to subsection 1.1.2.2). This period will allow time for the community to review and submit comments on posted application materials

(referred to as “application comments.”) The comment forum will require commenters to associate comments with specific applications and the relevant panel. Application comments received within a 60-day period from the posting of the application materials will be available to the evaluation panels performing the Initial Evaluation reviews. This period is subject to extension, should the volume of applications or other circumstances require. **To be considered by evaluators, comments must be received in the designated comment forum within the stated time period.**

Evaluators will perform due diligence on the application comments (i.e., determine their relevance to the evaluation, verify the accuracy of claims, analyze meaningfulness of references cited) and take the information provided in these comments into consideration. In cases where consideration of the comments has impacted the scoring of the application, the evaluators will seek clarification from the applicant. Statements concerning consideration of application comments that have impacted the evaluation decision will be reflected in the evaluators' summary reports, which will be published at the end of Extended Evaluation.

Comments received after the 60-day period will be stored and available (along with comments received during the comment period) for other considerations, such as the dispute resolution process, as described below.

In the new gTLD application process, all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. Anyone may submit a comment in a public comment forum.

**Comments and the Formal Objection Process:** A distinction should be made between application comments, which may be relevant to ICANN's task of determining whether applications meet the established criteria, and formal objections that concern matters outside those evaluation criteria. The formal objection process was created to allow a full and fair consideration of objections based on certain limited grounds outside ICANN's evaluation of applications on their merits (see subsection 3.2).

Public comments will not be considered as formal objections. Comments on matters associated with formal objections will not be considered by panels during Initial Evaluation. These comments will be available to and may

be subsequently considered by an expert panel during a dispute resolution proceeding (see subsection 1.1.2.9). However, in general, application comments have a very limited role in the dispute resolution process.

**String Contention:** Comments designated for the Community Priority Panel, as relevant to the criteria in Module 4, may be taken into account during a Community Priority Evaluation.

**Government Notifications:** Governments may provide a notification using the application comment forum to communicate concerns relating to national laws. However, a government's notification of concern will not in itself be deemed to be a formal objection. A notification by a government does not constitute grounds for rejection of a gTLD application. A government may elect to use this comment mechanism to provide such a notification, in addition to or as an alternative to the GAC Early Warning procedure described in subsection 1.1.2.4 below.

Governments may also communicate directly to applicants using the contact information posted in the application, e.g., to send a notification that an applied-for gTLD string might be contrary to a national law, and to try to address any concerns with the applicant.

**General Comments:** A general public comment forum will remain open through all stages of the evaluation process, to provide a means for the public to bring forward any other relevant information or issues.

#### **1.1.2.4 GAC Early Warning**

Concurrent with the 60-day comment period, ICANN's Governmental Advisory Committee (GAC) may issue a GAC Early Warning notice concerning an application. This provides the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.

The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process.

A GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities. A GAC Early Warning may be issued for any reason.<sup>1</sup> The GAC may then send that notice to the Board – constituting the GAC Early Warning. ICANN will notify applicants of GAC Early Warnings as soon as practicable after receipt from the GAC. The GAC Early Warning notice may include a nominated point of contact for further information.

GAC consensus is not required for a GAC Early Warning to be issued. Minimally, the GAC Early Warning must be provided in writing to the ICANN Board, and be clearly labeled as a GAC Early Warning. This may take the form of an email from the GAC Chair to the ICANN Board. For GAC Early Warnings to be most effective, they should include the reason for the warning and identify the objecting countries.

Upon receipt of a GAC Early Warning, the applicant may elect to withdraw the application for a partial refund (see subsection 1.5.1), or may elect to continue with the application (this may include meeting with representatives from the relevant government(s) to try to address the concern). To qualify for the refund described in subsection 1.5.1, the applicant must provide notification to ICANN of its election to withdraw the application within 21 calendar days of the date of GAC Early Warning delivery to the applicant.

To reduce the possibility of a GAC Early Warning, all applicants are encouraged to identify potential sensitivities in advance of application submission, and to work with the relevant parties (including governments) beforehand to mitigate concerns related to the application.

#### *1.1.2.5 Initial Evaluation*

Initial Evaluation will begin immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation. At the beginning of this period, background screening on the applying entity and the individuals named in the application will be conducted. Applications

<sup>1</sup> While definitive guidance has not been issued, the GAC has indicated that strings that could raise sensitivities include those that "purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, 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)" and "those 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."



must pass this step in conjunction with the Initial Evaluation reviews.

There are two main elements of the Initial Evaluation:

1. String reviews (concerning the applied-for gTLD string). String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS, including problems caused by similarity to existing TLDs or reserved names.
2. Applicant reviews (concerning the entity applying for the gTLD and its proposed registry services). Applicant reviews include a determination of whether the applicant has the requisite technical, operational, and financial capabilities to operate a registry.

By the conclusion of the Initial Evaluation period, ICANN will post notice of all Initial Evaluation results. Depending on the volume of applications received, such notices may be posted in batches over the course of the Initial Evaluation period.

The Initial Evaluation is expected to be completed for all applications in a period of approximately 5 months. If the volume of applications received significantly exceeds 500, applications will be processed in batches and the 5-month timeline will not be met. The first batch will be limited to 500 applications and subsequent batches will be limited to 400 to account for capacity limitations due to managing extended evaluation, string contention, and other processes associated with each previous batch.

If batching is required, a secondary time-stamp process will be employed to establish the batches. (Batching priority will not be given to an application based on the time at which the application was submitted to ICANN, nor will batching priority be established based on a random selection method.)

The secondary time-stamp process will require applicants to obtain a time-stamp through a designated process which will occur after the close of the application submission period. The secondary time stamp process will occur, if required, according to the details to be published on ICANN's website. (Upon the Board's approval of a final designation of the operational details of the "secondary timestamp" batching process, the final plan will be added as a process within the Applicant Guidebook.)

If batching is required, the String Similarity review will be completed on all applications prior to the establishment of evaluation priority batches. For applications identified as part of a contention set, the entire contention set will be kept together in the same batch.

If batches are established, ICANN will post updated process information and an estimated timeline.

Note that the processing constraints will limit delegation rates to a steady state even in the event of an extremely high volume of applications. The annual delegation rate will not exceed 1,000 per year in any case, no matter how many applications are received.<sup>2</sup>

#### *1.1.2.6 Objection Filing*

Formal objections to applications can be filed on any of four enumerated grounds, by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications as described in subsection 1.1.2.2, and will last for approximately 7 months.

Objectors must file such formal objections directly with dispute resolution service providers (DRSPs), not with ICANN. The objection filing period will close following the end of the Initial Evaluation period (refer to subsection 1.1.2.5), with a two-week window of time between the posting of the Initial Evaluation results and the close of the objection filing period. Objections that have been filed during the objection filing period will be addressed in the dispute resolution stage, which is outlined in subsection 1.1.2.9 and discussed in detail in Module 3.

All applicants should be aware that third parties have the opportunity to file objections to any application during the objection filing period. Applicants whose applications are the subject of a formal objection will have an opportunity to file a response according to the dispute resolution service provider's rules and procedures. An applicant wishing to file a formal objection to another application that has been submitted would do so within the objection filing period, following the objection filing procedures in Module 3.

Applicants are encouraged to identify possible regional, cultural, property interests, or other sensitivities regarding TLD strings and their uses before applying and, where

<sup>2</sup> See "Delegation Rate Scenarios for New gTLDs" at <http://icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf> for additional discussion.

possible, consult with interested parties to mitigate any concerns in advance.

#### *1.1.2.7 Receipt of GAC Advice on New gTLDs*

The GAC may provide public policy advice directly to the ICANN Board on any application. The procedure for GAC Advice on New gTLDs described in Module 3 indicates that, to be considered by the Board during the evaluation process, the GAC Advice on New gTLDs must be submitted by the close of the objection filing period. A GAC Early Warning is not a prerequisite to use of the GAC Advice process.

If the Board receives GAC Advice on New gTLDs stating that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved. If the Board does not act in accordance with this type of advice, it must provide rationale for doing so.

See Module 3 for additional detail on the procedures concerning GAC Advice on New gTLDs.

#### *1.1.2.8 Extended Evaluation*

*Extended Evaluation is available only to certain applicants that do not pass Initial Evaluation.*

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not pass Initial Evaluation and does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for an additional exchange of information between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An application may be required to enter an Extended Evaluation if one or more proposed registry services raise technical issues that might adversely affect the security or stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such a review is required by the end of the Initial Evaluation period.

Evaluators and any applicable experts consulted will communicate the conclusions resulting from the additional review by the end of the Extended Evaluation period.

At the conclusion of the Extended Evaluation period, ICANN will post summary reports, by panel, from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next relevant stage. If the application does not pass the Extended Evaluation, it will proceed no further.

The Extended Evaluation is expected to be completed for all applications in a period of approximately 5 months, though this timeframe could be increased based on volume. In this event, ICANN will post updated process information and an estimated timeline.

#### ***1.1.2.9 Dispute Resolution***

*Dispute resolution applies only to applicants whose applications are the subject of a formal objection.*

Where formal objections are filed and filing fees paid during the objection filing period, independent dispute resolution service providers (DRSPs) will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been submitted to ICANN. Dispute resolution service providers serve as the fora to adjudicate the proceedings based on the subject matter and the needed expertise. Consolidation of objections filed will occur where appropriate, at the discretion of the DRSP.

As a result of a dispute resolution proceeding, either the applicant will prevail (in which case the application can proceed to the next relevant stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). In the event of multiple objections, an applicant must prevail in all dispute resolution proceedings concerning the application to proceed to the next relevant stage. Applicants will be notified by the DRSP(s) of the results of dispute resolution proceedings.

Dispute resolution proceedings, where applicable, are expected to be completed for all applications within approximately a 5-month time frame. In the event that volume is such that this timeframe cannot be accommodated, ICANN will work with the dispute resolution service providers to create processing procedures and post updated timeline information.

### 1.1.2.10 String Contention

*String contention applies only when there is more than one qualified application for the same or similar gTLD strings.*

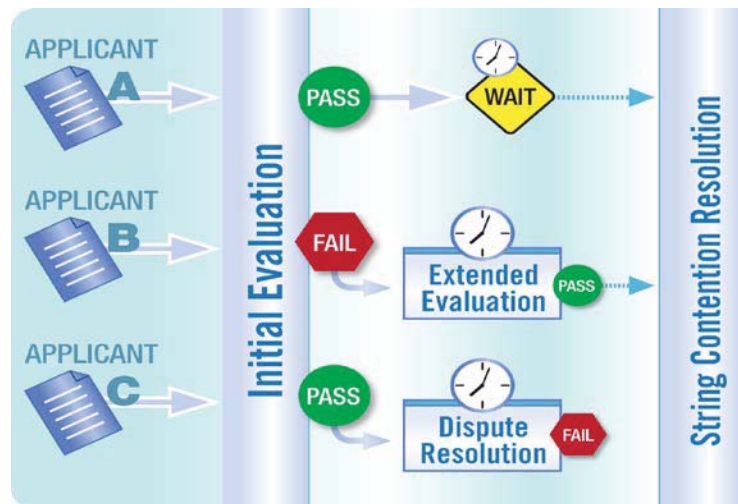
String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage. In the absence of resolution by the contending applicants, string contention cases are resolved either through a community priority evaluation (if a community-based applicant elects it) or through an auction.

In the event of contention between applied-for gTLD strings that represent geographic names, the parties may be required to follow a different process to resolve the contention. See subsection 2.2.1.4 of Module 2 for more information.

Groups of applied-for strings that are either identical or similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable.

To illustrate, as shown in Figure 1-2, Applicants A, B, and C all apply for .EXAMPLE and are identified as a contention set. Applicants A and C pass Initial Evaluation, but Applicant B does not. Applicant B requests Extended Evaluation. A third party files an objection to Applicant C's application, and Applicant C enters the dispute resolution process. Applicant A must wait to see whether Applicants B and C successfully complete the Extended Evaluation and dispute resolution phases, respectively, before it can proceed to the string contention resolution stage. In this example, Applicant B passes the Extended Evaluation, but Applicant C does not prevail in the dispute resolution proceeding. String contention resolution then proceeds between Applicants A and B.



**Figure 1-2 – All applications in a contention set must complete all previous evaluation and dispute resolution stages before string contention resolution can begin.**

Applicants prevailing in a string contention resolution procedure will proceed toward delegation of the applied-for gTLDs.

String contention resolution for a contention set is estimated to take from 2.5 to 6 months to complete. The time required will vary per case because some contention cases may be resolved in either a community priority evaluation or an auction, while others may require both processes.

#### *1.1.2.11 Transition to Delegation*

Applicants successfully completing all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps before delegation of the applied-for gTLD into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application.

Following execution of a registry agreement, the prospective registry operator must complete technical set-up and show satisfactory performance on a set of technical tests before delegation of the gTLD into the root zone may be initiated. If the pre-delegation testing requirements are not satisfied so that the gTLD can be delegated into the root zone within the time frame specified in the registry agreement, ICANN may in its sole and absolute discretion elect to terminate the registry agreement.

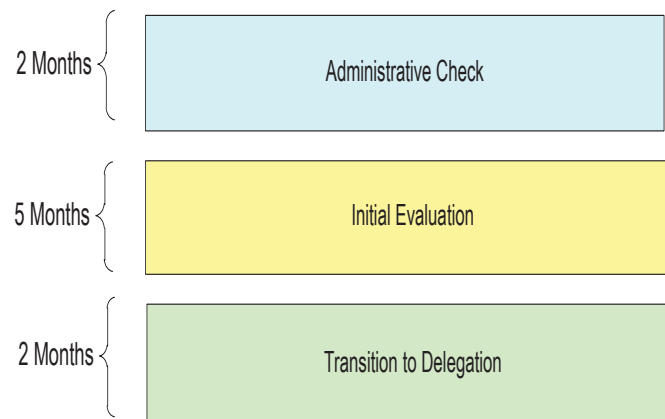
Once all of these steps have been successfully completed, the applicant is eligible for delegation of its applied-for gTLD into the DNS root zone.

It is expected that the transition to delegation steps can be completed in approximately 2 months, though this could take more time depending on the applicant's level of preparedness for the pre-delegation testing and the volume of applications undergoing these steps concurrently.

### 1.1.3 Lifecycle Timelines

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Based on the estimates for each stage described in this section, the lifecycle for a straightforward application could be approximately 9 months, as follows:



**Figure 1-3 – A straightforward application could have an approximate 9-month lifecycle.**

The lifecycle for a highly complex application could be much longer, such as 20 months in the example below:



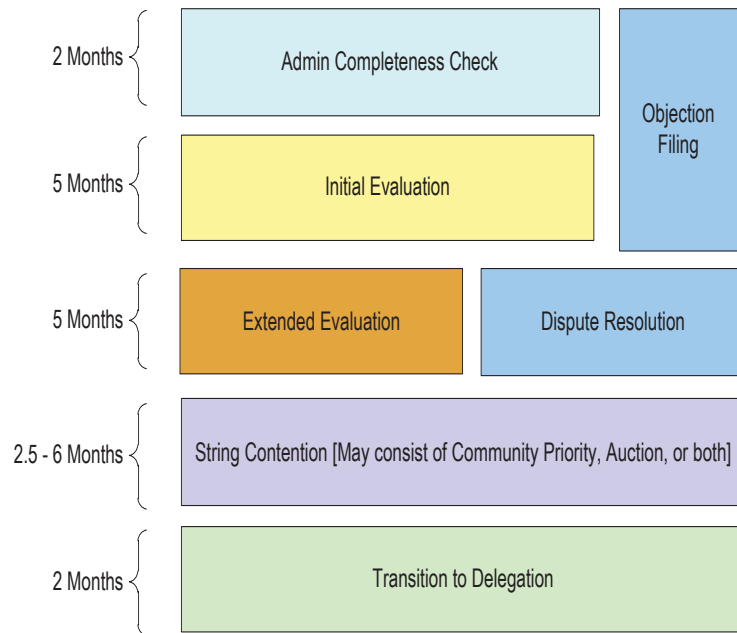


Figure 1-4 – A complex application could have an approximate 20-month lifecycle.

### 1.1.4 Posting Periods

The results of application reviews will be made available to the public at various stages in the process, as shown below.

Period	Posting Content
During Administrative Completeness Check	Public portions of all applications (posted within 2 weeks of the start of the Administrative Completeness Check).
End of Administrative Completeness Check	Results of Administrative Completeness Check.
GAC Early Warning Period	GAC Early Warnings received.
During Initial Evaluation	Status updates for applications withdrawn or ineligible for further review.  Contention sets resulting from String Similarity review.

Period	Posting Content
End of Initial Evaluation	Application status updates with all Initial Evaluation results.
GAC Advice on New gTLDs	GAC Advice received.
End of Extended Evaluation	Application status updates with all Extended Evaluation results.  Evaluation summary reports from the Initial and Extended Evaluation periods.
During Objection Filing/Dispute Resolution	Information on filed objections and status updates available via Dispute Resolution Service Provider websites.  Notice of all objections posted by ICANN after close of objection filing period.
During Contention Resolution (Community Priority Evaluation)	Results of each Community Priority Evaluation posted as completed.
During Contention Resolution (Auction)	Results from each auction posted as completed.
Transition to Delegation	Registry Agreements posted when executed.  Pre-delegation testing status updated.

### *1.1.5 Sample Application Scenarios*

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process. The table that follows exemplifies various processes and outcomes. This is not intended to be an exhaustive list of possibilities. There are other possible combinations of paths an application could follow.

Estimated time frames for each scenario are also included, based on current knowledge. Actual time frames may vary depending on several factors, including the total number

of applications received by ICANN during the application submission period. It should be emphasized that most applications are expected to pass through the process in the shortest period of time, i.e., they will not go through extended evaluation, dispute resolution, or string contention resolution processes. Although most of the scenarios below are for processes extending beyond nine months, it is expected that most applications will complete the process within the nine-month timeframe.

Scenario Number	Initial Evaluation	Extended Evaluation	Objection(s) Filed	String Contention	Approved for Delegation Steps	Estimated Elapsed Time
1	Pass	N/A	None	No	Yes	9 months
2	Fail	Pass	None	No	Yes	14 months
3	Pass	N/A	None	Yes	Yes	11.5 – 15 months
4	Pass	N/A	Applicant prevails	No	Yes	14 months
5	Pass	N/A	Objector prevails	N/A	No	12 months
6	Fail	Quit	N/A	N/A	No	7 months
7	Fail	Fail	N/A	N/A	No	12 months
8	Fail	Pass	Applicant prevails	Yes	Yes	16.5 – 20 months
9	Fail	Pass	Applicant prevails	Yes	No	14.5 – 18 months

**Scenario 1 – Pass Initial Evaluation, No Objection, No Contention**

– In the most straightforward case, the application passes Initial Evaluation and there is no need for an Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. As there is no contention for the applied-for gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD. Most applications are expected to complete the process within this timeframe.

**Scenario 2 – Extended Evaluation, No Objection, No Contention**

– In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. As with Scenario 1, no objections are filed

during the objection period, so there is no dispute to resolve. As there is no contention for the gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

**Scenario 3 – Pass Initial Evaluation, No Objection,**

**Contention** – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the application prevails in the contention resolution, so the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

**Scenario 4 – Pass Initial Evaluation, Win Objection, No**

**Contention** – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

**Scenario 5 – Pass Initial Evaluation, Lose Objection** – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, multiple objections are filed by one or more objectors with standing for one or more of the four enumerated objection grounds. Each objection is heard by a dispute resolution service provider panel. In this case, the panels find in favor of the applicant for most of the objections, but one finds in favor of the objector. As one of the objections has been upheld, the application does not proceed.

**Scenario 6 – Fail Initial Evaluation, Applicant Withdraws** – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant decides to withdraw the application rather than continuing with Extended Evaluation. The application does not proceed.

**Scenario 7 – Fail Initial Evaluation, Fail Extended Evaluation**

-- In this case, the application fails one or more aspects of the Initial Evaluation. The applicant requests Extended Evaluation for the appropriate elements. However, the

application fails Extended Evaluation also. The application does not proceed.

**Scenario 8 – Extended Evaluation, Win Objection, Pass**

**Contention** – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the applicant prevails over other applications in the contention resolution procedure, the applicant can enter into a registry agreement, and the application can proceed toward delegation of the applied-for gTLD.

**Scenario 9 – Extended Evaluation, Objection, Fail**

**Contention** – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, another applicant prevails in the contention resolution procedure, and the application does not proceed.

**Transition to Delegation** – After an application has successfully completed Initial Evaluation, and other stages as applicable, the applicant is required to complete a set of steps leading to delegation of the gTLD, including execution of a registry agreement with ICANN, and completion of pre-delegation testing. Refer to Module 5 for a description of the steps required in this stage.

### ***1.1.6 Subsequent Application Rounds***

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ICANN's goal is to launch subsequent gTLD application rounds as quickly as possible. The exact timing will be based on experiences gained and changes required after this round is completed. The goal is for the next application round to begin within one year of the close of the application submission period for the initial round.

ICANN has committed to reviewing the effects of the New gTLD Program on the operations of the root zone system after the first application round, and will defer the delegations in a second application round until it is determined that the delegations resulting from the first round did not jeopardize root zone system security or stability.

It is the policy of ICANN that there be subsequent application rounds, and that a systemized manner of applying for gTLDs be developed in the long term.

## *1.2 Information for All Applicants*

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### *1.2.1 Eligibility*

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Established corporations, organizations, or institutions in good standing may apply for a new gTLD. Applications from individuals or sole proprietorships will not be considered. Applications from or on behalf of yet-to-be-formed legal entities, or applications presupposing the future formation of a legal entity (for example, a pending Joint Venture) will not be considered.

ICANN has designed the New gTLD Program with multiple stakeholder protection mechanisms. Background screening, features of the gTLD Registry Agreement, data and financial escrow mechanisms are all intended to provide registrant and user protections.

The application form requires applicants to provide information on the legal establishment of the applying entity, as well as the identification of directors, officers, partners, and major shareholders of that entity. The names and positions of individuals included in the application will be published as part of the application; other information collected about the individuals will not be published.

Background screening at both the entity level and the individual level will be conducted for all applications to confirm eligibility. This inquiry is conducted on the basis of the information provided in questions 1-11 of the application form. ICANN may take into account information received from any source if it is relevant to the criteria in this section. If requested by ICANN, all applicants will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct background screening activities.

ICANN will perform background screening in only two areas: (1) General business diligence and criminal history; and (2) History of cybersquatting behavior. The criteria used for criminal history are aligned with the "crimes of trust" standard sometimes used in the banking and finance industry.

**In the absence of exceptional circumstances, applications from any entity with or including any individual with convictions or decisions of the types listed in (a) – (m) below will be automatically disqualified from the program.**

- a. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that ICANN deems as the substantive equivalent of any of these;
- b. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of the funds of others;
- c. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities;
- d. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative;
- e. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes;
- f. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force;
- g. has ever been convicted of any violent or sexual offense victimizing children, the



elderly, or individuals with disabilities;

- h. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988<sup>3</sup>;
- i. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols)<sup>4 5</sup>;
- j. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes above (i.e., within the past 10 years for crimes listed in (a) - (d) above, or ever for the crimes listed in (e) - (i) above);
- k. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents), within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (a) - (d) above, or ever for the crimes listed in (e) - (i) above);
- l. is the subject of a disqualification imposed by ICANN and in effect at the time the application is considered;
- m. has been involved in a pattern of adverse, final decisions indicating that the applicant

<sup>3</sup> <http://www.unodc.org/unodc/en/treaties/illicit-traffic.html>

<sup>4</sup> <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>

<sup>5</sup> It is recognized that not all countries have signed on to the UN conventions referenced above. These conventions are being used solely for identification of a list of crimes for which background screening will be performed. It is not necessarily required that an applicant would have been convicted pursuant to the UN convention but merely convicted of a crime listed under these conventions, to trigger these criteria.

or individual named in the application was engaged in cybersquatting as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), the Anti-Cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or other equivalent legislation. Three or more such decisions with one occurring in the last four years will generally be considered to constitute a pattern.

- n. fails to provide ICANN with the identifying information necessary to confirm identity at the time of application or to resolve questions of identity during the background screening process;
- o. fails to provide a good faith effort to disclose all relevant information relating to items (a) – (m).

Background screening is in place to protect the public interest in the allocation of critical Internet resources, and ICANN reserves the right to deny an otherwise qualified application based on any information identified during the background screening process. For example, a final and legally binding decision obtained by a national law enforcement or consumer protection authority finding that the applicant was engaged in fraudulent and deceptive commercial practices as defined in the Organization for Economic Co-operation and Development (OECD) Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders<sup>6</sup> may cause an application to be rejected. ICANN may also contact the applicant with additional questions based on information obtained in the background screening process.

All applicants are required to provide complete and detailed explanations regarding any of the above events as part of the application. Background screening information will not be made publicly available by ICANN.

**Registrar Cross-Ownership --** ICANN-accredited registrars are eligible to apply for a gTLD. However, all gTLD registries

<sup>6</sup> [http://www.oecd.org/document/56/0,3746,en\\_2649\\_34267\\_2515000\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/document/56/0,3746,en_2649_34267_2515000_1_1_1_1.00.html)

are required to abide by a Code of Conduct addressing, *inter alia*, non-discriminatory access for all authorized registrars. ICANN reserves the right to refer any application to the appropriate competition authority relative to any cross-ownership issues.

**Legal Compliance** -- ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN List). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.

### ***1.2.2 Required Documents***

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All applicants should be prepared to submit the following documents, which are required to accompany each application:

1. **Proof of legal establishment** – Documentation of the applicant's establishment as a specific type of entity in accordance with the applicable laws of its jurisdiction.
2. **Financial statements** – Applicants must provide audited or independently certified financial statements for the most recently completed fiscal year for the applicant. In some cases, unaudited financial statements may be provided.

As indicated in the relevant questions, supporting documentation should be submitted in the original language. English translations are not required.

All documents must be valid at the time of submission. Refer to the Evaluation Criteria, attached to Module 2, for additional details on the requirements for these documents.

Some types of supporting documentation are required only in certain cases:

1. **Community endorsement** – If an applicant has designated its application as community-based (see section 1.2.3), it will be asked to submit a written endorsement of its application by one or more established institutions representing the community it has named. An applicant may submit written endorsements from multiple institutions. If applicable, this will be submitted in the section of the application concerning the community-based designation.

At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement of support for the application, and supply the contact information of the entity providing the endorsement.

Written endorsements from individuals need not be submitted with the application, but may be submitted in the application comment forum.

2. **Government support or non-objection** – If an applicant has applied for a gTLD string that is a geographic name (as defined in this Guidebook), the applicant is required to submit documentation of support for or non-objection to its application from the relevant governments or public authorities. Refer to subsection 2.2.1.4 for more information on the requirements for geographic names. If applicable, this will be submitted in the geographic names section of the application.
3. **Documentation of third-party funding commitments** – If an applicant lists funding from third parties in its application, it must provide evidence of commitment by the party committing the funds. If applicable, this will be submitted in the financial section of the application.

### *1.2.3 Community-Based Designation*

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All applicants are required to designate whether their application is **community-based**.

#### *1.2.3.1 Definitions*

For purposes of this Applicant Guidebook, a **community-based gTLD** is a gTLD that is operated for the benefit of a clearly delineated community. Designation or non-

designation of an application as community-based is entirely at the discretion of the applicant. 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. Additional information may be requested in the event of a community priority evaluation (refer to section 4.2 of Module 4). 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.

For purposes of differentiation, an application that has not been designated as community-based will be referred to hereinafter in this document as a **standard application**. A standard gTLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. A standard applicant may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions. Standard simply means here that the applicant has not designated the application as community-based.

### *1.2.3.2 Implications of Application Designation*

Applicants should understand how their designation as community-based or standard will affect application processing at particular stages, and, if the application is successful, execution of the registry agreement and subsequent obligations as a gTLD registry operator, as described in the following paragraphs.

**Objection / Dispute Resolution** – All applicants should understand that a formal objection may be filed against any application on community grounds, even if the applicant has not designated itself as community-based or

declared the gTLD to be aimed at a particular community. Refer to Module 3, Objection Procedures.

**String Contention** – Resolution of string contention may include one or more components, depending on the composition of the contention set and the elections made by community-based applicants.

- A **settlement between the parties** can occur at any time after contention is identified. The parties will be encouraged to meet with an objective to settle the contention. Applicants in contention always have the opportunity to resolve the contention voluntarily, resulting in the withdrawal of one or more applications, before reaching the contention resolution stage.
- A **community priority evaluation** will take place only if a community-based applicant in a contention set elects this option. All community-based applicants in a contention set will be offered this option in the event that there is contention remaining after the applications have successfully completed all previous evaluation stages.
- An **auction** will result for cases of contention not resolved by community priority evaluation or agreement between the parties. Auction occurs as a contention resolution means of last resort. If a community priority evaluation occurs but does not produce a clear winner, an auction will take place to resolve the contention.

Refer to Module 4, String Contention Procedures, for detailed discussions of contention resolution procedures.

**Contract Execution and Post-Delegation** – A community-based applicant will be subject to certain post-delegation contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation. Material changes to the contract, including changes to the community-based nature of the gTLD and any associated provisions, may only be made with ICANN's approval. The determination of whether to approve changes requested by the applicant will be at ICANN's discretion. Proposed criteria for approving such changes are the subject of policy discussions.

Community-based applications are intended to be a narrow category, for applications where there are

unambiguous associations among the applicant, the community served, and the applied-for gTLD string. Evaluation of an applicant's designation as community-based will occur only in the event of a contention situation that results in a community priority evaluation. However, any applicant designating its application as community-based will, if the application is approved, be bound by the registry agreement to implement the community-based restrictions it has specified in the application. This is true even if there are no contending applicants.

### *1.2.3.3 Changes to Application Designation*

An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing.

### *1.2.4 Notice concerning Technical Acceptance Issues with New gTLDs*

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All applicants should be aware that approval of an application and entry into a registry agreement with ICANN do not guarantee that a new gTLD will immediately function throughout the Internet. Past experience indicates that network operators may not immediately fully support new top-level domains, even when these domains have been delegated in the DNS root zone, since third-party software modification may be required and may not happen immediately.

Similarly, software applications sometimes attempt to validate domain names and may not recognize new or unknown top-level domains. ICANN has no authority or ability to require that software accept new top-level domains, although it does prominently publicize which top-level domains are valid and has developed a basic tool to assist application providers in the use of current root-zone data.

ICANN encourages applicants to familiarize themselves with these issues and account for them in their startup and launch plans. Successful applicants may find themselves expending considerable efforts working with providers to achieve acceptance of their new top-level domains.

Applicants should review <http://www.icann.org/en/topics/TLD-acceptance/> for background. IDN applicants should also review the material concerning experiences with IDN test strings in the root zone (see <http://idn.icann.org/>).



### *1.2.5 Notice concerning TLD Delegations*

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ICANN is only able to create TLDs as delegations in the DNS root zone, expressed using NS records with any corresponding DS records and glue records. There is no policy enabling ICANN to place TLDs as other DNS record types (such as A, MX, or DNAME records) in the root zone.

### *1.2.6 Terms and Conditions*

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All applicants must agree to a standard set of Terms and Conditions for the application process. The Terms and Conditions are available in Module 6 of this guidebook.

### *1.2.7 Notice of Changes to Information*

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If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.

### *1.2.8 Voluntary Designation for High Security Zones*

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An ICANN stakeholder group has considered development of a possible special designation for "High Security Zone Top Level Domains" ("HSTLDs"). The group's Final Report can be found at <http://www.icann.org/en/topics/new-gtlds/hstld-final-report-11mar11-en.pdf>.

The Final Report may be used to inform further work. ICANN will support independent efforts toward developing voluntary high-security TLD designations, which may be available to gTLD applicants wishing to pursue such designations.

### *1.2.9 Security and Stability*

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*Root Zone Stability:* There has been significant study, analysis, and consultation in preparation for launch of the

New gTLD Program, indicating that the addition of gTLDs to the root zone will not negatively impact the security or stability of the DNS.

It is estimated that 200-300 TLDs will be delegated annually, and determined that in no case will more than 1000 new gTLDs be added to the root zone in a year. The delegation rate analysis, consultations with the technical community, and anticipated normal operational upgrade cycles all lead to the conclusion that the new gTLD delegations will have no significant impact on the stability of the root system. Modeling and reporting will continue during, and after, the first application round so that root-scaling discussions can continue and the delegation rates can be managed as the program goes forward.

All applicants should be aware that delegation of any new gTLDs is conditional on the continued absence of significant negative impact on the security or stability of the DNS and the root zone system (including the process for delegating TLDs in the root zone). In the event that there is a reported impact in this regard and processing of applications is delayed, the applicants will be notified in an orderly and timely manner.

#### *1.2.10 Resources for Applicant Assistance*

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A variety of support resources are available to gTLD applicants. Financial assistance will be available to a limited number of eligible applicants. To request financial assistance, applicants must submit a separate financial assistance application in addition to the gTLD application form.

To be eligible for consideration, all financial assistance applications must be received by **23:59 UTC 12 April 2012**. Financial assistance applications will be evaluated and scored against pre-established criteria.

In addition, ICANN maintains a webpage as an informational resource for applicants seeking assistance, and organizations offering support.

See <http://newgtlds.icann.org/applicants/candidate-support> for details on these resources.

#### *1.2.11 Updates to the Applicant Guidebook*

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As approved by the ICANN Board of Directors, this Guidebook forms the basis of the New gTLD Program. ICANN reserves the right to make reasonable updates and

changes to the Applicant Guidebook at any time, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process. Any such updates or revisions will be posted on ICANN's website.

### *1.3 Information for Internationalized Domain Name Applicants*

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Some applied-for gTLD strings are expected to be Internationalized Domain Names (IDNs). IDNs are domain names including characters used in the local representation of languages not written with the basic Latin alphabet (a - z), European-Arabic digits (0 - 9), and the hyphen (-). As described below, IDNs require the insertion of A-labels into the DNS root zone.

#### *1.3.1 IDN-Specific Requirements*

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An applicant for an IDN string must provide information indicating compliance with the IDNA protocol and other technical requirements. The IDNA protocol and its documentation can be found at <http://icann.org/en/topics/idn/rfcs.htm>.

Applicants must provide applied-for gTLD strings in the form of both a **U-label** (the IDN TLD in local characters) and an **A-label**.

An A-label is the ASCII form of an IDN label. Every IDN A-label begins with the IDNA ACE prefix, "xn--", followed by a string that is a valid output of the Punycode algorithm, making a maximum of 63 total ASCII characters in length. The prefix and string together must conform to all requirements for a label that can be stored in the DNS including conformance to the LDH (host name) rule described in RFC 1034, RFC 1123, and elsewhere.

A U-label is the Unicode form of an IDN label, which a user expects to see displayed in applications.

For example, using the current IDN test string in Cyrillic script, the U-label is <испытание> and the A-label is <**xn--80akhbyknj4f**>. An A-label must be capable of being produced by conversion from a U-label and a U-label must be capable of being produced by conversion from an A-label.

Applicants for IDN gTLDs will also be required to provide the following at the time of the application:

1. Meaning or restatement of string in English. The applicant will provide a short description of what the string would mean or represent in English.
2. Language of label (ISO 639-1). The applicant will specify the language of the applied-for gTLD string, both according to the ISO codes for the representation of names of languages, and in English.
3. Script of label (ISO 15924). The applicant will specify the script of the applied-for gTLD string, both according to the ISO codes for the representation of names of scripts, and in English.
4. Unicode code points. The applicant will list all the code points contained in the U-label according to its Unicode form.
5. Applicants must further demonstrate that they have made reasonable efforts to ensure that the encoded IDN string does not cause any rendering or operational problems. For example, problems have been identified in strings with characters of mixed right-to-left and left-to-right directionality when numerals are adjacent to the path separator (i.e., the dot).<sup>7</sup>

If an applicant is applying for a string with known issues, it should document steps that will be taken to mitigate these issues in applications. While it is not possible to ensure that all rendering problems are avoided, it is important that as many as possible are identified early and that the potential registry operator is aware of these issues. Applicants can become familiar with these issues by understanding the IDNA protocol (see <http://www.icann.org/en/topics/idn/rfcs.htm>), and by active participation in the IDN wiki (see <http://idn.icann.org/>) where some rendering problems are demonstrated.

6. **[Optional]** - Representation of label in phonetic alphabet. The applicant may choose to provide its applied-for gTLD string notated according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>). Note that this information will not be evaluated or scored. The information, if provided, will be used as a guide to ICANN in responding to inquiries or speaking of the application in public presentations.

<sup>7</sup> See examples at <http://stupid.domain.name/node/683>

### 1.3.2 IDN Tables

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An IDN table provides the list of characters eligible for registration in domain names according to the registry's policy. It identifies any multiple characters that are considered equivalent for domain name registration purposes ("variant characters"). Variant characters occur where two or more characters can be used interchangeably.

Examples of IDN tables can be found in the Internet Assigned Numbers Authority (IANA) IDN Repository at <http://www.iana.org/procedures/idn-repository.html>.

In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string (the "top level tables"). IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second or lower levels.

Each applicant is responsible for developing its IDN Tables, including specification of any variant characters. Tables must comply with ICANN's IDN Guidelines<sup>8</sup> and any updates thereto, including:

- Complying with IDN technical standards.
- Employing an inclusion-based approach (i.e., code points not explicitly permitted by the registry are prohibited).
- Defining variant characters.
- Excluding code points not permissible under the guidelines, e.g., line-drawing symbols, pictographic dingbats, structural punctuation marks.
- Developing tables and registration policies in collaboration with relevant stakeholders to address common issues.
- Depositing IDN tables with the IANA Repository for IDN Practices (once the TLD is delegated).

An applicant's IDN tables should help guard against user confusion in the deployment of IDN gTLDs. Applicants are strongly urged to consider specific linguistic and writing system issues that may cause problems when characters are used in domain names, as part of their work of defining variant characters.

<sup>8</sup> See <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>

To avoid user confusion due to differing practices across TLD registries, it is recommended that applicants cooperate with TLD operators that offer domain name registration with the same or visually similar characters.

As an example, languages or scripts are often shared across geographic boundaries. In some cases, this can cause confusion among the users of the corresponding language or script communities. Visual confusion can also exist in some instances between different scripts (for example, Greek, Cyrillic and Latin).

Applicants will be asked to describe the process used in developing the IDN tables submitted. ICANN may compare an applicant's IDN table with IDN tables for the same languages or scripts that already exist in the IANA repository or have been otherwise submitted to ICANN. If there are inconsistencies that have not been explained in the application, ICANN may ask the applicant to detail the rationale for differences. For applicants that wish to conduct and review such comparisons prior to submitting a table to ICANN, a table comparison tool will be available.

ICANN will accept the applicant's IDN tables based on the factors above.

Once the applied-for string has been delegated as a TLD in the root zone, the applicant is required to submit IDN tables for lodging in the IANA Repository of IDN Practices. For additional information, see existing tables at <http://iana.org/domains/idn-tables/>, and submission guidelines at <http://iana.org/procedures/idn-repository.html>.

### *1.3.3 IDN Variant TLDs*

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A variant TLD string results from the substitution of one or more characters in the applied-for gTLD string with variant characters based on the applicant's top level tables.

Each application contains one applied-for gTLD string. The applicant may also declare any variant strings for the TLD in its application. However, no variant gTLD strings will be delegated through the New gTLD Program until variant management solutions are developed and implemented.<sup>9</sup> Declaring variant strings is informative only and will not imply any right or claim to the declared variant strings.

<sup>9</sup> The ICANN Board directed that work be pursued on variant management in its resolution on 25 Sep 2010, <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.5>.

When a variant delegation process is established, applicants may be required to submit additional information such as implementation details for the variant TLD management mechanism, and may need to participate in a subsequent evaluation process, which could contain additional fees and review steps.

The following scenarios are possible during the gTLD evaluation process:

- a. Applicant declares variant strings to the applied-for gTLD string in its application. If the application is successful, the applied-for gTLD string will be delegated to the applicant. The declared variant strings are noted for future reference. These declared variant strings will not be delegated to the applicant along with the applied-for gTLD string, nor will the applicant have any right or claim to the declared variant strings.

Variant strings listed in successful gTLD applications will be tagged to the specific application and added to a "Declared Variants List" that will be available on ICANN's website. A list of pending (i.e., declared) variant strings from the IDN ccTLD Fast Track is available at <http://icann.org/en/topics/idn/fast-track/string-evaluation-completion-en.htm>.

ICANN may perform independent analysis on the declared variant strings, and will not necessarily include all strings listed by the applicant on the Declared Variants List.

- b. Multiple applicants apply for strings that are identified by ICANN as variants of one another. These applications will be placed in a contention set and will follow the contention resolution procedures in Module 4.
- c. Applicant submits an application for a gTLD string and does not indicate variants to the applied-for gTLD string. ICANN will not identify variant strings unless scenario (b) above occurs.

Each variant string declared in the application must also conform to the string requirements in section 2.2.1.3.2.

Variant strings declared in the application will be reviewed for consistency with the top-level tables submitted in the application. Should any declared variant strings not be



based on use of variant characters according to the submitted top-level tables, the applicant will be notified and the declared string will no longer be considered part of the application.

Declaration of variant strings in an application does not provide the applicant any right or reservation to a particular string. Variant strings on the Declared Variants List may be subject to subsequent additional review per a process and criteria to be defined.

It should be noted that while variants for second and lower-level registrations are defined freely by the local communities without any ICANN validation, there may be specific rules and validation criteria specified for variant strings to be allowed at the top level. It is expected that the variant information provided by applicants in the first application round will contribute to a better understanding of the issues and assist in determining appropriate review steps and fee levels going forward.

## *1.4 Submitting an Application*

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Applicants may complete the application form and submit supporting documents using ICANN's TLD Application System (TAS). To access the system, each applicant must first register as a TAS user.

As TAS users, applicants will be able to provide responses in open text boxes and submit required supporting documents as attachments. Restrictions on the size of attachments as well as the file formats are included in the instructions on the TAS site.

Except where expressly provided within the question, all application materials must be submitted in English.

ICANN will not accept application forms or supporting materials submitted through other means than TAS (that is, hard copy, fax, email), unless such submission is in accordance with specific instructions from ICANN to applicants.

### *1.4.1 Accessing the TLD Application System*

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The TAS site will be accessible from the New gTLD webpage (<http://www.icann.org/en/topics/new-gtld-program.htm>), and will be highlighted in communications regarding the opening of the application submission period. Users of TAS will be expected to agree to a standard set of terms of use

including user rights, obligations, and restrictions in relation to the use of the system.

#### *1.4.1.1 User Registration*

TAS user registration (creating a TAS user profile) requires submission of preliminary information, which will be used to validate the identity of the parties involved in the application. An overview of the information collected in the user registration process is below:

<b>No.</b>	<b>Questions</b>
<b>1</b>	Full legal name of Applicant
<b>2</b>	Principal business address
<b>3</b>	Phone number of Applicant
<b>4</b>	Fax number of Applicant
<b>5</b>	Website or URL, if applicable
<b>6</b>	Primary Contact: Name, Title, Address, Phone, Fax, Email
<b>7</b>	Secondary Contact: Name, Title, Address, Phone, Fax, Email
<b>8</b>	Proof of legal establishment
<b>9</b>	Trading, subsidiary, or joint venture information
<b>10</b>	Business ID, Tax ID, VAT registration number, or equivalent of Applicant
<b>11</b>	Applicant background: previous convictions, cybersquatting activities
<b>12</b>	Deposit payment confirmation and payer information

A subset of identifying information will be collected from the entity performing the user registration, in addition to the applicant information listed above. The registered user could be, for example, an agent, representative, or

employee who would be completing the application on behalf of the applicant.

The registration process will require the user to request the desired number of application slots. For example, a user intending to submit five gTLD applications would complete five application slot requests, and the system would assign the user a unique ID number for each of the five applications.

Users will also be required to submit a deposit of USD 5,000 per application slot. This deposit amount will be credited against the evaluation fee for each application. The deposit requirement is in place to help reduce the risk of frivolous access to the online application system.

After completing the registration, TAS users will receive access enabling them to enter the rest of the application information into the system. Application slots will be populated with the registration information provided by the applicant, which may not ordinarily be changed once slots have been assigned.

No new user registrations will be accepted after **23:59 UTC 29 March 2012**.

ICANN will take commercially reasonable steps to protect all applicant data submitted from unauthorized access, but cannot warrant against the malicious acts of third parties who may, through system corruption or other means, gain unauthorized access to such data.

#### *1.4.1.2 Application Form*

Having obtained the requested application slots, the applicant will complete the remaining application questions. An overview of the areas and questions contained in the form is shown here:

No.	Application and String Information
12	Payment confirmation for remaining evaluation fee amount
13	Applied-for gTLD string
14	IDN string information, if applicable
15	IDN tables, if applicable

16	Mitigation of IDN operational or rendering problems, if applicable
17	Representation of string in International Phonetic Alphabet (Optional)
18	Mission/purpose of the TLD
19	Is the application for a community-based TLD?
20	If community based, describe elements of community and proposed policies
21	Is the application for a geographic name? If geographic, documents of support required
22	Measures for protection of geographic names at second level
23	Registry Services: name and full description of all registry services to be provided
	<b>Technical and Operational Questions (External)</b>
24	Shared registration system (SRS) performance
25	EPP
26	Whois
27	Registration life cycle
28	Abuse prevention & mitigation
29	Rights protection mechanisms
30(a)	Security
	<b>Technical and Operational Questions (Internal)</b>
30(b)	Security
31	Technical overview of proposed registry
32	Architecture

33	Database capabilities
34	Geographic diversity
35	DNS service compliance
36	IPv6 reachability
37	Data backup policies and procedures
38	Escrow
39	Registry continuity
40	Registry transition
41	Failover testing
42	Monitoring and fault escalation processes
43	DNSSEC
44	IDNs (Optional)
	<b>Financial Questions</b>
45	Financial statements
46	Projections template: costs and funding
47	Costs: setup and operating
48	Funding and revenue
49	Contingency planning: barriers, funds, volumes
50	Continuity: continued operations instrument

#### *1.4.2 Customer Service during the Application Process*

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Assistance will be available to applicants throughout the application process via the Applicant Service Center (ASC). The ASC will be staffed with customer service agents

to answer questions relating to the New gTLD Program, the application process, and TAS.

### *1.4.3 Backup Application Process*

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If the online application system is not available, ICANN will provide alternative instructions for submitting applications.

## *1.5 Fees and Payments*

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This section describes the fees to be paid by the applicant. Payment instructions are also included here.

### *1.5.1 gTLD Evaluation Fee*

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The gTLD evaluation fee is required from all applicants. This fee is in the amount of USD 185,000. The evaluation fee is payable in the form of a 5,000 deposit submitted at the time the user requests an application slot within TAS, and a payment of the remaining 180,000 submitted with the full application. ICANN will not begin its evaluation of an application unless it has received the full gTLD evaluation fee by **23:59 UTC 12 April 2012**.

The gTLD evaluation fee is set to recover costs associated with the new gTLD program. The fee is set to ensure that the program is fully funded and revenue neutral and is not subsidized by existing contributions from ICANN funding sources, including generic TLD registries and registrars, ccTLD contributions and RIR contributions.

The gTLD evaluation fee covers all required reviews in Initial Evaluation and, in most cases, any required reviews in Extended Evaluation. If an extended Registry Services review takes place, an additional fee will be incurred for this review (see section 1.5.2). There is no additional fee to the applicant for Extended Evaluation for geographic names, technical and operational, or financial reviews.

**Refunds --** In certain cases, refunds of a portion of the evaluation fee may be available for applications that are withdrawn before the evaluation process is complete. An applicant may request a refund at any time until it has executed a registry agreement with ICANN. The amount of the refund will depend on the point in the process at which the withdrawal is requested, as follows:

<b>Refund Available to Applicant</b>	<b>Percentage of Evaluation Fee</b>	<b>Amount of Refund</b>
Within 21 calendar days of a GAC Early	80%	USD 148,000

<b>Refund Available to Applicant</b>	<b>Percentage of Evaluation Fee</b>	<b>Amount of Refund</b>
Warning		
After posting of applications until posting of Initial Evaluation results	70%	USD 130,000
After posting Initial Evaluation results	35%	USD 65,000
After the applicant has completed Dispute Resolution, Extended Evaluation, or String Contention Resolution(s)	20%	USD 37,000
After the applicant has entered into a registry agreement with ICANN		None

Thus, any applicant that has not been successful is eligible for at least a 20% refund of the evaluation fee if it withdraws its application.

An applicant that wishes to withdraw an application must initiate the process through TAS. Withdrawal of an application is final and irrevocable. Refunds will only be issued to the organization that submitted the original payment. All refunds are paid by wire transfer. Any bank transfer or transaction fees incurred by ICANN, or any unpaid evaluation fees, will be deducted from the amount paid. Any refund paid will be in full satisfaction of ICANN's obligations to the applicant. The applicant will have no entitlement to any additional amounts, including for interest or currency exchange rate changes.

**Note on 2000 proof-of-concept round applicants --**

Participants in ICANN's proof-of-concept application process in 2000 may be eligible for a credit toward the evaluation fee. The credit is in the amount of USD 86,000 and is subject to:

- submission of documentary proof by the applicant that it is the same entity, a successor in interest to the same entity, or an affiliate of the same entity that applied previously;
- a confirmation that the applicant was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the applicant has no legal claims arising from the 2000 proof-of-concept process; and
- submission of an application, which may be modified from the application originally submitted in 2000, for the same TLD string that such entity applied for in the 2000 proof-of-concept application round.

Each participant in the 2000 proof-of-concept application process is eligible for at most one credit. A maximum of one credit may be claimed for any new gTLD application submitted according to the process in this guidebook. Eligibility for this credit is determined by ICANN.

### *1.5.2 Fees Required in Some Cases*

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Applicants may be required to pay additional fees in certain cases where specialized process steps are applicable. Those possible additional fees<sup>10</sup> include:

- **Registry Services Review Fee** – If applicable, this fee is payable for additional costs incurred in referring an application to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review. Applicants will be notified if such a fee is due. The fee for a three-member RSTEP review team is anticipated to be USD 50,000. In some cases, five-member panels might be required, or there might be increased scrutiny at a greater cost. The amount of the fee will cover the cost of the RSTEP review. In the event that reviews of proposed registry services can be consolidated across multiple applications or applicants, ICANN will apportion the fees in an equitable manner. In every case, the applicant will be advised of the cost before initiation of the review. Refer to subsection 2.2.3 of Module 2 on Registry Services review.

<sup>10</sup> The estimated fee amounts provided in this section 1.5.2 will be updated upon engagement of panel service providers and establishment of fees.



- **Dispute Resolution Filing Fee** – This amount must accompany any filing of a formal objection and any response that an applicant files to an objection. This fee is payable directly to the applicable dispute resolution service provider in accordance with the provider's payment instructions. ICANN estimates that filing fees could range from approximately USD 1,000 to USD 5,000 (or more) per party per proceeding. Refer to the appropriate provider for the relevant amount. Refer to Module 3 for dispute resolution procedures.
- **Advance Payment of Costs** – In the event of a formal objection, this amount is payable directly to the applicable dispute resolution service provider in accordance with that provider's procedures and schedule of costs. Ordinarily, both parties in the dispute resolution proceeding will be required to submit an advance payment of costs in an estimated amount to cover the entire cost of the proceeding. This may be either an hourly fee based on the estimated number of hours the panelists will spend on the case (including review of submissions, facilitation of a hearing, if allowed, and preparation of a decision), or a fixed amount. In cases where disputes are consolidated and there are more than two parties involved, the advance payment will occur according to the dispute resolution service provider's rules.

The prevailing party in a dispute resolution proceeding will have its advance payment refunded, while the non-prevailing party will not receive a refund and thus will bear the cost of the proceeding. In cases where disputes are consolidated and there are more than two parties involved, the refund of fees will occur according to the dispute resolution service provider's rules.

ICANN estimates that adjudication fees for a proceeding involving a fixed amount could range from USD 2,000 to USD 8,000 (or more) per proceeding. ICANN further estimates that an hourly rate based proceeding with a one-member panel could range from USD 32,000 to USD 56,000 (or more) and with a three-member panel it could range from USD 70,000 to USD 122,000 (or more). These estimates may be lower if the panel does not call for written submissions beyond the objection and response, and does not allow a hearing. Please

refer to the appropriate provider for the relevant amounts or fee structures.

- **Community Priority Evaluation Fee** – In the event that the applicant participates in a community priority evaluation, this fee is payable as a deposit in an amount to cover the cost of the panel's review of that application (currently estimated at USD 10,000). The deposit is payable to the provider appointed to handle community priority evaluations. Applicants will be notified if such a fee is due. Refer to Section 4.2 of Module 4 for circumstances in which a community priority evaluation may take place. An applicant who scores at or above the threshold for the community priority evaluation will have its deposit refunded.

ICANN will notify the applicants of due dates for payment in respect of additional fees (if applicable). This list does not include fees (annual registry fees) that will be payable to ICANN following execution of a registry agreement.

### *1.5.3 Payment Methods*

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Payments to ICANN should be submitted by **wire transfer**. Instructions for making a payment by wire transfer will be available in TAS.<sup>11</sup>

Payments to Dispute Resolution Service Providers should be submitted in accordance with the provider's instructions.

### *1.5.4 Requesting a Remittance Form*

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The TAS interface allows applicants to request issuance of a remittance form for any of the fees payable to ICANN. This service is for the convenience of applicants that require an invoice to process payments.

## *1.6 Questions about this Applicant Guidebook*

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For assistance and questions an applicant may have in the process of completing the application form, applicants should use the customer support resources available via the ASC. Applicants who are unsure of the information being sought in a question or the parameters for acceptable documentation are encouraged to communicate these questions through the appropriate

<sup>11</sup> Wire transfer is the preferred method of payment as it offers a globally accessible and dependable means for international transfer of funds. This enables ICANN to receive the fee and begin processing applications as quickly as possible.

support channels before the application is submitted. This helps avoid the need for exchanges with evaluators to clarify information, which extends the timeframe associated with processing the application.

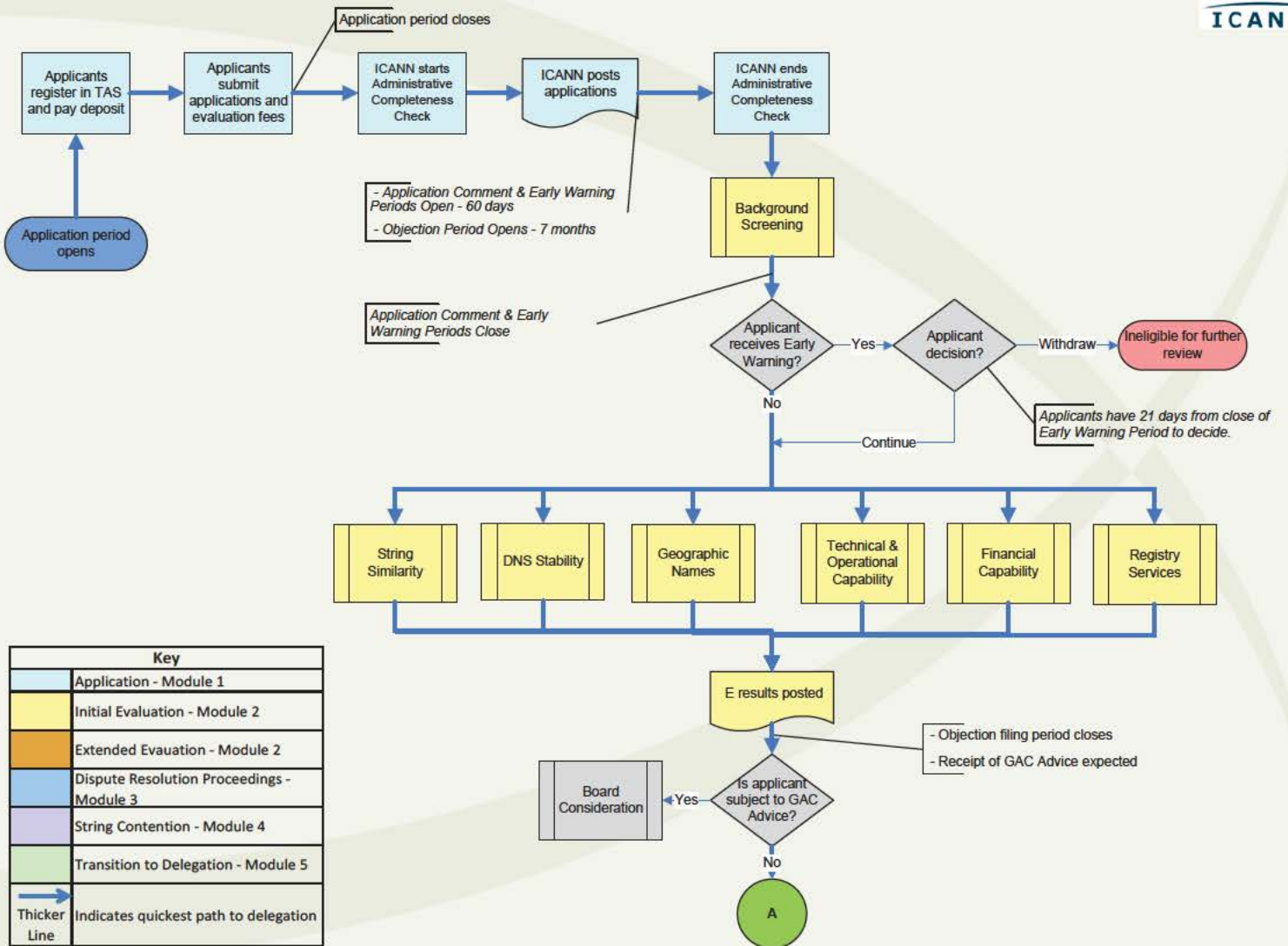
Currently, questions may be submitted via <newgtld@icann.org>. To provide all applicants equitable access to information, ICANN will make all questions and answers publicly available.

All requests to ICANN for information about the process or issues surrounding preparation of an application must be submitted to the ASC. ICANN will not grant requests from applicants for personal or telephone consultations regarding the preparation of an application. Applicants that contact ICANN for clarification about aspects of the application will be referred to the ASC.

Answers to inquiries will only provide clarification about the application forms and procedures. ICANN will not provide consulting, financial, or legal advice.

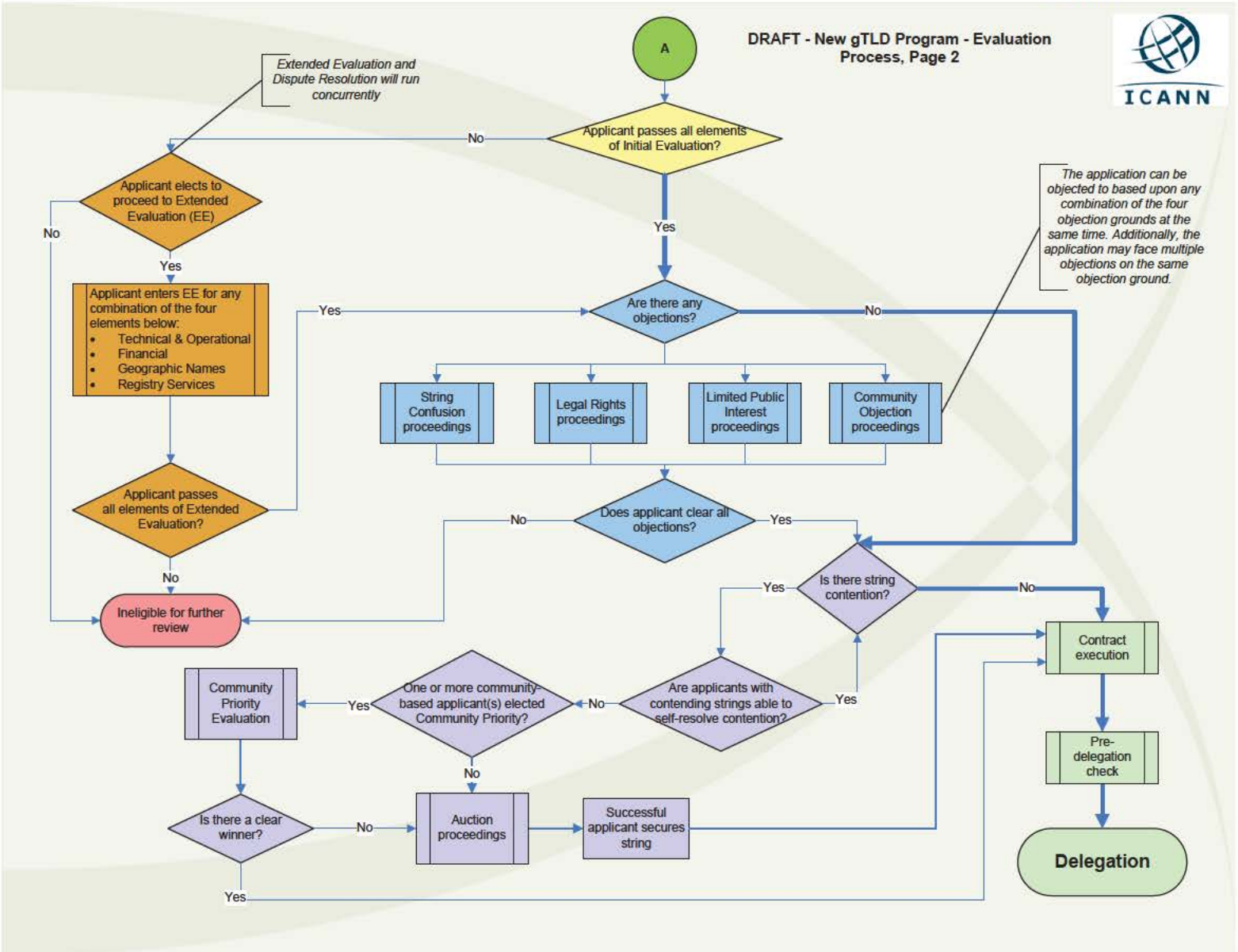


## DRAFT - New gTLD Program - Evaluation Process





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# gTLD Applicant Guidebook

(v. 2012-06-04)

## Module 2

4 June 2012

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# Module 2

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## *Evaluation Procedures*

This module describes the evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation. All applicants will undergo an Initial Evaluation and those that do not pass all elements may request Extended Evaluation.

The first, required evaluation is the **Initial Evaluation**, during which ICANN assesses an applied-for gTLD string, an applicant's qualifications, and its proposed registry services.

The following assessments are performed in the **Initial Evaluation**:

- String Reviews
  - String similarity
  - Reserved names
  - DNS stability
  - Geographic names
- Applicant Reviews
  - Demonstration of technical and operational capability
  - Demonstration of financial capability
  - Registry services reviews for DNS stability issues

An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.

**Extended Evaluation** may be applicable in cases in which an applicant does not pass the Initial Evaluation. See Section 2.3 below.

### *2.1 Background Screening*

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Background screening will be conducted in two areas:

- (a) General business diligence and criminal history; and
- (b) History of cybersquatting behavior.

The application must pass both background screening areas to be eligible to proceed. Background screening results are evaluated according to the criteria described in section 1.2.1. Due to the potential sensitive nature of the material, applicant background screening reports will not be published.

The following sections describe the process ICANN will use to perform background screening.

### *2.1.1 General business diligence and criminal history*

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Applying entities that are publicly traded corporations listed and in good standing on any of the world's largest 25 stock exchanges (as listed by the World Federation of Exchanges) will be deemed to have passed the general business diligence and criminal history screening. The largest 25 will be based on the domestic market capitalization reported at the end of the most recent calendar year prior to launching each round.<sup>1</sup>

Before an entity is listed on an exchange, it must undergo significant due diligence including an investigation by the exchange, regulators, and investment banks. As a publicly listed corporation, an entity is subject to ongoing scrutiny from shareholders, analysts, regulators, and exchanges. All exchanges require monitoring and disclosure of material information about directors, officers, and other key personnel, including criminal behavior. In totality, these requirements meet or exceed the screening ICANN will perform.

For applicants not listed on one of these exchanges, ICANN will submit identifying information for the entity, officers, directors, and major shareholders to an international background screening service. The service provider(s) will use the criteria listed in section 1.2.1 and return results that match these criteria. Only publicly available information will be used in this inquiry.

ICANN is in discussions with INTERPOL to identify ways in which both organizations can collaborate in background screenings of individuals, entities and their identity documents consistent with both organizations' rules and regulations. Note that the applicant is expected to disclose potential problems in meeting the criteria in the application, and provide any clarification or explanation at the time of application submission. Results returned from

<sup>1</sup> See <http://www.world-exchanges.org/statistics/annual/2010/equity-markets/domestic-market-capitalization>



the background screening process will be matched with the disclosures provided by the applicant and those cases will be followed up to resolve issues of discrepancies or potential false positives.

If no hits are returned, the application will generally pass this portion of the background screening.

### *2.1.2 History of cybersquatting*

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ICANN will screen applicants against UDRP cases and legal databases as financially feasible for data that may indicate a pattern of cybersquatting behavior pursuant to the criteria listed in section 1.2.1.

The applicant is required to make specific declarations regarding these activities in the application. Results returned during the screening process will be matched with the disclosures provided by the applicant and those instances will be followed up to resolve issues of discrepancies or potential false positives.

If no hits are returned, the application will generally pass this portion of the background screening.

## *2.2 Initial Evaluation*

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The Initial Evaluation consists of two types of review. Each type is composed of several elements.

String review: The first review focuses on the applied-for gTLD string to test:

- Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;
- Whether the applied-for gTLD string might adversely affect DNS security or stability; and
- Whether evidence of requisite government approval is provided in the case of certain geographic names.

Applicant review: The second review focuses on the applicant to test:

- Whether the applicant has the requisite technical, operational, and financial capability to operate a registry; and
- Whether the registry services offered by the applicant might adversely affect DNS security or stability.

## 2.2.1 *String Reviews*

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In the Initial Evaluation, ICANN reviews every applied-for gTLD string. Those reviews are described in greater detail in the following subsections.

### 2.2.1.1 *String Similarity Review*

This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

Note: In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

The visual similarity check that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review will be conducted by an independent String Similarity Panel.

#### 2.2.1.1.1 *Reviews Performed*

The String Similarity Panel's task is to identify visual string similarities that would create a probability of user confusion.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

- Applied-for gTLD strings against existing TLDs and reserved names;
- Applied-for gTLD strings against other applied-for gTLD strings;
- Applied-for gTLD strings against strings requested as IDN ccTLDs; and
- Applied-for 2-character IDN gTLD strings against:
  - Every other single character.
  - Any other 2-character ASCII string (to protect possible future ccTLD delegations).

**Similarity to Existing TLDs or Reserved Names** – This review involves cross-checking between each applied-for string and the lists of existing TLD strings and Reserved Names to determine whether two strings are so similar to one another that they create a probability of user confusion.

In the simple case in which an applied-for gTLD string is identical to an existing TLD or reserved name, the online application system will not allow the application to be submitted.

Testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. For example, protocols treat equivalent labels as alternative forms of the same label, just as “foo” and “Foo” are treated as alternative forms of the same label (RFC 3490).

All TLDs currently in the root zone can be found at <http://iana.org/domains/root/db/>.

IDN tables that have been submitted to ICANN are available at <http://www.iana.org/domains/idn-tables/>.

**Similarity to Other Applied-for gTLD Strings (String Contention Sets)** – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, the String Similarity Panel will create contention sets that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or similar to one another. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

ICANN will notify applicants who are part of a contention set as soon as the String Similarity review is completed. (This provides a longer period for contending applicants to reach their own resolution before reaching the contention resolution stage.) These contention sets will also be published on ICANN's website.

**Similarity to TLD strings requested as IDN ccTLDs** -- Applied-for gTLD strings will also be reviewed for similarity to TLD strings requested in the IDN ccTLD Fast Track process (see <http://www.icann.org/en/topics/idn/fast-track/>). Should a conflict with a prospective fast-track IDN ccTLD be identified, ICANN will take the following approach to resolving the conflict.

If one of the applications has completed its respective process before the other is lodged, that TLD will be delegated. A gTLD application that has successfully completed all relevant evaluation stages, including dispute resolution and string contention, if applicable, and is eligible for entry into a registry agreement will be considered complete, and therefore would not be disqualified by a newly-filed IDN ccTLD request. Similarly, an IDN ccTLD request that has completed evaluation (i.e., is validated) will be considered complete and therefore would not be disqualified by a newly-filed gTLD application.

In the case where neither application has completed its respective process, where the gTLD application does not have the required approval from the relevant government or public authority, a validated request for an IDN ccTLD will prevail and the gTLD application will not be approved. The term “validated” is defined in the IDN ccTLD Fast Track Process Implementation, which can be found at <http://www.icann.org/en/topics/idn>.

In the case where a gTLD applicant has obtained the support or non-objection of the relevant government or public authority, but is eliminated due to contention with a string requested in the IDN ccTLD Fast Track process, a full refund of the evaluation fee is available to the applicant if the gTLD application was submitted prior to the publication of the ccTLD request.

**Review of 2-character IDN strings** — In addition to the above reviews, an applied-for gTLD string that is a 2-character IDN string is reviewed by the String Similarity Panel for visual similarity to:

- a) Any one-character label (in any script), and
- b) Any possible two-character ASCII combination.

An applied-for gTLD string that is found to be too similar to a) or b) above will not pass this review.

#### ***2.2.1.1.2 Review Methodology***

The String Similarity Panel is informed in part by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that a higher visual similarity score suggests a higher probability

that the application will not pass the String Similarity review. However, it should be noted that the score is only indicative and that the final determination of similarity is entirely up to the Panel's judgment.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes.<sup>2</sup> Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

The algorithm supports the common characters in Arabic, Chinese, Cyrillic, Devanagari, Greek, Japanese, Korean, and Latin scripts. It can also compare strings in different scripts to each other.

The panel will also take into account variant characters, as defined in any relevant language table, in its determinations. For example, strings that are not visually similar but are determined to be variant TLD strings based on an IDN table would be placed in a contention set. Variant TLD strings that are listed as part of the application will also be subject to the string similarity analysis.<sup>3</sup>

The panel will examine all the algorithm data and perform its own review of similarities between strings and whether they rise to the level of string confusion. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a common standard to test for whether string confusion exists, as follows:

**Standard for String Confusion** – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

#### *2.2.1.1.3 Outcomes of the String Similarity Review*

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation,

<sup>2</sup> See <http://icann.sword-group.com/algorithm/>

<sup>3</sup> In the case where an applicant has listed Declared Variants in its application (see subsection 1.3.3), the panel will perform an analysis of the listed strings to confirm that the strings are variants according to the applicant's IDN table. This analysis may include comparison of applicant IDN tables with other existing tables for the same language or script, and forwarding any questions to the applicant.

and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.

An application that passes the String Similarity review is still subject to objection by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a string confusion objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather, confusion based on any type of similarity (including visual, aural, or similarity of meaning) may be claimed by an objector. Refer to Module 3, Dispute Resolution Procedures, for more information about the objection process.

An applicant may file a formal objection against another gTLD application on string confusion grounds. Such an objection may, if successful, change the configuration of the preliminary contention sets in that the two applied-for gTLD strings will be considered in direct contention with one another (see Module 4, String Contention Procedures). The objection process will not result in removal of an application from a contention set.

### *2.2.1.2 Reserved Names and Other Unavailable Strings*

Certain names are not available as gTLD strings, as detailed in this section.

#### *2.2.1.2.1 Reserved Names*

All applied-for gTLD strings are compared with the list of top-level Reserved Names to ensure that the applied-for gTLD string does not appear on that list.

**Top-Level Reserved Names List**

<i>AFRINIC</i>	<i>IANA-SERVERS</i>	<i>NRO</i>
<i>ALAC</i>	<i>ICANN</i>	<i>RFC-EDITOR</i>
<i>APNIC</i>	<i>IESG</i>	<i>RIPE</i>
<i>ARIN</i>	<i>IETF</i>	<i>ROOT-SERVERS</i>
<i>ASO</i>	<i>INTERNIC</i>	<i>RSSAC</i>
<i>CCNSO</i>	<i>INVALID</i>	<i>SSAC</i>
<i>EXAMPLE*</i>	<i>IRTF</i>	<i>TEST*</i>
<i>GAC</i>	<i>ISTF</i>	<i>TLD</i>

<i>GNSO</i>	<i>LACNIC</i>	<i>WHOIS</i>
<i>GTLT-SERVERS</i>	<i>LOCAL</i>	<i>WWW</i>
<i>IAB</i>	<i>LOCALHOST</i>	
<i>IANA</i>	<i>NIC</i>	
*Note that in addition to the above strings, ICANN will reserve translations of the terms “test” and “example” in multiple languages. The remainder of the strings are reserved only in the form included above.		

If an applicant enters a Reserved Name as its applied-for gTLD string, the application system will recognize the Reserved Name and will not allow the application to be submitted.

In addition, applied-for gTLD strings are reviewed during the String Similarity review to determine whether they are similar to a Reserved Name. An application for a gTLD string that is identified as too similar to a Reserved Name will not pass this review.

#### *2.2.1.2.2 Declared Variants*

Names appearing on the Declared Variants List (see section 1.3.3) will be posted on ICANN’s website and will be treated essentially the same as Reserved Names, until such time as variant management solutions are developed and variant TLDs are delegated. That is, an application for a gTLD string that is identical or similar to a string on the Declared Variants List will not pass this review.

#### *2.2.1.2.3 Strings Ineligible for Delegation*

The following names are prohibited from delegation as gTLDs in the initial application round. Future application rounds may differ according to consideration of further policy advice.

These names are not being placed on the Top-Level Reserved Names List, and thus are not part of the string similarity review conducted for names on that list. Refer to subsection 2.2.1.1: where applied-for gTLD strings are reviewed for similarity to existing TLDs and reserved names, the strings listed in this section are not reserved names and accordingly are not incorporated into this review.

Applications for names appearing on the list included in this section will not be approved.

International Olympic Committee		
OLYMPIC	OLYMPIAD	OLYMPIQUE
OLYMPIADE	OLYMPISCH	OLÍMPICO
OLIMPÍADA	أولمبي	أولمبياد
奥林匹克	奥林匹亚	奥林匹克
奧林匹亞	Ολυμπιακοί	Ολυμπιάδα
올림픽	올림픽아드	Олимпийский
Олимпиада		
International Red Cross and Red Crescent Movement		
REDCROSS	REDCRESCENT	REDCRYSTAL
REDLIONANDSUN	MAGENDDAVIDADOM	REDSTAROFDAVID
CROIXROUGE	CROIX-ROUGE	CROISSANTROUGE
CROISSANT-ROUGE	CRISTALROUGE	CRISTAL-ROUGE
מגן דוד אדום	CRUZROJA	MEDIALUNAROJA
CRISTALROJO	Красный Крест	Красный Полумесяц
Красный Кристалл	رمح‌ال‌بيل‌صلا	لال‌ال‌رم‌ال‌
ءارم‌ح‌ال‌ق‌رول‌ب‌ل‌ا	الكريستلة الحمراء	紅十字
紅十字	紅新月	紅新月
紅水晶	紅水晶	

### 2.2.1.3 DNS Stability Review

This review determines whether an applied-for gTLD string might cause instability to the DNS. In all cases, this will involve a review for conformance with technical and other requirements for gTLD strings (labels). In some exceptional cases, an extended review may be necessary to investigate possible technical stability problems with the applied-for gTLD string.



Note: All applicants should recognize issues surrounding invalid TLD queries at the root level of the DNS.

Any new TLD registry operator may experience unanticipated queries, and some TLDs may experience a non-trivial load of unanticipated queries. For more information, see the Security and Stability Advisory Committee (SSAC)'s report on this topic at <http://www.icann.org/en/committees/security/sac045.pdf>. Some publicly available statistics are also available at <http://stats.l.root-servers.org/>.

ICANN will take steps to alert applicants of the issues raised in SAC045, and encourage the applicant to prepare to minimize the possibility of operational difficulties that would pose a stability or availability problem for its registrants and users. However, this notice is merely an advisory to applicants and is not part of the evaluation, unless the string raises significant security or stability issues as described in the following section.

#### *2.2.1.3.1 DNS Stability: String Review Procedure*

New gTLD labels must not adversely affect the security or stability of the DNS. During the Initial Evaluation period, ICANN will conduct a preliminary review on the set of applied-for gTLD strings to:

- ensure that applied-for gTLD strings comply with the requirements provided in section 2.2.1.3.2, and
- determine whether any strings raise significant security or stability issues that may require further review.

There is a very low probability that extended analysis will be necessary for a string that fully complies with the string requirements in subsection 2.2.1.3.2 of this module. However, the string review process provides an additional safeguard if unanticipated security or stability issues arise concerning an applied-for gTLD string.

In such a case, the DNS Stability Panel will perform an extended review of the applied-for gTLD string during the Initial Evaluation period. The panel will determine whether the string fails to comply with relevant standards or creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, and will report on its findings.

If the panel determines that the string complies with relevant standards and does not create the conditions

described above, the application will pass the DNS Stability review.

If the panel determines that the string does not comply with relevant technical standards, or that it creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, the application will not pass the Initial Evaluation, and no further reviews are available. In the case where a string is determined likely to cause security or stability problems in the DNS, the applicant will be notified as soon as the DNS Stability review is completed.

#### 2.2.1.3.2 *String Requirements*

ICANN will review each applied-for gTLD string to ensure that it complies with the requirements outlined in the following paragraphs.

If an applied-for gTLD string is found to violate any of these rules, the application will not pass the DNS Stability review. No further reviews are available.

**Part I -- Technical Requirements for all Labels (Strings)** – The technical requirements for top-level domain labels follow.

- 1.1 The ASCII label (i.e., the label as transmitted on the wire) must be valid as specified in technical standards *Domain Names: Implementation and Specification* (RFC 1035), and *Clarifications to the DNS Specification* (RFC 2181) and any updates thereto. This includes the following:
  - 1.1.1 The label must have no more than 63 characters.
  - 1.1.2 Upper and lower case characters are treated as identical.
- 1.2 The ASCII label must be a valid host name, as specified in the technical standards *DOD Internet Host Table Specification* (RFC 952), *Requirements for Internet Hosts — Application and Support* (RFC 1123), and *Application Techniques for Checking and Transformation of Names* (RFC 3696), *Internationalized Domain Names in Applications (IDNA)* (RFCs 5890-5894), and any updates thereto. This includes the following:
  - 1.2.1 The ASCII label must consist entirely of letters (alphabetic characters a-z), or

- 1.2.2 The label must be a valid IDNA A-label (further restricted as described in Part II below).

**Part II -- Requirements for Internationalized Domain Names**

– These requirements apply only to prospective top-level domains that contain non-ASCII characters. Applicants for these internationalized top-level domain labels are expected to be familiar with the Internet Engineering Task Force (IETF) IDNA standards, Unicode standards, and the terminology associated with Internationalized Domain Names.

- 2.1 The label must be an A-label as defined in IDNA, converted from (and convertible to) a U-label that is consistent with the definition in IDNA, and further restricted by the following, non-exhaustive, list of limitations:
- 2.1.1 Must be a valid A-label according to IDNA.
  - 2.1.2 The derived property value of all codepoints used in the U-label, as defined by IDNA, must be PVALID or CONTEXT (accompanied by unambiguous contextual rules).<sup>4</sup>
  - 2.1.3 The general category of all codepoints, as defined by IDNA, must be one of (Ll, Lo, Lm, Mn, Mc).
  - 2.1.4 The U-label must be fully compliant with Normalization Form C, as described in *Unicode Standard Annex #15: Unicode Normalization Forms*. See also examples in <http://unicode.org/faq/normalization.html>.
  - 2.1.5 The U-label must consist entirely of characters with the same directional property, or fulfill the requirements of the Bidi rule per RFC 5893.
- 2.2 The label must meet the relevant criteria of the ICANN *Guidelines for the Implementation of Internationalised Domain Names*. See <http://www.icann.org/en/topics/idn/implementation>

<sup>4</sup> It is expected that conversion tools for IDNA will be available before the Application Submission period begins, and that labels will be checked for validity under IDNA. In this case, labels valid under the previous version of the protocol (IDNA2003) but not under IDNA will not meet this element of the requirements. Labels that are valid under both versions of the protocol will meet this element of the requirements. Labels valid under IDNA but not under IDNA2003 may meet the requirements; however, applicants are strongly advised to note that the duration of the transition period between the two protocols cannot presently be estimated nor guaranteed in any specific timeframe. The development of support for IDNA in the broader software applications environment will occur gradually. During that time, TLD labels that are valid under IDNA, but not under IDNA2003, will have limited functionality.

[n-guidelines.htm](#). This includes the following, non-exhaustive, list of limitations:

- 2.2.1 All code points in a single label must be taken from the same script as determined by the Unicode Standard Annex #24: Unicode Script Property (See <http://www.unicode.org/reports/tr24/>).
- 2.2.2 Exceptions to 2.2.1 are permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. However, even with this exception, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible code points unless a corresponding policy and character table are clearly defined.

### **Part III - Policy Requirements for Generic Top-Level**

**Domains** – These requirements apply to all prospective top-level domain strings applied for as gTLDs.

- 3.1 Applied-for gTLD strings in ASCII must be composed of three or more visually distinct characters. Two-character ASCII strings are not permitted, to avoid conflicting with current and future country codes based on the ISO 3166-1 standard.
- 3.2 Applied-for gTLD strings in IDN scripts must be composed of two or more visually distinct characters in the script, as appropriate.<sup>5</sup> Note, however, that a two-character IDN string will not be approved if:
  - 3.2.1 It is visually similar to any one-character label (in any script); or
  - 3.2.2 It is visually similar to any possible two-character ASCII combination.

See the String Similarity review in subsection 2.2.1.1 for additional information on this requirement.

<sup>5</sup> Note that the Joint ccNSO-GNSO IDN Working Group (JIG) has made recommendations that this section be revised to allow for single-character IDN gTLD labels. See the JIG Final Report at <http://gns0.icann.org/drafts/jig-final-report-30mar11-en.pdf>. Implementation models for these recommendations are being developed for community discussion.

#### 2.2.1.4 *Geographic Names Review*

Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names. The requirements and procedure ICANN will follow in the evaluation process are described in the following paragraphs. Applicants should review these requirements even if they do not believe their intended gTLD string is a geographic name. All applied-for gTLD strings will be reviewed according to the requirements in this section, regardless of whether the application indicates it is for a geographic name.

##### 2.2.1.4.1 *Treatment of Country or Territory Names*<sup>6</sup>

Applications for strings that are country or territory names will not be approved, as they are not available under the New gTLD Program in this application round. A string shall be considered to be a country or territory name if:

- i. it is an alpha-3 code listed in the ISO 3166-1 standard.
- ii. it is a long-form name listed in the ISO 3166-1 standard, or a translation of the long-form name in any language.
- iii. it is a short-form name listed in the ISO 3166-1 standard, or a translation of the short-form name in any language.
- iv. it is the short- or long-form name association with a code that has been designated as "exceptionally reserved" by the ISO 3166 Maintenance Agency.
- v. it is a separable component of a country name designated on the "Separable Country Names List," or is a translation of a name appearing on the list, in any language. See the Annex at the end of this module.
- vi. it is a permutation or transposition of any of the names included in items (i) through (v). Permutations include removal of spaces, insertion of punctuation, and addition or

<sup>6</sup> Country and territory names are excluded from the process based on advice from the Governmental Advisory Committee in recent communiqués providing interpretation of Principle 2.2 of the GAC Principles regarding New gTLDs to indicate that strings which are a meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccPDP, and other geographic strings could be allowed in the gTLD space if in agreement with the relevant government or public authority.

removal of grammatical articles like “the.” A transposition is considered a change in the sequence of the long or short-form name, for example, “RepublicCzech” or “IslandsCayman.”

- vii. it is a name by which a country is commonly known, as demonstrated by evidence that the country is recognized by that name by an intergovernmental or treaty organization.

#### 2.2.1.4.2 *Geographic Names Requiring Government Support*

The following types of applied-for strings are considered geographic names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities:

1. An application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard.
2. An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name.

City names present challenges because city names may also be generic terms or brand names, and in many cases city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names are not universally protected. However, the process does provide a means for cities and applicants to work together where desired.

An application for a city name will be subject to the geographic names requirements (i.e., will require documentation of support or non-objection from the relevant governments or public authorities) if:

- (a) It is clear from applicant statements within the application that the applicant will use the TLD primarily for purposes associated with the city name; and

(b) The applied-for string is a city name as listed on official city documents.<sup>7</sup>

3. An application for any string that is an exact match of a *sub-national place name*, such as a county, province, or state, listed in the ISO 3166-2 standard.
4. An application for a string listed as a UNESCO region<sup>8</sup> or appearing on the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” list.<sup>9</sup>

In the case of an application for a string appearing on either of the lists above, documentation of support will be required from at least 60% of the respective national governments in the region, and there may be no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region.

Where the 60% rule is applied, and there are common regions on both lists, the regional composition contained in the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” takes precedence.

An applied-for gTLD string that falls into any of 1 through 4 listed above is considered to represent a geographic name. In the event of any doubt, it is in the applicant's interest to consult with relevant governments and public authorities and enlist their support or non-objection prior to submission of the application, in order to preclude possible objections and pre-address any ambiguities concerning the string and applicable requirements.

Strings that include but do not match a geographic name (as defined in this section) will not be considered geographic names as defined by section 2.2.1.4.2, and therefore will not require documentation of government support in the evaluation process.

<sup>7</sup> City governments with concerns about strings that are duplicates, nicknames or close renderings of a city name should not rely on the evaluation process as the primary means of protecting their interests in a string. Rather, a government may elect to file a formal objection to an application that is opposed by the relevant community, or may submit its own application for the string.

<sup>8</sup> See <http://www.unesco.org/new/en/unesco/worldwide/>.

<sup>9</sup> See <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

For each application, the Geographic Names Panel will determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis. In the event that there is more than one relevant government or public authority for the applied-for gTLD string, the applicant must provide documentation of support or non-objection from all the relevant governments or public authorities. It is anticipated that this may apply to the case of a sub-national place name.

It is the applicant's responsibility to:

- identify whether its applied-for gTLD string falls into any of the above categories; and
- identify and consult with the relevant governments or public authorities; and
- identify which level of government support is required.

Note: the level of government and which administrative agency is responsible for the filing of letters of support or non-objection is a matter for each national administration to determine. Applicants should consult within the relevant jurisdiction to determine the appropriate level of support.

The requirement to include documentation of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds (refer to subsection 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community.

#### ***2.2.1.4.3 Documentation Requirements***

The documentation of support or non-objection should include a signed letter from the relevant government or public authority. Understanding that this will differ across the respective jurisdictions, the letter could be signed by the minister with the portfolio responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister or President of the relevant jurisdiction; or a senior representative of the agency or department responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister. To assist the applicant in determining who the relevant government or public authority may be for a potential geographic name, the applicant may wish to consult with the relevant



Governmental Advisory Committee (GAC) representative.<sup>10</sup>

The letter must clearly express the government's or public authority's support for or non-objection to the applicant's application and demonstrate the government's or public authority's understanding of the string being requested and its intended use.

The letter should also demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN requiring compliance with consensus policies and payment of fees. (See Module 5 for a discussion of the obligations of a gTLD registry operator.)

A sample letter of support is available as an attachment to this module.

Applicants and governments may conduct discussions concerning government support for an application at any time. Applicants are encouraged to begin such discussions at the earliest possible stage, and enable governments to follow the processes that may be necessary to consider, approve, and generate a letter of support or non-objection.

It is important to note that a government or public authority is under no obligation to provide documentation of support or non-objection in response to a request by an applicant.

It is also possible that a government may withdraw its support for an application at a later time, including after the new gTLD has been delegated, if the registry operator has deviated from the conditions of original support or non-objection. Applicants should be aware that ICANN has committed to governments that, in the event of a dispute between a government (or public authority) and a registry operator that submitted documentation of support from that government or public authority, **ICANN will comply with a legally binding order** from a court in the jurisdiction of the government or public authority that has given support to an application.

#### *2.2.1.4.4 Review Procedure for Geographic Names*

A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic

<sup>10</sup> See <https://gacweb.icann.org/display/gacweb/GAC+Members>

name, and verify the relevance and authenticity of the supporting documentation where necessary.

The GNP will review all applications received, not only those where the applicant has noted its applied-for gTLD string as a geographic name. For any application where the GNP determines that the applied-for gTLD string is a country or territory name (as defined in this module), the application will not pass the Geographic Names review and will be denied. No additional reviews will be available.

For any application where the GNP determines that the applied-for gTLD string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.

For any application where the GNP determines that the applied-for gTLD string is a geographic name requiring government support, the GNP will confirm that the applicant has provided the required documentation from the relevant governments or public authorities, and that the communication from the government or public authority is legitimate and contains the required content. ICANN may confirm the authenticity of the communication by consulting with the relevant diplomatic authorities or members of ICANN's Governmental Advisory Committee for the government or public authority concerned on the competent authority and appropriate point of contact within their administration for communications.

The GNP may communicate with the signing entity of the letter to confirm their intent and their understanding of the terms on which the support for an application is given.

In cases where an applicant has not provided the required documentation, the applicant will be contacted and notified of the requirement, and given a limited time frame to provide the documentation. If the applicant is able to provide the documentation before the close of the Initial Evaluation period, and the documentation is found to meet the requirements, the applicant will pass the Geographic Names review. If not, the applicant will have additional time to obtain the required documentation; however, if the applicant has not produced the required documentation by the required date (at least 90 calendar days from the date of notice), the application will be considered incomplete and will be ineligible for further review. The applicant may reapply in subsequent application rounds, if desired, subject to the fees and requirements of the specific application rounds.

If there is more than one application for a string representing a certain geographic name as described in this section, and the applications have requisite government approvals, the applications will be suspended pending resolution by the applicants. If the applicants have not reached a resolution by either the date of the end of the application round (as announced by ICANN), or the date on which ICANN opens a subsequent application round, whichever comes first, the applications will be rejected and applicable refunds will be available to applicants according to the conditions described in section 1.5.

However, in the event that a contention set is composed of multiple applications with documentation of support from the same government or public authority, the applications will proceed through the contention resolution procedures described in Module 4 when requested by the government or public authority providing the documentation.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographical names, the string contention will be resolved using the string contention procedures described in Module 4.

## *2.2.2 Applicant Reviews*

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Concurrent with the applied-for gTLD string reviews described in subsection 2.2.1, ICANN will review the applicant's technical and operational capability, its financial capability, and its proposed registry services. Those reviews are described in greater detail in the following subsections.

### *2.2.2.1 Technical/Operational Review*

In its application, the applicant will respond to a set of questions (see questions 24 – 44 in the Application Form) intended to gather information about the applicant's technical capabilities and its plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual gTLD registry to pass the Technical/Operational review. It will be necessary, however, for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of a gTLD registry operation. Subsequently, each applicant that passes the technical evaluation and all other steps will be required to complete

a pre-delegation technical test prior to delegation of the new gTLD. Refer to Module 5, Transition to Delegation, for additional information.

#### *2.2.2.2 Financial Review*

In its application, the applicant will respond to a set of questions (see questions 45-50 in the Application Form) intended to gather information about the applicant's financial capabilities for operation of a gTLD registry and its financial planning in preparation for long-term stability of the new gTLD.

Because different registry types and purposes may justify different responses to individual questions, evaluators will pay particular attention to the consistency of an application across all criteria. For example, an applicant's scaling plans identifying system hardware to ensure its capacity to operate at a particular volume level should be consistent with its financial plans to secure the necessary equipment. That is, the evaluation criteria scale with the applicant plans to provide flexibility.

#### *2.2.2.3 Evaluation Methodology*

Dedicated technical and financial evaluation panels will conduct the technical/operational and financial reviews, according to the established criteria and scoring mechanism included as an attachment to this module. These reviews are conducted on the basis of the information each applicant makes available to ICANN in its response to the questions in the Application Form.

The 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. These communications will occur via TAS. Unless otherwise noted, such communications will include a 2-week deadline for the applicant to respond. Any supplemental information provided by the applicant will become part of the application.

It is the applicant's responsibility to ensure that the questions have been fully answered and the required documentation is attached. Evaluators are entitled, but not obliged, to request further information or evidence from an applicant, and are not obliged to take into account any information or evidence that is not made

available in the application and submitted by the due date, unless explicitly requested by the evaluators.

### *2.2.3 Registry Services Review*

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Concurrent with the other reviews that occur during the Initial Evaluation period, ICANN will review the applicant's proposed registry services for any possible adverse impact on security or stability. The applicant will be required to provide a list of proposed registry services in its application.

#### *2.2.3.1 Definitions*

**Registry services** are defined as:

1. operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry zone servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement;
2. other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and
3. any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator.

Proposed registry services will be examined to determine if they might raise significant stability or security issues. Examples of services proposed by existing registries can be found at <http://www.icann.org/en/registries/rsep/>. In most cases, these proposed services successfully pass this inquiry.

Registry services currently provided by gTLD registries can be found in registry agreement appendices. See <http://www.icann.org/en/registries/agreements.htm>.

A full definition of registry services can be found at <http://www.icann.org/en/registries/rsep/rsep.html>.

For purposes of this review, security and stability are defined as follows:

**Security** – an effect on security by the proposed registry service means (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or

resources on the Internet by systems operating in accordance with all applicable standards.

**Stability** – an effect on stability means that the proposed registry service (1) does not comply with applicable relevant standards that are authoritative and published by a well-established, recognized, and authoritative standards body, such as relevant standards-track or best current practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant standards-track or best current practice RFCs and relying on registry operator's delegation information or provisioning services.

#### 2.2.3.2 *Customary Services*

The following registry services are customary services offered by a registry operator:

- Receipt of data from registrars concerning registration of domain names and name servers
- Dissemination of TLD zone files
- Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web-based Whois, RESTful Whois)
- DNS Security Extensions

The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD.

Any additional registry services that are unique to the proposed gTLD registry should be described in detail. Directions for describing the registry services are provided at [http://www.icann.org/en/registries/rsep/rrs\\_sample.html](http://www.icann.org/en/registries/rsep/rrs_sample.html).

#### 2.2.3.3 *TLD Zone Contents*

ICANN receives a number of inquiries about use of various record types in a registry zone, as entities contemplate different business and technical models. Permissible zone contents for a TLD zone are:

- Apex SOA record.
- Apex NS records and in-bailiwick glue for the TLD's DNS servers.

- NS records and in-bailiwick glue for DNS servers of registered names in the TLD.
- DS records for registered names in the TLD.
- Records associated with signing the TLD zone (i.e., RRSIG, DNSKEY, NSEC, and NSEC3).

An applicant wishing to place any other record types into its TLD zone should describe in detail its proposal in the registry services section of the application. This will be evaluated and could result in an extended evaluation to determine whether the service would create a risk of a meaningful adverse impact on security or stability of the DNS. Applicants should be aware that a service based on use of less-common DNS resource records in the TLD zone, even if approved in the registry services review, might not work as intended for all users due to lack of application support.

#### *2.2.3.4 Methodology*

Review of the applicant's proposed registry services will include a preliminary determination of whether any of the proposed registry services could raise significant security or stability issues and require additional consideration.

If the preliminary determination reveals that there may be significant security or stability issues (as defined in subsection 2.2.3.1) surrounding a proposed service, the application will be flagged for an extended review by the Registry Services Technical Evaluation Panel (RSTEP), see <http://www.icann.org/en/registries/rsep/rstep.html>. This review, if applicable, will occur during the Extended Evaluation period (refer to Section 2.3).

In the event that an application is flagged for extended review of one or more registry services, an additional fee to cover the cost of the extended review will be due from the applicant. Applicants will be advised of any additional fees due, which must be received before the additional review begins.

#### *2.2.4 Applicant's Withdrawal of an Application*

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An applicant who does not pass the Initial Evaluation may withdraw its application at this stage and request a partial refund (refer to subsection 1.5 of Module 1).

## ***2.3 Extended Evaluation***

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An applicant may request an Extended Evaluation if the application has failed to pass the Initial Evaluation elements concerning:

- Geographic names (refer to subsection 2.2.1.4). There is no additional fee for an extended evaluation in this instance.
- Demonstration of technical and operational capability (refer to subsection 2.2.2.1). There is no additional fee for an extended evaluation in this instance.
- Demonstration of financial capability (refer to subsection 2.2.2.2). There is no additional fee for an extended evaluation in this instance.
- Registry services (refer to subsection 2.2.3). Note that this investigation incurs an additional fee (the Registry Services Review Fee) if the applicant wishes to proceed. See Section 1.5 of Module 1 for fee and payment information.

An Extended Evaluation does not imply any change of the evaluation criteria. The same criteria used in the Initial Evaluation will be used to review the application in light of clarifications provided by the applicant.

From the time an applicant receives notice of failure to pass the Initial Evaluation, eligible applicants will have 15 calendar days to submit to ICANN the Notice of Request for Extended Evaluation. If the applicant does not explicitly request the Extended Evaluation (and pay an additional fee in the case of a Registry Services inquiry) the application will not proceed.

### ***2.3.1 Geographic Names Extended Evaluation***

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In the case of an application that has been identified as a geographic name requiring government support, but where the applicant has not provided sufficient evidence of support or non-objection from all relevant governments or public authorities by the end of the Initial Evaluation period, the applicant has additional time in the Extended Evaluation period to obtain and submit this documentation.

If the applicant submits the documentation to the Geographic Names Panel by the required date, the GNP will perform its review of the documentation as detailed in



section 2.2.1.4. If the applicant has not provided the documentation by the required date (at least 90 calendar days from the date of the notice), the application will not pass the Extended Evaluation, and no further reviews are available.

### *2.3.2 Technical/Operational or Financial Extended Evaluation*

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The following applies to an Extended Evaluation of an applicant's technical and operational capability or financial capability, as described in subsection 2.2.2.

An applicant who has requested Extended Evaluation will again access the online application system (TAS) and clarify its answers to those questions or sections on which it received a non-passing score (or, in the case of an application where individual questions were passed but the total score was insufficient to pass Initial Evaluation, those questions or sections on which additional points are possible). The answers should be responsive to the evaluator report that indicates the reasons for failure, or provide any amplification that is not a material change to the application. Applicants may not use the Extended Evaluation period to substitute portions of new information for the information submitted in their original applications, i.e., to materially change the application.

An applicant participating in an Extended Evaluation on the Technical / Operational or Financial reviews will have the option to have its application reviewed by the same evaluation panelists who performed the review during the Initial Evaluation period, or to have a different set of panelists perform the review during Extended Evaluation.

The Extended Evaluation allows an additional exchange of information between the evaluators and the applicant to further clarify information contained in the application. This supplemental information will become part of the application record. Such communications will include a deadline for the applicant to respond.

ICANN will notify applicants at the end of the Extended Evaluation period as to whether they have passed. If an application passes Extended Evaluation, it continues to the next stage in the process. If an application does not pass Extended Evaluation, it will proceed no further. No further reviews are available.

### *2.3.3 Registry Services Extended Evaluation*

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This section applies to Extended Evaluation of registry services, as described in subsection 2.2.3.

If a proposed registry service has been referred to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review, the RSTEP will form a review team of members with the appropriate qualifications.

The review team will generally consist of three members, depending on the complexity of the registry service proposed. In a 3-member panel, the review could be conducted within 30 to 45 calendar days. In cases where a 5-member panel is needed, this will be identified before the extended evaluation starts. In a 5-member panel, the review could be conducted in 45 calendar days or fewer.

The cost of an RSTEP review will be covered by the applicant through payment of the Registry Services Review Fee. Refer to payment procedures in section 1.5 of Module 1. The RSTEP review will not commence until payment has been received.

If the RSTEP finds that one or more of the applicant's proposed registry services may be introduced without risk of a meaningful adverse effect on security or stability, these services will be included in the applicant's registry agreement with ICANN. If the RSTEP finds that the proposed service would create a risk of a meaningful adverse effect on security or stability, the applicant may elect to proceed with its application without the proposed service, or withdraw its application for the gTLD. In this instance, an applicant has 15 calendar days to notify ICANN of its intent to proceed with the application. If an applicant does not explicitly provide such notice within this time frame, the application will proceed no further.

## *2.4 Parties Involved in Evaluation*

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A number of independent experts and groups play a part in performing the various reviews in the evaluation process. A brief description of the various panels, their evaluation roles, and the circumstances under which they work is included in this section.

### 2.4.1 *Panels and Roles*

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The **String Similarity Panel** will assess whether a proposed gTLD string creates a probability of user confusion due to similarity with any reserved name, any existing TLD, any requested IDN ccTLD, or any new gTLD string applied for in the current application round. This occurs during the String Similarity review in Initial Evaluation. The panel may also review IDN tables submitted by applicants as part of its work.

The **DNS Stability Panel** will determine whether a proposed string might adversely affect the security or stability of the DNS. This occurs during the DNS Stability String review in Initial Evaluation.

The **Geographic Names Panel** will review each application to determine whether the applied-for gTLD represents a geographic name, as defined in this guidebook. In the event that the string is a geographic name requiring government support, the panel will ensure that the required documentation is provided with the application and verify that the documentation is from the relevant governments or public authorities and is authentic.

The **Technical Evaluation Panel** will review the technical components of each application against the criteria in the Applicant Guidebook, along with proposed registry operations, in order to determine whether the applicant is technically and operationally capable of operating a gTLD registry as proposed in the application. This occurs during the Technical/Operational reviews in Initial Evaluation, and may also occur in Extended Evaluation if elected by the applicant.

The **Financial Evaluation Panel** will review each application against the relevant business, financial and organizational criteria contained in the Applicant Guidebook, to determine whether the applicant is financially capable of maintaining a gTLD registry as proposed in the application. This occurs during the Financial review in Initial Evaluation, and may also occur in Extended Evaluation if elected by the applicant.

The **Registry Services Technical Evaluation Panel (RSTEP)** will review proposed registry services in the application to determine if they pose a risk of a meaningful adverse impact on security or stability. This occurs, if applicable, during the Extended Evaluation period.

Members of all panels are required to abide by the established Code of Conduct and Conflict of Interest guidelines included in this module.

#### *2.4.2 Panel Selection Process*

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ICANN has selected qualified third-party providers to perform the various reviews, based on an extensive selection process.<sup>11</sup> In addition to the specific subject matter expertise required for each panel, specified qualifications are required, including:

- The provider must be able to convene – or have the capacity to convene - globally diverse panels and be able to evaluate applications from all regions of the world, including applications for IDN gTLDs.
- The provider should be familiar with the IETF IDNA standards, Unicode standards, relevant RFCs and the terminology associated with IDNs.
- The provider must be able to scale quickly to meet the demands of the evaluation of an unknown number of applications. At present it is not known how many applications will be received, how complex they will be, and whether they will be predominantly for ASCII or non-ASCII gTLDs.
- The provider must be able to evaluate the applications within the required timeframes of Initial and Extended Evaluation.

#### *2.4.3 Code of Conduct Guidelines for Panelists*

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The purpose of the New gTLD Program ("Program") Code of Conduct ("Code") is to prevent real and apparent conflicts of interest and unethical behavior by any Evaluation Panelist ("Panelist").

Panelists shall conduct themselves as thoughtful, competent, well prepared, and impartial professionals throughout the application process. Panelists are expected to comply with equity and high ethical standards while assuring the Internet community, its constituents, and the public of objectivity, integrity, confidentiality, and credibility. Unethical actions, or even the appearance of compromise, are not acceptable. Panelists are expected

<sup>11</sup> <http://newgtlds.icann.org/about/evaluation-panels-selection-process>

to be guided by the following principles in carrying out their respective responsibilities. This Code is intended to summarize the principles and nothing in this Code should be considered as limiting duties, obligations or legal requirements with which Panelists must comply.

**Bias** -- Panelists shall:

- not advance personal agendas or non-ICANN approved agendas in the evaluation of applications;
- examine facts as they exist and not be influenced by past reputation, media accounts, or unverified statements about the applications being evaluated;
- exclude themselves from participating in the evaluation of an application if, to their knowledge, there is some predisposing factor that could prejudice them with respect to such evaluation; and
- exclude themselves from evaluation activities if they are philosophically opposed to or are on record as having made generic criticism about a specific type of applicant or application.

**Compensation/Gifts** -- Panelists shall not request or accept any compensation whatsoever or any gifts of substance from the Applicant being reviewed or anyone affiliated with the Applicant. (Gifts of substance would include any gift greater than USD 25 in value).

If the giving of small tokens is important to the Applicant's culture, Panelists may accept these tokens; however, the total of such tokens must not exceed USD 25 in value. If in doubt, the Panelist should err on the side of caution by declining gifts of any kind.

**Conflicts of Interest** -- Panelists shall act in accordance with the "New gTLD Program Conflicts of Interest Guidelines" (see subsection 2.4.3.1).

**Confidentiality** -- Confidentiality is an integral part of the evaluation process. Panelists must have access to sensitive information in order to conduct evaluations. Panelists must maintain confidentiality of information entrusted to them by ICANN and the Applicant and any other confidential information provided to them from whatever source,

except when disclosure is legally mandated or has been authorized by ICANN. "Confidential information" includes all elements of the Program and information gathered as part of the process – which includes but is not limited to: documents, interviews, discussions, interpretations, and analyses – related to the review of any new gTLD application.

**Affirmation --** All Panelists shall read this Code prior to commencing evaluation services and shall certify in writing that they have done so and understand the Code.

#### ***2.4.3.1 Conflict of Interest Guidelines for Panelists***

It is recognized that third-party providers may have a large number of employees in several countries serving numerous clients. In fact, it is possible that a number of Panelists may be very well known within the registry / registrar community and have provided professional services to a number of potential applicants.

To safeguard against the potential for inappropriate influence and ensure applications are evaluated in an objective and independent manner, ICANN has established detailed Conflict of Interest guidelines and procedures that will be followed by the Evaluation Panelists. To help ensure that the guidelines are appropriately followed ICANN will:

- Require each Evaluation Panelist (provider and individual) to acknowledge and document understanding of the Conflict of Interest guidelines.
- Require each Evaluation Panelist to disclose all business relationships engaged in at any time during the past six months.
- Where possible, identify and secure primary and backup providers for evaluation panels.
- In conjunction with the Evaluation Panelists, develop and implement a process to identify conflicts and re-assign applications as appropriate to secondary or contingent third party providers to perform the reviews.

**Compliance Period --** All Evaluation Panelists must comply with the Conflict of Interest guidelines beginning with the opening date of the Application Submission period and ending with the public announcement by ICANN of the

final outcomes of all the applications from the Applicant in question.

**Guidelines --** The following guidelines are the minimum standards with which all Evaluation Panelists must comply. It is recognized that it is impossible to foresee and cover all circumstances in which a potential conflict of interest might arise. In these cases the Evaluation Panelist should evaluate whether the existing facts and circumstances would lead a reasonable person to conclude that there is an actual conflict of interest.

Evaluation Panelists and Immediate Family Members:

- Must not be under contract, have or be included in a current proposal to provide Professional Services for or on behalf of the Applicant during the Compliance Period.
- Must not currently hold or be committed to acquire any interest in a privately-held Applicant.
- Must not currently hold or be committed to acquire more than 1% of any publicly listed Applicant's outstanding equity securities or other ownership interests.
- Must not be involved or have an interest in a joint venture, partnership or other business arrangement with the Applicant.
- Must not have been named in a lawsuit with or against the Applicant.
- Must not be a:
  - Director, officer, or employee, or in any capacity equivalent to that of a member of management of the Applicant;
  - Promoter, underwriter, or voting trustee of the Applicant; or
  - Trustee for any pension or profit-sharing trust of the Applicant.

**Definitions--**

Evaluation Panelist: An Evaluation Panelist is any individual associated with the review of an application. This includes

any primary, secondary, and contingent third party Panelists engaged by ICANN to review new gTLD applications.

Immediate Family Member: Immediate Family Member is a spouse, spousal equivalent, or dependent (whether or not related) of an Evaluation Panelist.

Professional Services: include, but are not limited to legal services, financial audit, financial planning / investment, outsourced services, consulting services such as business / management / internal audit, tax, information technology, registry / registrar services.

#### *2.4.3.2 Code of Conduct Violations*

Evaluation panelist breaches of the Code of Conduct, whether intentional or not, shall be reviewed by ICANN, which may make recommendations for corrective action, if deemed necessary. Serious breaches of the Code may be cause for dismissal of the person, persons or provider committing the infraction.

In a case where ICANN determines that a Panelist has failed to comply with the Code of Conduct, the results of that Panelist's review for all assigned applications will be discarded and the affected applications will undergo a review by new panelists.

Complaints about violations of the Code of Conduct by a Panelist may be brought to the attention of ICANN via the public comment and applicant support mechanisms, throughout the evaluation period. Concerns of applicants regarding panels should be communicated via the defined support channels (see subsection 1.4.2). Concerns of the general public (i.e., non-applicants) can be raised via the public comment forum, as described in Module 1.

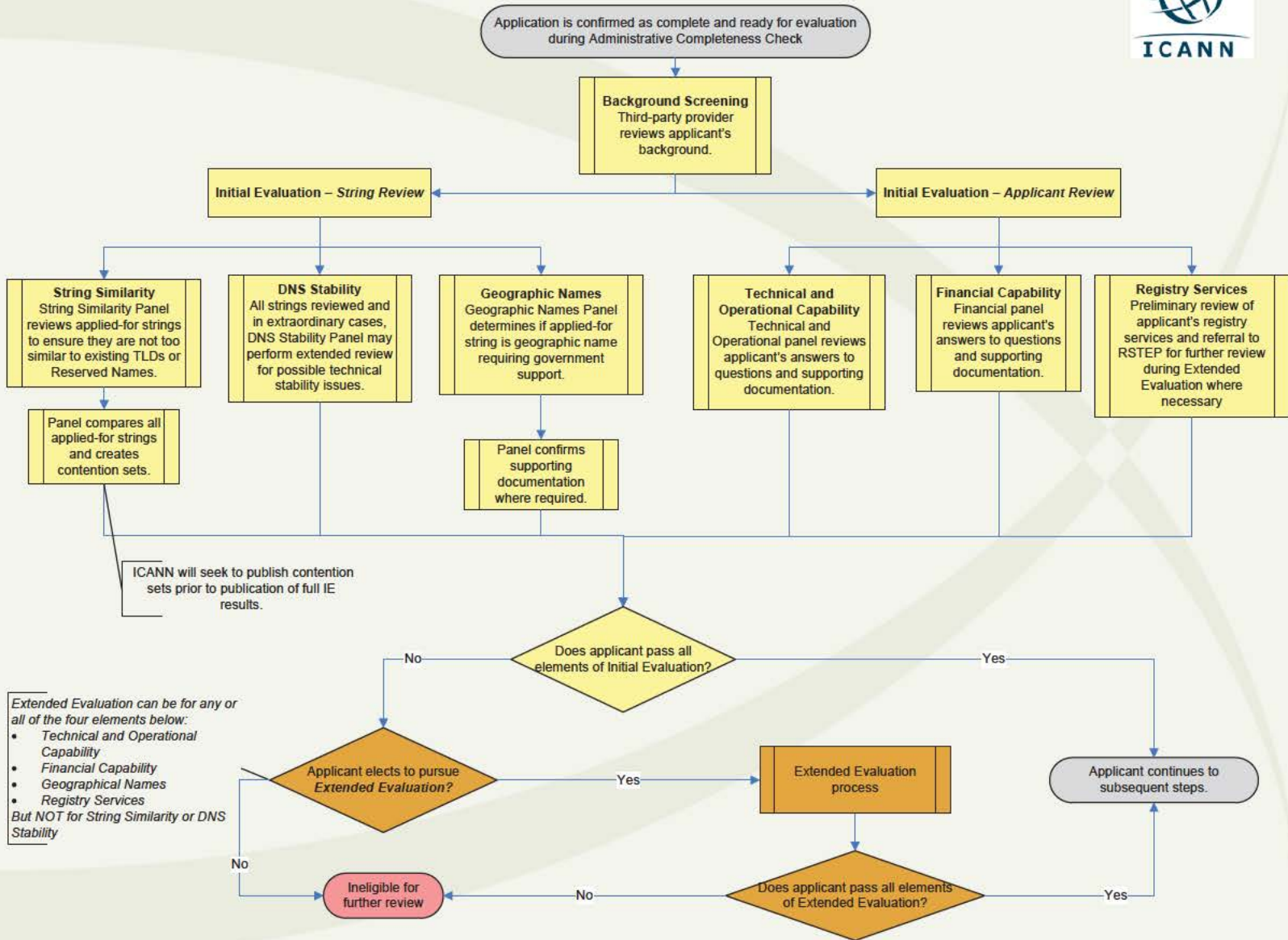
#### *2.4.4 Communication Channels*

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Defined channels for technical support or exchanges of information with ICANN and with evaluation panels are available to applicants during the Initial Evaluation and Extended Evaluation periods. Contacting individual ICANN staff members, Board members, or individuals engaged by ICANN to perform an evaluation role in order to lobby for a particular outcome or to obtain confidential information about applications under review is not appropriate. In the interests of fairness and equivalent treatment for all applicants, any such individual contacts will be referred to the appropriate communication channels.



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Extended Evaluation can be for any or all of the four elements below:

- Technical and Operational Capability
- Financial Capability
- Geographical Names
- Registry Services

But NOT for String Similarity or DNS Stability

## Annex: Separable Country Names List

gTLD application restrictions on country or territory names are tied to listing in property fields of the ISO 3166-1 standard. Notionally, the ISO 3166-1 standard has an “English short name” field which is the common name for a country and can be used for such protections; however, in some cases this does not represent the common name. This registry seeks to add additional protected elements which are derived from definitions in the ISO 3166-1 standard. An explanation of the various classes is included below.

**Separable Country Names List**

Code	English Short Name	Cl.	Separable Name
ax	Aland Islands	B1	Aland
as	American Samoa	C	Tutuila
		C	Swain's Island
ao	Angola	C	Cabinda
ag	Antigua and Barbuda	A	Antigua
		A	Barbuda
		C	Redonda Island
au	Australia	C	Lord Howe Island
		C	Macquarie Island
		C	Ashmore Island
		C	Cartier Island
		C	Coral Sea Islands
bo	Bolivia, Plurinational State of	B1	Bolivia
bq	Bonaire, Sint Eustatius and Saba	A	Bonaire
		A	Sint Eustatius
		A	Saba
ba	Bosnia and Herzegovina	A	Bosnia
		A	Herzegovina
br	Brazil	C	Fernando de Noronha Island
		C	Martim Vaz Islands
		C	Trinidad Island
io	British Indian Ocean Territory	C	Chagos Archipelago
		C	Diego Garcia
bn	Brunei Darussalam	B1	Brunei
		C	Negara Brunei Darussalam
cv	Cape Verde	C	São Tiago
		C	São Vicente
ky	Cayman Islands	C	Grand Cayman
cl	Chile	C	Easter Island
		C	Juan Fernández Islands
		C	Sala y Gómez Island
		C	San Ambrosio Island
		C	San Félix Island
cc	Cocos (Keeling) Islands	A	Cocos Islands
		A	Keeling Islands
co	Colombia	C	Malpelo Island
		C	San Andrés Island
		C	Providencia Island
km	Comoros	C	Anjouan
		C	Grande Comore
		C	Mohéli
ck	Cook Islands	C	Rarotonga
cr	Costa Rica	C	Coco Island
ec	Ecuador	C	Galápagos Islands
gq	Equatorial Guinea	C	Annobón Island
		C	Bioko Island

		C	Río Muni
fk	Falkland Islands (Malvinas)	B1	Falkland Islands
		B1	Malvinas
fo	Faroe Islands	A	Faroe
fj	Fiji	C	Vanua Levu
		C	Viti Levu
		C	Rotuma Island
pf	French Polynesia	C	Austral Islands
		C	Gambier Islands
		C	Marquesas Islands
		C	Society Archipelago
		C	Tahiti
		C	Tuamotu Islands
		C	Clipperton Island
tf	French Southern Territories	C	Amsterdam Islands
		C	Crozet Archipelago
		C	Kerguelen Islands
		C	Saint Paul Island
gr	Greece	C	Mount Athos
		B1	**
gd	Grenada	C	Southern Grenadine Islands
		C	Carriacou
gp	Guadeloupe	C	la Désirade
		C	Marie-Galante
		C	les Saintes
hm	Heard Island and McDonald Islands	A	Heard Island
		A	McDonald Islands
va	Holy See (Vatican City State)	A	Holy See
		A	Vatican
hn	Honduras	C	Swan Islands
in	India	C	Amindivi Islands
		C	Andaman Islands
		C	Laccadive Islands
		C	Minicoy Island
		C	Nicobar Islands
ir	Iran, Islamic Republic of	B1	Iran
ki	Kiribati	C	Gilbert Islands
		C	Tarawa
		C	Banaba
		C	Line Islands
		C	Kiritimati
		C	Phoenix Islands
		C	Abariringa
		C	Enderbury Island
kp	Korea, Democratic People's Republic of	C	North Korea
kr	Korea, Republic of	C	South Korea
la	Lao People's Democratic Republic	B1	Laos
mk	Macedonia, the Former Yugoslav Republic of	B1	**
my	Malaysia	C	Sabah
		C	Sarawak
mh	Marshall Islands	C	Jaluit
			Kwajalein
			Majuro
mu	Mauritius	C	Agalega Islands
		C	Cargados Carajos Shoals
		C	Rodrigues Island
fm	Micronesia, Federated States of	B1	Micronesia

		C	Caroline Islands (see also pw)
		C	Chuuk
		C	Kosrae
		C	Pohnpei
		C	Yap
md	Moldova, Republic of	B1	Moldova
		C	Moldava
nc	New Caledonia	C	Loyalty Islands
mp	Northern Mariana Islands	C	Mariana Islands
		C	Saipan
om	Oman	C	Musandam Peninsula
pw	Palau	C	Caroline Islands (see also fm)
		C	Babelthuap
ps	Palestinian Territory, Occupied	B1	Palestine
pg	Papua New Guinea	C	Bismarck Archipelago
		C	Northern Solomon Islands
		C	Bougainville
pn	Pitcairn	C	Ducie Island
		C	Henderson Island
		C	Oeno Island
re	Réunion	C	Bassas da India
		C	Europa Island
		C	Glorioso Island
		C	Juan de Nova Island
		C	Tromelin Island
ru	Russian Federation	B1	Russia
		C	Kaliningrad Region
sh	Saint Helena, Ascension, and Tristan de Cunha	A	Saint Helena
		A	Ascension
		A	Tristan de Cunha
		C	Gough Island
		C	Tristan de Cunha Archipelago
kn	Saint Kitts and Nevis	A	Saint Kitts
		A	Nevis
pm	Saint Pierre and Miquelon	A	Saint Pierre
		A	Miquelon
vc	Saint Vincent and the Grenadines	A	Saint Vincent
		A	The Grenadines
		C	Northern Grenadine Islands
		C	Bequia
		C	Saint Vincent Island
ws	Samoa	C	Savai'i
		C	Upolu
st	Sao Tome and Principe	A	Sao Tome
		A	Principe
sc	Seychelles	C	Mahé
		C	Aldabra Islands
		C	Amirante Islands
		C	Cosmoledo Islands
		C	Farquhar Islands
sb	Solomon Islands	C	Santa Cruz Islands
		C	Southern Solomon Islands
		C	Guadalcanal
za	South Africa	C	Marion Island
		C	Prince Edward Island
gs	South Georgia and the South Sandwich Islands	A	South Georgia
		A	South Sandwich Islands

sj	Svalbard and Jan Mayen	A	Svalbard
		A	Jan Mayen
		C	Bear Island
sy	Syrian Arab Republic	B1	Syria
tw	Taiwan, Province of China	B1	Taiwan
		C	Penghu Islands
		C	Pescadores
tz	Tanzania, United Republic of	B1	Tanzania
tl	Timor-Leste	C	Oecussi
to	Tonga	C	Tongatapu
tt	Trinidad and Tobago	A	Trinidad
		A	Tobago
tc	Turks and Caicos Islands	A	Turks Islands
		A	Caicos Islands
tv	Tuvalu	C	Fanafuti
ae	United Arab Emirates	B1	Emirates
us	United States	B2	America
um	United States Minor Outlying Islands	C	Baker Island
		C	Howland Island
		C	Jarvis Island
		C	Johnston Atoll
		C	Kingman Reef
		C	Midway Islands
		C	Palmyra Atoll
		C	Wake Island
		C	Navassa Island
vu	Vanuatu	C	Efate
		C	Santo
ve	Venezuela, Bolivarian Republic of	B1	Venezuela
		C	Bird Island
vg	Virgin Islands, British	B1	Virgin Islands
		C	Anegada
		C	Jost Van Dyke
		C	Tortola
		C	Virgin Gorda
vi	Virgin Islands, US	B1	Virgin Islands
		C	Saint Croix
		C	Saint John
		C	Saint Thomas
wf	Wallis and Futuna	A	Wallis
		A	Futuna
		C	Hoom Islands
		C	Wallis Islands
		C	Uvea
ye	Yemen	C	Socotra Island

### **Maintenance**

A Separable Country Names Registry will be maintained and published by ICANN Staff.

Each time the ISO 3166-1 standard is updated with a new entry, this registry will be reappraised to identify if the changes to the standard warrant changes to the entries in this registry. Appraisal will be based on the criteria listing in the "Eligibility" section of this document.

Codes reserved by the ISO 3166 Maintenance Agency do not have any implication on this registry, only entries derived from normally assigned codes appearing in ISO 3166-1 are eligible.

If an ISO code is struck off the ISO 3166-1 standard, any entries in this registry deriving from that code must be struck.

## Eligibility

Each record in this registry is derived from the following possible properties:

- Class A:** The ISO 3166-1 English Short Name is comprised of multiple, separable parts whereby the country is comprised of distinct sub-entities. Each of these separable parts is eligible in its own right for consideration as a country name. For example, "Antigua and Barbuda" is comprised of "Antigua" and "Barbuda."
- Class B:** The ISO 3166-1 English Short Name (1) or the ISO 3166-1 English Full Name (2) contains additional language as to the type of country the entity is, which is often not used in common usage when referencing the country. For example, one such short name is "The Bolivarian Republic of Venezuela" for a country in common usage referred to as "Venezuela."
- \*\* Macedonia is a separable name in the context of this list; however, due to the ongoing dispute listed in UN documents between the Hellenic Republic (Greece) and the Former Yugoslav Republic of Macedonia over the name, no country will be afforded attribution or rights to the name "Macedonia" until the dispute over the name has been resolved. See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/240/37/IMG/N9324037.pdf>.
- Class C:** The ISO 3166-1 Remarks column containing synonyms of the country name, or sub-national entities, as denoted by "often referred to as," "includes", "comprises", "variant" or "principal islands".

In the first two cases, the registry listing must be directly derivative from the English Short Name by excising words and articles. These registry listings do not include vernacular or other non-official terms used to denote the country.

Eligibility is calculated in class order. For example, if a term can be derived both from Class A and Class C, it is only listed as Class A.

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# *Attachment to Module 2*

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## *Sample Letter of Government Support*

**[This letter should be provided on official letterhead]**

ICANN  
Suite 330, 4676 Admiralty Way  
Marina del Rey, CA 90292

Attention: New gTLD Evaluation Process

Subject: Letter for support for [TLD requested]

This letter is to confirm that [government entity] fully supports the application for [TLD] submitted to ICANN by [applicant] in the New gTLD Program. As the [Minister/Secretary/position] I confirm that I have the authority of the [x government/public authority] to be writing to you on this matter. [Explanation of government entity, relevant department, division, office, or agency, and what its functions and responsibilities are]

The gTLD will be used to [explain your understanding of how the name will be used by the applicant. This could include policies developed regarding who can register a name, pricing regime and management structures.] [Government/public authority/department] has worked closely with the applicant in the development of this proposal.

The [x government/public authority] supports this application, and in doing so, understands that in the event that the application is successful, [applicant] will be required to enter into a Registry Agreement with ICANN. In doing so, they will be required to pay fees to ICANN and comply with consensus policies developed through the ICANN multi-stakeholder policy processes.

[Government / public authority] further understands that, in the event of a dispute between [government/public authority] and the applicant, ICANN will comply with a legally binding order from a court in the jurisdiction of [government/public authority].

**[Optional]** This application is being submitted as a community-based application, and as such it is understood that the Registry Agreement will reflect the community restrictions proposed in the application. In the event that we believe the registry is not complying with these restrictions, possible avenues of recourse include the Registry Restrictions Dispute Resolution Procedure.

**[Optional]** I can advise that in the event that this application is successful [government/public authority] will enter into a separate agreement with the applicant. This agreement will outline the conditions under which we support them in the operation of the TLD, and circumstances under which we would withdraw that support. ICANN will not be a party to this agreement, and enforcement of this agreement lies fully with [government/public authority].

[Government / public authority] understands that the Geographic Names Panel engaged by ICANN will, among other things, conduct due diligence on the authenticity of this documentation. I would request that if additional information is required during this process, that [name and contact details] be contacted in the first instance.

Thank you for the opportunity to support this application.

Yours sincerely

Signature from relevant government/public authority



---

# *Attachment to Module 2*

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## *Evaluation Questions and Criteria*

Since ICANN was founded in 1998 as a not-for-profit, multi-stakeholder organization, one of its key mandates has been to promote competition in the domain name market. ICANN's mission specifically calls for the corporation to maintain and build on processes that will ensure competition and consumer interests – without compromising Internet security and stability. This includes the consideration and implementation of new gTLDs. It is ICANN's goal to make the criteria and evaluation as objective as possible.

While new gTLDs are viewed by ICANN as important to fostering choice, innovation and competition in domain registration services, the decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community.

Any public or private sector organization can apply to create and operate a new gTLD. However the process is not like simply registering or buying a second-level domain name. Instead, the application process is to evaluate and select candidates capable of running a registry, a business that manages top level domains such as, for example, .COM or .INFO. Any successful applicant will need to meet published operational and technical criteria in order to preserve Internet stability and interoperability.

### *I. Principles of the Technical and Financial New gTLD Evaluation Criteria*

- Principles of conservatism. This is the first round of what is to be an ongoing process for the introduction of new TLDs, including Internationalized Domain Names. Therefore, the criteria in this round require applicants to provide a thorough and thoughtful analysis of the technical requirements to operate a registry and the proposed business model.
- The criteria and evaluation should be as objective as possible.
  - With that goal in mind, an important objective of the new TLD process is to diversify the namespace, with different registry business models and target audiences. In some cases, criteria that are objective, but that ignore the differences in business models and target audiences of new registries, will tend to make the process exclusionary. For example, the business model for a registry targeted to a small community need not possess the same robustness in funding and technical infrastructure as a registry intending to compete with large gTLDs. Therefore purely objective criteria such as a requirement for a certain amount of cash on hand will not provide for the flexibility to consider different business models. The process must provide for an objective evaluation framework, but allow for adaptation according to the differing models applicants will present. Within that framework, applicant responses will be evaluated against the criteria in light of the proposed model.
  - Therefore the criteria should be flexible: able to scale with the overall business approach, providing that the planned approach is consistent and coherent, and can withstand highs and lows.

- Criteria can be objective in areas of registrant protection, for example:
  - Providing for funds to continue operations in the event of a registry failure.
  - Adherence to data escrow, registry failover, and continuity planning requirements.
- The evaluation must strike the correct balance between establishing the business and technical competence of the applicant to operate a registry (to serve the interests of registrants), while not asking for the detailed sort of information or making the judgment that a venture capitalist would. ICANN is not seeking to certify business success but instead seeks to encourage innovation while providing certain safeguards for registrants.
- New registries must be added in a way that maintains DNS stability and security. Therefore, ICANN asks several questions so that the applicant can demonstrate an understanding of the technical requirements to operate a registry. ICANN will ask the applicant to demonstrate actual operational technical compliance prior to delegation. This is in line with current prerequisites for the delegation of a TLD.
- Registrant protection is emphasized in both the criteria and the scoring. Examples of this include asking the applicant to:
  - Plan for the occurrence of contingencies and registry failure by putting in place financial resources to fund the ongoing resolution of names while a replacement operator is found or extended notice can be given to registrants,
  - Demonstrate a capability to understand and plan for business contingencies to afford some protections through the marketplace,
  - Adhere to DNS stability and security requirements as described in the technical section, and
  - Provide access to the widest variety of services.

## *II. Aspects of the Questions Asked in the Application and Evaluation Criteria*

The technical and financial questions are intended to inform and guide the applicant in aspects of registry start-up and operation. The established registry operator should find the questions straightforward while inexperienced applicants should find them a natural part of planning.

Evaluation and scoring (detailed below) will emphasize:

- How thorough are the answers? Are they well thought through and do they provide a sufficient basis for evaluation?
- Demonstration of the ability to operate and fund the registry on an ongoing basis:
  - Funding sources to support technical operations in a manner that ensures stability and security and supports planned expenses,
  - Resilience and sustainability in the face of ups and downs, anticipation of contingencies,
  - Funding to carry on operations in the event of failure.

- Demonstration that the technical plan will likely deliver on best practices for a registry and identification of aspects that might raise DNS stability and security issues.
- Ensures plan integration, consistency and compatibility (responses to questions are not evaluated individually but in comparison to others):
  - Funding adequately covers technical requirements,
  - Funding covers costs,
  - Risks are identified and addressed, in comparison to other aspects of the plan.

### *III. Scoring*

#### Evaluation

- The questions, criteria, scoring and evaluation methodology are to be conducted in accordance with the principles described earlier in section I. With that in mind, globally diverse evaluation panelists will staff evaluation panels. The diversity of evaluators and access to experts in all regions of the world will ensure application evaluations take into account cultural, technical and business norms in the regions from which applications originate.
- Evaluation teams will consist of two independent panels. One will evaluate the applications against the financial criteria. The other will evaluate the applications against the technical & operational criteria. Given the requirement that technical and financial planning be well integrated, the panels will work together and coordinate information transfer where necessary. Other relevant experts (e.g., technical, audit, legal, insurance, finance) in pertinent regions will provide advice as required.
- Precautions will be taken to ensure that no member of the Evaluation Teams will have any interest or association that may be viewed as a real or potential conflict of interest with an applicant or application. All members must adhere to the Code of Conduct and Conflict of Interest guidelines that are found in Module 2.
- Communications between the evaluation teams and the applicants will be through an online interface. During the evaluation, evaluators may pose a set of clarifying questions to an applicant, to which the applicant may respond through the interface.

Confidentiality: ICANN will post applications after the close of the application submission period. The application form notes which parts of the application will be posted.

#### Scoring

- Responses will be evaluated against each criterion. A score will be assigned according to the scoring schedule linked to each question or set of questions. In several questions, 1 point is the maximum score that may be awarded. In several other questions, 2 points are awarded for a response that exceeds requirements, 1 point is awarded for a response that meets requirements and 0 points are awarded for a response that fails to meet requirements. Each question must receive at least a score of "1," making each a "pass/fail" question.
- In the Continuity question in the financial section(see Question #50), up to 3 points are awarded if an applicant provides, at the application stage, a financial instrument that will guarantee ongoing registry operations in the event of a business failure. This extra

point can serve to guarantee passing the financial criteria for applicants who score the minimum passing score for each of the individual criteria. The purpose of this weighting is to reward applicants who make early arrangements for the protection of registrants and to accept relatively riskier business plans where registrants are protected.

- There are 21 Technical & Operational questions. Each question has a criterion and scoring associated with it. The scoring for each is 0, 1, or 2 points as described above. One of the questions (IDN implementation) is optional. Other than the optional questions, all Technical & Operational criteria must be scored a 1 or more or the application will fail the evaluation.
- The total technical score must be equal to or greater than 22 for the application to pass. That means the applicant can pass by:
  - Receiving a 1 on all questions, including the optional question, and a 2 on at least one mandatory question; or
  - Receiving a 1 on all questions, excluding the optional question and a 2 on at least two mandatory questions.

This scoring methodology requires a minimum passing score for each question and a slightly higher average score than the per question minimum to pass.

- There are six Financial questions and six sets of criteria that are scored by rating the answers to one or more of the questions. For example, the question concerning registry operation costs requires consistency between the technical plans (described in the answers to the Technical & Operational questions) and the costs (described in the answers to the costs question).
- The scoring for each of the Financial criteria is 0, 1 or 2 points as described above with the exception of the Continuity question, for which up to 3 points are possible. All questions must receive at least a 1 or the application will fail the evaluation.
- The total financial score on the six criteria must be 8 or greater for the application to pass. That means the applicant can pass by:
  - Scoring a 3 on the continuity criteria, or
  - Scoring a 2 on any two financial criteria.
- Applications that do not pass Initial Evaluation can enter into an extended evaluation process as described in Module 2. The scoring is the same.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
<b>Applicant Information</b>	1	Full legal name of the Applicant (the established entity that would enter into a Registry Agreement with ICANN)	Y	Responses to Questions 1 - 12 are required for a complete application. Responses are not scored.			
	2	Address of the principal place of business of the Applicant. This address will be used for contractual purposes. No Post Office boxes are allowed.	Y				
	3	Phone number for the Applicant's principal place of business.	Y				
	4	Fax number for the Applicant's principal place of business.	Y				
	5	Website or URL, if applicable.	Y				
<b>Primary Contact for this Application</b>	6	Name	Y	The primary contact is the individual designated with the primary responsibility for management of the application, including responding to tasks in the TLD Application System (TAS) during the various application phases. Both contacts listed should also be prepared to receive inquiries from the public.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
		Fax number	Y				
	Email address	Y					
<b>Secondary Contact for this Application</b>	7	Name	Y	The secondary contact is listed in the event the primary contact is unavailable to continue with the application process.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
	Fax number	Y					

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		Email address	Y				
Proof of Legal Establishment	8	(a) Legal form of the Applicant. (e.g., partnership, corporation, non-profit institution).	Y				
		(b) State the specific national or other jurisdiction that defines the type of entity identified in 8(a).	Y	In the event of questions regarding proof of establishment, the applicant may be asked for additional details, such as the specific national or other law applying to this type of entity			
		(c) Attach evidence of the applicant's establishment as the type of entity identified in Question 8(a) above, in accordance with the applicable laws identified in Question 8(b).	Y	Applications without valid proof of legal establishment will not be evaluated further. Supporting documentation for proof of legal establishment should be submitted in the original language.			
	9	(a) If the applying entity is publicly traded, provide the exchange and symbol.	Y				
		(b) If the applying entity is a subsidiary, provide the parent company.	Y				
		(c) If the applying entity is a joint venture, list all joint venture partners.	Y				
	10	Business ID, Tax ID, VAT registration number, or equivalent of the Applicant.	N				
Applicant Background	11	(a) Enter the full name, date and country of birth, contact information (permanent residence), and position of all directors (i.e., members of the applicant's Board of Directors, if applicable).	Partial	<p>Applicants should be aware that the names and positions of the individuals listed in response to this question will be published as part of the application. The contact information listed for individuals is for identification purposes only and will not be published as part of the application.</p> <p>Background checks may be conducted on individuals named in the applicant's response to question 11. Any material misstatement or misrepresentation (or omission of material information) may cause the application to be rejected.</p> <p>The applicant certifies that it has obtained permission for the posting of the names and positions of individuals included in this application.</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(b) Enter the full name, date and country of birth, contact information (permanent residence), and position of all officers and partners. Officers are high-level management officials of a corporation or business, for example, a CEO, vice president, secretary, chief financial officer. Partners would be listed in the context of a partnership or other such form of legal entity.	Partial				
		(c) Enter the full name and contact information of all shareholders holding at least 15% of shares, and percentage held by each. For a shareholder entity, enter the principal place of business. For a shareholder individual, enter the date and country of birth and contact information (permanent residence).	Partial				
		(d) For an applying entity that does not have directors, officers, partners, or shareholders, enter the full name, date and country of birth, contact information (permanent residence), and position of all individuals having overall legal or executive responsibility for the applying entity.	Partial				
		<p>(e) Indicate whether the applicant or any of the individuals named above:</p> <ul style="list-style-type: none"> <li>i. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these;</li> <li>ii. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others;</li> <li>iii. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities;</li> <li>iv. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative;</li> </ul>	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>v. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes;</p> <p>vi. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force;</p> <p>vii. has ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities;</p> <p>viii. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988;</p> <p>ix. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols);</p> <p>x. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) - (iv) above, or ever for the crimes listed in (v) - (ix) above);</p> <p>xi. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) - (iv) above, or ever for the crimes listed in (v) - (ix) above);</p> <p>xii. is the subject of a disqualification imposed by ICANN and in effect at the time of this application.</p> <p>If any of the above events have occurred, please provide details.</p>					



	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(f) Indicate whether the applicant or any of the individuals named above have been involved in any decisions indicating that the applicant or individual named in the application was engaged in cybersquatting, as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), Anti-cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or equivalent legislation.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(g) Disclose whether the applicant or any of the individuals named above has been involved in any administrative or other legal proceeding in which allegations of intellectual property infringement relating to registration or use of a domain name have been made. Provide an explanation related to each such instance.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(h) Provide an explanation for any additional background information that may be found concerning the applicant or any individual named in the application, which may affect eligibility, including any criminal convictions not identified above.	N				
Evaluation Fee	12	(a) Enter the confirmation information for payment of the evaluation fee (e.g., wire transfer confirmation number).	N	<p>The evaluation fee is paid in the form of a deposit at the time of user registration, and submission of the remaining amount at the time the full application is submitted. The information in question 12 is required for each payment.</p> <p>The full amount in USD must be received by ICANN. Applicant is responsible for all transaction fees and exchange rate fluctuation.</p> <p>Fedwire is the preferred wire mechanism; SWIFT is also acceptable. ACH is not recommended as these funds will take longer to clear and could affect timing of the application processing.</p>			
		(b) Payer name	N				
		(c) Payer address	N				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(d) Wiring bank	N				
		(e) Bank address	N				
		(f) Wire date	N				
Applied-for gTLD string	13	Provide the applied-for gTLD string. If applying for an IDN, provide the U-label.	Y	Responses to Questions 13-17 are not scored, but are used for database and validation purposes.  The U-label is an IDNA-valid string of Unicode characters, including at least one non-ASCII character.			
	14	(a) If applying for an IDN, provide the A-label (beginning with "xn--").	Y				
		(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.	Y				
		(c) If an IDN, provide the language of the label (both in English and as referenced by ISO-639-1).	Y				
		(d) If an IDN, provide the script of the label (both in English and as referenced by ISO 15924).	Y				
		(e) If an IDN, list all code points contained in the U-label according to Unicode form.	Y	For example, the string "HELLO" would be listed as U+0048 U+0065 U+006C U+006C U+006F.			
	15	(a) If an IDN, upload IDN tables for the proposed registry. An IDN table must include: <ol style="list-style-type: none"> <li>the applied-for gTLD string relevant to the tables,</li> <li>the script or language designator (as defined in BCP 47),</li> <li>table version number,</li> <li>effective date (DD Month YYYY), and</li> <li>contact name, email address, and phone number.</li> </ol> <p>Submission of IDN tables in a standards-based format is encouraged.</p>	Y	In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string. IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second level (see question 44).  IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.			
		(b) Describe the process used for development of the IDN tables submitted, including consultations and sources used.	Y				
		(c) List any variants to the applied-for gTLD string according to the relevant IDN tables.	Y	Variant TLD strings will not be delegated as a result of this application. Variant strings will be checked for consistency and, if the application is approved, will be entered on a Declared IDN Variants List to allow for future allocation once a variant management mechanism is established for the top level. Inclusion of variant TLD strings in this application is for information only and confers no right or claim to these strings upon the applicant.			
	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.	Y				
	17	<b>OPTIONAL</b> Provide a representation of the label according to the International Phonetic Alphabet ( <a href="http://www.jangsci.ucl.ac.uk/ipa/">http://www.jangsci.ucl.ac.uk/ipa/</a> ).	Y	If provided, this information will be used as a guide to ICANN in communications regarding the application.			
<b>Mission/Purpose</b>	18	(a) Describe the mission/purpose of your proposed gTLD.	Y	The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space.  For the application to be considered complete, answers to this section must be fulsome and sufficiently quantitative and detailed to inform future study on plans vs. results.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				<p>The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion.</p> <p>The information gathered in this section will be one source of input to help inform this review. This information is not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored.</p> <p>An applicant wishing to designate this application as community-based should ensure that these responses are consistent with its responses for question 20 below.</p>			
		(b) How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?	Y	<p>Answers should address the following points:</p> <ul style="list-style-type: none"> <li>i. What is the goal of your proposed gTLD in terms of areas of specialty, service levels, or reputation?</li> <li>ii. What do you anticipate your proposed gTLD will add to the current space, in terms of competition, differentiation, or innovation?</li> <li>iii. What goals does your proposed gTLD have in terms of user experience?</li> <li>iv. Provide a complete description of the applicant's intended registration policies in support of the goals listed above.</li> <li>v. Will your proposed gTLD impose any measures for</li> </ul>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				<p>protecting the privacy or confidential information of registrants or users? If so, please describe any such measures.</p> <p>Describe whether and in what ways outreach and communications will help to achieve your projected benefits.</p>			
	18	(c) What operating rules will you adopt to eliminate or minimize social costs (e.g., time or financial resource costs, as well as various types of consumer vulnerabilities)? What other steps will you take to minimize negative consequences/costs imposed upon consumers?	Y	<p>Answers should address the following points:</p> <ul style="list-style-type: none"> <li>i. How will multiple applications for a particular domain name be resolved, for example, by auction or on a first-come/first-serve basis?</li> <li>ii. Explain any cost benefits for registrants you intend to implement (e.g., advantageous pricing, introductory discounts, bulk registration discounts).</li> <li>iii. Note that the Registry Agreement requires that registrars be offered the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Additionally, the Registry Agreement requires advance written notice of price increases. Do you intend to make contractual commitments to registrants regarding the magnitude of price escalation? If so, please describe your plans.</li> </ul>			
Community-based Designation	19	Is the application for a community-based TLD?	Y	There is a presumption that the application is a standard application (as defined in the Applicant Guidebook) if this question is left unanswered.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				The applicant's designation as standard or community-based cannot be changed once the application is submitted.			
	20	(a) 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. The name of the community does not have to be formally adopted for the application to be designated as community-based.	Y	<p>Descriptions should include:</p> <ul style="list-style-type: none"> <li>How the community is 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.</li> <li>How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required.</li> <li>When the community was established, including the date(s) of formal organization, if any, as well as a description of community activities to date.</li> <li>The current estimated size of the community, both as to membership and geographic extent.</li> </ul>		<p>Responses to Question 20 will be regarded as firm commitments to the specified community and reflected in the Registry Agreement, provided the application is successful.</p> <p>Responses are not scored in the Initial Evaluation. Responses may be scored in a community priority evaluation, if applicable. Criteria and scoring methodology for the community priority evaluation are described in Module 4 of the Applicant Guidebook.</p>	
		(b) Explain the applicant's relationship to the community identified in 20(a).	Y	<p>Explanations should clearly state:</p> <ul style="list-style-type: none"> <li>Relations to any community organizations.</li> <li>Relations to the community and its constituent parts/groups.</li> <li>Accountability mechanisms of the applicant to the community.</li> </ul>			
		(c) Provide a description of the community-based purpose of the applied-for gTLD.	Y	<p>Descriptions should include:</p> <ul style="list-style-type: none"> <li>Intended registrants in the TLD.</li> <li>Intended end-users of the TLD.</li> <li>Related activities the applicant has carried out or intends to carry out in service of this purpose.</li> <li>Explanation of how the purpose is of a lasting nature.</li> </ul>			
		(d) Explain the relationship between the applied-for gTLD string and the community identified in 20(a).	Y	<p>Explanations should clearly state:</p> <ul style="list-style-type: none"> <li>relationship to the established name, if any, of the community.</li> </ul>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				<ul style="list-style-type: none"> <li>relationship to the identification of community members.</li> <li>any connotations the string may have beyond the community.</li> </ul>			
		(e) Provide a complete description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD. Policies and enforcement mechanisms are expected to constitute a coherent set.	Y	<p>Descriptions should include proposed policies, if any, on the following:</p> <ul style="list-style-type: none"> <li>Eligibility: who is eligible to register a second-level name in the gTLD, and how will eligibility be determined.</li> <li>Name selection: what types of second-level names may be registered in the gTLD.</li> <li>Content/Use: what restrictions, if any, the registry operator will impose on how a registrant may use its registered name.</li> <li>Enforcement: what investigation practices and mechanisms exist to enforce the policies above, what resources are allocated for enforcement, and what appeal mechanisms are available to registrants.</li> </ul>			
		(f) Attach any written endorsements for the application from established institutions representative of the community identified in 20(a). An applicant may submit written endorsements by multiple institutions, if relevant to the community.	Y	<p>At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement of support for the application, and supply the contact information of the entity providing the endorsement.</p> <p>Endorsements from institutions not mentioned in the response to 20(b) should be accompanied by a clear description of each such institution's relationship to the community.</p> <p>Endorsements presented as supporting documentation for this question should be submitted in the original language.</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
Geographic Names	21	(a) Is the application for a geographic name?	Y	<p>An applied-for gTLD string is considered a geographic name requiring government support if it is: (a) the capital city name of a country or territory listed in the ISO 3166-1 standard; (b) a city name, where it is clear from statements in the application that the applicant intends to use the gTLD for purposes associated with the city name; (c) a sub-national place name listed in the ISO 3166-2 standard; or (d) a name listed as a UNESCO region or appearing on the "Composition of macro geographic (continental) or regions, geographic sub-regions, and selected economic and other groupings" list. See Module 2 for complete definitions and criteria.</p> <p>An application for a country or territory name, as defined in the Applicant Guidebook, will not be approved.</p>			
		(b) If a geographic name, attach documentation of support or non-objection from all relevant governments or public authorities.	N	<p>See the documentation requirements in Module 2 of the Applicant Guidebook.</p> <p>Documentation presented in response to this question should be submitted in the original language.</p>			
Protection of Geographic Names	22	Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD. This should include any applicable rules and procedures for reservation and/or release of such names.	Y	<p>Applicants should consider and describe how they will incorporate Governmental Advisory Committee (GAC) advice in their management of second-level domain name registrations. See "Principles regarding New gTLDs" at <a href="https://qaqweb.icann.org/display/GACADV/New+gTLDs">https://qaqweb.icann.org/display/GACADV/New+gTLDs</a>.</p> <p>For reference, applicants may draw on existing methodology developed for the reservation and release of country names in the .INFO top-level domain. See the Dot Info Circular at <a href="https://qaqweb.icann.org/display/GACADV/New+gTLDs">https://qaqweb.icann.org/display/GACADV/New+gTLDs</a>.</p> <p>Proposed measures will be posted for public comment as part of the application. However, note that procedures for release of geographic names at the second level</p>			



	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				must be separately approved according to Specification 5 of the Registry Agreement. That is, approval of a gTLD application does not constitute approval for release of any geographic names under the Registry Agreement. Such approval must be granted separately by ICANN.			
Registry Services	23	<p>Provide name and full description of all the Registry Services to be provided. Descriptions should include both technical and business components of each proposed service, and address any potential security or stability concerns.</p> <p>The following registry services are customary services offered by a registry operator:</p> <p>A. Receipt of data from registrars concerning registration of domain names and name servers.</p> <p>B. Dissemination of TLD zone files.</p> <p>C. Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web-based Whois, RESTful Whois service).</p> <p>D. Internationalized Domain Names, where offered.</p> <p>E. DNS Security Extensions (DNSSEC).</p> <p>The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD.</p> <p>Additional proposed registry services that are unique to the registry must also be described.</p>	Y	<p>Registry Services are defined as the following: (1) operations of the Registry critical to the following tasks: (i) the receipt of data from registrars concerning registrations of domain names and name servers; (ii) provision to registrars of status information relating to the zone servers for the TLD; (iii) dissemination of TLD zone files; (iv) operation of the Registry zone servers, and (v) dissemination of contact and other information concerning domain name server registrations in the TLD as required by the Registry Agreement; and (2) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy; (3) any other products or services that only a Registry Operator is capable of providing, by reason of its designation as the Registry Operator. A full definition of Registry Services can be found at <a href="http://www.icann.org/en/registries/rsep/rsep.html">http://www.icann.org/en/registries/rsep/rsep.html</a>.</p> <p>Security: For purposes of this Applicant Guidebook, an effect on security by the proposed Registry Service means (1) the unauthorized disclosure, alteration, insertion or destruction of Registry Data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with applicable standards.</p> <p>Stability: For purposes of this Applicant Guidebook, an effect on stability shall mean that the proposed Registry Service (1) is not compliant with applicable relevant standards that are authoritative and published by a well-established, recognized and</p>		<p>Responses are not scored. A preliminary assessment will be made to determine if there are potential security or stability issues with any of the applicant's proposed Registry Services. If any such issues are identified, the application will be referred for an extended review. See the description of the Registry Services review process in Module 2 of the Applicant Guidebook. Any information contained in the application may be considered as part of the Registry Services review. If its application is approved, applicant may engage in only those registry services defined in the application, unless a new request is submitted to ICANN in accordance with the Registry Agreement.</p>	

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs and relying on Registry Operator's delegation information or provisioning.			
<b>Demonstration of Technical &amp; Operational Capability (External)</b>	24	<p>Shared Registration System (SRS) Performance: describe</p> <ul style="list-style-type: none"> <li>the plan for operation of a robust and reliable SRS. SRS is a critical registry function for enabling multiple registrars to provide domain name registration services in the TLD. SRS must include the EPP interface to the registry, as well as any other interfaces intended to be provided, if they are critical to the functioning of the registry. Please refer to the requirements in Specification 6 (section 1.2) and Specification 10 (SLA Matrix) attached to the Registry Agreement; and</li> <li>resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A complete answer should include, but is not limited to:</p> <ul style="list-style-type: none"> <li>A high-level SRS system description;</li> <li>Representative network diagram(s);</li> <li>Number of servers;</li> <li>Description of interconnectivity with other registry systems;</li> <li>Frequency of synchronization between servers; and</li> <li>Synchronization scheme (e.g., hot standby, cold standby).</li> </ul>	Y	<p>The questions in this section (24-44) are intended to give applicants an opportunity to demonstrate their technical and operational capabilities to run a registry. In the event that an applicant chooses to outsource one or more parts of its registry operations, the applicant should still provide the full details of the technical arrangements.</p> <p>Note that the resource plans provided in this section assist in validating the technical and operational plans as well as informing the cost estimates in the Financial section below.</p> <p>Questions 24-30(a) are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are outward-facing, i.e., interactions with registrars, registrants, and various DNS users. Responses to these questions will be published to allow review by affected parties.</p>	0-1	<p>Complete answer demonstrates:</p> <p>(1) a plan for operating a robust and reliable SRS, one of the five critical registry functions;</p> <p>(2) scalability and performance consistent with the overall business approach, and planned size of the registry;</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and</p> <p>(4) evidence of compliance with Specification 6 (section 1.2) to the Registry Agreement.</p>	<p><b>1 - meets requirements:</b> Response includes</p> <ol style="list-style-type: none"> <li>An adequate description of SRS that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</li> <li>Details of a well-developed plan to operate a robust and reliable SRS;</li> <li>SRS plans are sufficient to result in compliance with Specification 6 and Specification 10 to the Registry Agreement;</li> <li>SRS is consistent with the technical, operational and financial approach described in the application; and</li> <li>Demonstrates that adequate technical resources are already on hand, or committed or readily available to carry out this function.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		A complete answer is expected to be no more than 5 pages. (As a guide, one page contains approximately 4000 characters).					
	25	<p>Extensible Provisioning Protocol (EPP): provide a detailed description of the interface with registrars, including how the applicant will comply with EPP in RFCs 3735 (if applicable), and 5730-5734.</p> <p>If intending to provide proprietary EPP extensions, provide documentation consistent with RFC 3735, including the EPP templates and schemas that will be used.</p> <p>Describe resourcing plans (number and description of personnel roles allocated to this area).</p> <p>A complete answer is expected to be no more than 5 pages. If there are proprietary EPP extensions, a complete answer is also expected to be no more than 5 pages per EPP extension.</p>	Y		0-1	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of this aspect of registry technical requirements;</p> <p>(2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section;</p> <p>(4) ability to comply with relevant RFCs;</p> <p>(5) if applicable, a well-documented implementation of any proprietary EPP extensions; and</p> <p>(6) if applicable, how proprietary EPP extensions are consistent with the registration lifecycle as described in Question 27.</p>	<p><b>1 - meets requirements:</b> Response includes</p> <p>(1) Adequate description of EPP that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) Sufficient evidence that any proprietary EPP extensions are compliant with RFCs and provide all necessary functionalities for the provision of registry services;</p> <p>(3) EPP interface is consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates that technical resources are already on hand, or committed or readily available.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>
	26	<p>Whois: describe</p> <ul style="list-style-type: none"> <li>• how the applicant will comply with Whois specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement;</li> <li>• how the Applicant's Whois service will comply with RFC 3912; and</li> <li>• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A complete answer should include, but is not limited to:</p>	Y	The Registry Agreement (Specification 4) requires provision of Whois lookup services for all names registered in the TLD. This is a minimum requirement. Provision for Searchable Whois as defined in the scoring column is a requirement for achieving a score of 2 points.	0-2	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of this aspect of registry technical requirements, (one of the five critical registry functions);</p> <p>(2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry;</p> <p>(3) a technical plan that is adequately resourced in the</p>	<p><b>2 - exceeds requirements:</b> Response meets all the attributes for a score of 1 and includes:</p> <p>(1) A Searchable Whois service: Whois service includes web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit. Boolean search capabilities may be offered. The service shall include appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users), and the</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<ul style="list-style-type: none"> <li>• A high-level Whois system description;</li> <li>• Relevant network diagram(s);</li> <li>• IT and infrastructure resources (e.g., servers, switches, routers and other components);</li> <li>• Description of interconnectivity with other registry systems; and</li> <li>• Frequency of synchronization between servers.</li> </ul> <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> <li>• Provision for Searchable Whois capabilities; and</li> <li>• A description of potential forms of abuse of this feature, how these risks will be mitigated, and the basis for these descriptions.</li> </ul> <p>A complete answer is expected to be no more than 5 pages.</p>				<p>planned costs detailed in the financial section;</p> <p>(4) ability to comply with relevant RFCs;</p> <p>(5) evidence of compliance with Specifications 4 and 10 to the Registry Agreement; and</p> <p>(6) if applicable, a well-documented implementation of Searchable Whois.</p>	<p>application demonstrates compliance with any applicable privacy laws or policies.</p> <p><b>1 - meets requirements:</b> Response includes</p> <p>(1) adequate description of Whois service that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) Evidence that Whois services are compliant with RFCs, Specifications 4 and 10 to the Registry Agreement, and any other contractual requirements including all necessary functionalities for user interface;</p> <p>(3) Whois capabilities consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) demonstrates an adequate level of resources that are already on hand or readily available to carry out this function.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>
	27	<p>Registration Life Cycle: provide a detailed description of the proposed registration lifecycle for domain names in the proposed gTLD. The description must:</p> <ul style="list-style-type: none"> <li>• explain the various registration states as well as the criteria and procedures that are used to change state;</li> <li>• describe the typical registration lifecycle of create/update/delete and all intervening steps such as pending, locked, expired, and transferred that may apply;</li> <li>• clearly explain any time elements that are involved - for instance details of add-grace or redemption grace periods, or notice periods for renewals or transfers; and</li> <li>• describe resourcing plans for this aspect of the criteria (number and</li> </ul>	Y		0-1	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of registration lifecycles and states;</p> <p>(2) consistency with any specific commitments made to registrants as adapted to the overall business approach for the proposed gTLD; and</p> <p>(3) the ability to comply with relevant RFCs.</p>	<p><b>1 - meets requirements:</b> Response includes</p> <p>(1) An adequate description of the registration lifecycle that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</p> <p>(2) Details of a fully developed registration life cycle with definition of various registration states, transition between the states, and trigger points;</p> <p>(3) A registration lifecycle that is consistent with any commitments to registrants and with technical, operational, and financial plans described in the application; and</p> <p>(4) Demonstrates an adequate level of</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>description of personnel roles allocated to this area).</p> <p>The description of the registration lifecycle should be supplemented by the inclusion of a state diagram, which captures definitions, explanations of trigger points, and transitions from state to state.</p> <p>If applicable, provide definitions for aspects of the registration lifecycle that are not covered by standard EPP RFCs.</p> <p>A complete answer is expected to be no more than 5 pages.</p>					<p>resources that are already on hand or committed or readily available to carry out this function.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>
	28	<p>Abuse Prevention and Mitigation: Applicants should describe the proposed policies and procedures to minimize abusive registrations and other activities that have a negative impact on Internet users. A complete answer should include, but is not limited to:</p> <ul style="list-style-type: none"> <li>• An implementation plan to establish and publish on its website a single abuse point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller;</li> <li>• Policies for handling complaints regarding abuse;</li> <li>• Proposed measures for removal of orphan glue records for names removed from the zone when provided with evidence in written form that the glue is present in connection with malicious conduct (see Specification 6); and</li> <li>• Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>To be eligible for a score of 2, answers must include measures to promote Whois accuracy as well as measures from one other area as</p>	Y	<p>Note that, while orphan glue often supports correct and ordinary operation of the DNS, registry operators will be required to take action to remove orphan glue records (as defined at <a href="http://www.icann.org/en/committees/security/sac048.pdf">http://www.icann.org/en/committees/security/sac048.pdf</a>) when provided with evidence in written form that such records are present in connection with malicious conduct.</p>	0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) Comprehensive abuse policies, which include clear definitions of what constitutes abuse in the TLD, and procedures that will effectively minimize potential for abuse in the TLD;</li> <li>(2) Plans are adequately resourced in the planned costs detailed in the financial section;</li> <li>(3) Policies and procedures identify and address the abusive use of registered names at startup and on an ongoing basis; and</li> <li>(4) When executed in accordance with the Registry Agreement, plans will result in compliance with contractual requirements.</li> </ol>	<p><b>2 – exceeds requirements:</b> Response meets all the attributes for a score of 1 and includes:</p> <ol style="list-style-type: none"> <li>(1) Details of measures to promote Whois accuracy, using measures specified here or other measures commensurate in their effectiveness; and</li> <li>(2) Measures from at least one additional area to be eligible for 2 points as described in the question.</li> </ol> <p><b>1 - meets requirements</b> Response includes:</p> <ol style="list-style-type: none"> <li>(1) An adequate description of abuse prevention and mitigation policies and procedures that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</li> <li>(2) Details of well-developed abuse policies and procedures;</li> <li>(3) Plans are sufficient to result in compliance with contractual requirements;</li> <li>(4) Plans are consistent with the technical, operational, and financial approach described in the application, and any commitments made to registrants; and</li> <li>(5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to</li> </ol>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>described below.</p> <ul style="list-style-type: none"> <li>• Measures to promote Whois accuracy (can be undertaken by the registry directly or by registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to:               <ul style="list-style-type: none"> <li>○ 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.</li> <li>○ 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; and</li> <li>○ 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.</li> </ul> </li> <li>• A description of policies and procedures that define malicious or abusive behavior, capture metrics, and establish Service Level Requirements for resolution, including service levels for responding to law enforcement requests. This may include rapid takedown or suspension systems and sharing information regarding malicious or abusive behavior with industry partners;</li> <li>• Adequate controls to ensure proper access to domain functions (can be undertaken by the registry directly or by</li> </ul>					<p>carry out this function.  <b>0 – fails requirements</b>            Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to:</p> <ul style="list-style-type: none"> <li>o Requiring multi-factor authentication (i.e., strong passwords, tokens, one-time passwords) from registrants to process update, transfers, and deletion requests;</li> <li>o Requiring multiple, unique points of contact to request and/or approve update, transfer, and deletion requests; and</li> <li>o Requiring the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted.</li> </ul> <p>A complete answer is expected to be no more than 20 pages.</p>					
	29	<p>Rights Protection Mechanisms: Applicants must describe how their registry will comply with policies and practices that minimize abusive registrations and other activities that affect the legal rights of others, such as the Uniform Domain Name Dispute Resolution Policy (UDRP), Uniform Rapid Suspension (URS) system, and Trademark Claims and Sunrise services at startup.</p> <p>A complete answer should include:</p> <ul style="list-style-type: none"> <li>• A description of how the registry operator will implement safeguards against allowing unqualified registrations (e.g., registrations made in violation of the registry's eligibility restrictions or policies), and reduce opportunities for behaviors such as phishing or pharming. At a minimum, the registry operator must offer a Sunrise period and a Trademark Claims service during the required time periods, and implement decisions rendered under the URS on an ongoing basis; and</li> <li>• A description of resourcing plans for the</li> </ul>	Y		0-2	<p>Complete answer describes mechanisms designed to:</p> <ul style="list-style-type: none"> <li>(1) prevent abusive registrations, and</li> <li>(2) identify and address the abusive use of registered names on an ongoing basis.</li> </ul>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and includes:</p> <ul style="list-style-type: none"> <li>(1) Identification of rights protection as a core objective, supported by a well-developed plan for rights protection; and</li> <li>(2) Mechanisms for providing effective protections that exceed minimum requirements (e.g., RPMs in addition to those required in the registry agreement).</li> </ul> <p><b>1 - meets requirements:</b> Response includes</p> <ul style="list-style-type: none"> <li>(1) An adequate description of RPMs that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</li> <li>(2) A commitment from the applicant to implement of rights protection mechanisms sufficient to comply with minimum requirements in Specification 7;</li> <li>(3) Plans that are sufficient to result in compliance with contractual requirements;</li> </ul>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</p> <p>To be eligible for a score of 2, answers must also include additional measures specific to rights protection, such as abusive use policies, takedown procedures, registrant pre-verification, or authentication procedures, or other covenants.</p> <p>A complete answer is expected to be no more than 10 pages.</p>					<p>(4) Mechanisms that are consistent with the technical, operational, and financial approach described in the application; and</p> <p>(5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>
	30	<p>(a) Security Policy: provide a summary of the security policy for the proposed registry, including but not limited to:</p> <ul style="list-style-type: none"> <li>• indication of any independent assessment reports demonstrating security capabilities, and provisions for periodic independent assessment reports to test security capabilities;</li> <li>• description of any augmented security levels or capabilities commensurate with the nature of the applied for gTLD string, including the identification of any existing international or industry relevant security standards the applicant commits to following (reference site must be provided);</li> <li>• list of commitments made to registrants concerning security levels.</li> </ul> <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> <li>• Evidence of an independent assessment report demonstrating effective security controls (e.g., ISO 27001).</li> </ul> <p>A summary of the above should be no more than 20 pages. Note that the complete security policy for the registry is required to be submitted in accordance with 30(b).</p>	Y	<p>Criterion 5 calls for security levels to be appropriate for the use and level of trust associated with the TLD string, such as, for example, financial services oriented TLDs. "Financial services" are activities performed by financial institutions, including: 1) the acceptance of deposits and other repayable funds; 2) lending; 3) payment and remittance services; 4) insurance or reinsurance services; 5) brokerage services; 6) investment services and activities; 7) financial leasing; 8) issuance of guarantees and commitments; 9) provision of financial advice; or 10) portfolio management and advice; or 11) acting as a financial clearinghouse. Financial services is used as an example only; other strings with exceptional potential to cause harm to consumers would also be expected to deploy appropriate levels of security.</p>	0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) detailed description of processes and solutions deployed to manage logical security across infrastructure and systems, monitoring and detecting threats and security vulnerabilities and taking appropriate steps to resolve them;</li> <li>(2) security capabilities are consistent with the overall business approach and planned size of the registry;</li> <li>(3) a technical plan adequately resourced in the planned costs detailed in the financial section;</li> <li>(4) security measures are consistent with any commitments made to registrants regarding security levels; and</li> <li>(5) security measures are appropriate for the applied-for gTLD string (For example, applications for strings with unique trust implications, such as financial services-oriented strings, would be expected to provide a commensurate level of security).</li> </ol>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and includes:</p> <ol style="list-style-type: none"> <li>(1) Evidence of highly developed and detailed security capabilities, with various baseline security levels, independent benchmarking of security metrics, robust periodic security monitoring, and continuous enforcement; and</li> <li>(2) an independent assessment report is provided demonstrating effective security controls are either in place or have been designed, and are commensurate with the applied-for gTLD string. (This could be ISO 27001 certification or other well-established and recognized industry certifications for the registry operation. If new independent standards for demonstration of effective security controls are established, such as the High Security Top Level Domain (HSTLD) designation, this could also be included. An illustrative example of an independent standard is the proposed set of requirements described in <a href="http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf">http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf</a>.)</li> </ol> <p><b>1 - meets requirements:</b> Response includes:</p>



	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
							(1) Adequate description of security policies and procedures that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of adequate security capabilities, including enforcement of logical access control, threat analysis, incident response and auditing, Ad-hoc oversight and governance and leading practices being followed; (3) Security capabilities consistent with the technical, operational, and financial approach as described in the application, and any commitments made to registrants; (4) Demonstrates that an adequate level of resources are on hand, committed or readily available to carry out this function; and (5) Proposed security measures are commensurate with the nature of the applied-for gTLD string. <b>0 - fails requirements:</b> Does not meet all the requirements to score 1.
Demonstration of Technical & Operational Capability (Internal)	30	(b) Security Policy: provide the complete security policy and procedures for the proposed registry, including but not limited to: <ul style="list-style-type: none"> <li>• system (data, server, application / services) and network access control, ensuring systems are maintained in a secure fashion, including details of how they are monitored, logged and backed up;</li> <li>• resources to secure integrity of updates between registry systems and nameservers, and between nameservers, if any;</li> <li>• independent assessment reports demonstrating security capabilities (submitted as attachments), if any;</li> <li>• provisioning and other measures that mitigate risks posed by denial of service attacks;</li> <li>• computer and network incident response</li> </ul>	N	Questions 30(b) – 44 are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are internal to the infrastructure and operations of the registry. To allow the applicant to provide full details and safeguard proprietary information, responses to these questions will not be published.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>policies, plans, and processes;</p> <ul style="list-style-type: none"> <li>• plans to minimize the risk of unauthorized access to its systems or tampering with registry data;</li> <li>• intrusion detection mechanisms, a threat analysis for the proposed registry, the defenses that will be deployed against those threats, and provision for periodic threat analysis updates;</li> <li>• details for auditing capability on all network access;</li> <li>• physical security approach;</li> <li>• identification of department or group responsible for the registry's security organization;</li> <li>• background checks conducted on security personnel;</li> <li>• description of the main security threats to the registry operation that have been identified; and</li> <li>• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul>					
	31	<p>Technical Overview of Proposed Registry: provide a technical overview of the proposed registry.</p> <p>The technical plan must be adequately resourced, with appropriate expertise and allocation of costs. The applicant will provide financial descriptions of resources in the next section and those resources must be reasonably related to these technical requirements.</p> <p>The overview should include information on the estimated scale of the registry's technical operation, for example, estimates for the number of registration transactions and DNS queries per month should be provided for the first two years of operation.</p> <p>In addition, the overview should account for geographic dispersion of incoming network traffic such as DNS, Whois, and registrar transactions.</p>	N	<p>To the extent this answer is affected by the applicant's intent to outsource various registry operations, the applicant should describe these plans (e.g., taking advantage of economies of scale or existing facilities). However, the response must include specifying the technical plans, estimated scale, and geographic dispersion as required by the question.</p>	0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) complete knowledge and understanding of technical aspects of registry requirements;</li> <li>(2) an adequate level of resiliency for the registry's technical operations;</li> <li>(3) consistency with planned or currently deployed technical/operational solutions;</li> <li>(4) consistency with the overall business approach and planned size of the registry;</li> <li>(5) adequate resourcing for technical plan in the</li> </ol>	<p><b>1 - meets requirements:</b> Response includes:</p> <ol style="list-style-type: none"> <li>(1) A description that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</li> <li>(2) Technical plans consistent with the technical, operational, and financial approach as described in the application;</li> <li>(3) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>If the registry serves a highly localized registrant base, then traffic might be expected to come mainly from one area.</p> <p>This high-level summary should not repeat answers to questions below. Answers should include a visual diagram(s) to highlight dataflows, to provide context for the overall technical infrastructure. Detailed diagrams for subsequent questions should be able to map back to this high-level diagram(s). The visual diagram(s) can be supplemented with documentation, or a narrative, to explain how all of the Technical &amp; Operational components conform.</p> <p>A complete answer is expected to be no more than 10 pages.</p>				<p>planned costs detailed in the financial section; and (6) consistency with subsequent technical questions.</p>	
	32	<p>Architecture: provide documentation for the system and network architecture that will support registry operations for the proposed scale of the registry. System and network architecture documentation must clearly demonstrate the applicant's ability to operate, manage, and monitor registry systems. Documentation should include multiple diagrams or other components including but not limited to:</p> <ul style="list-style-type: none"> <li>• Detailed network diagram(s) showing the full interplay of registry elements, including but not limited to SRS, DNS, Whois, data escrow, and registry database functions;</li> <li>• Network and associated systems necessary to support registry operations, including: <ul style="list-style-type: none"> <li>▪ Anticipated TCP / IP addressing scheme,</li> <li>▪ Hardware (i.e., servers, routers, networking components, virtual machines and key characteristics (CPU and RAM, Disk space, internal network connectivity, and make and model)),</li> <li>▪ Operating system and versions, and</li> <li>▪ Software and applications (with version information) necessary to support registry operations, management, and monitoring</li> </ul> </li> <li>• General overview of capacity planning, including bandwidth allocation plans;</li> <li>• List of providers / carriers; and</li> <li>• Resourcing plans for the initial</li> </ul>	N		0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) detailed and coherent network architecture;</li> <li>(2) architecture providing resiliency for registry systems;</li> <li>(3) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; and</li> <li>(4) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</li> </ol>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and includes</p> <ol style="list-style-type: none"> <li>(1) Evidence of highly developed and detailed network architecture that is able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for initial registry startup; and</li> <li>(2) Evidence of a highly available, robust, and secure infrastructure.</li> </ol> <p><b>1 - meets requirements:</b> Response includes</p> <ol style="list-style-type: none"> <li>(1) An adequate description of the architecture that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</li> <li>(2) Plans for network architecture describe all necessary elements;</li> <li>(3) Descriptions demonstrate adequate network architecture providing robustness and security of the</li> </ol>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</p> <p>To be eligible for a score of 2, answers must also include evidence of a network architecture design that greatly reduces the risk profile of the proposed registry by providing a level of scalability and adaptability (e.g., protection against DDoS attacks) that far exceeds the minimum configuration necessary for the expected volume.</p> <p>A complete answer is expected to be no more than 10 pages.</p>					<p>registry;</p> <p>(4) Bandwidth and SLA are consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(5) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>
	33	<p>Database Capabilities: provide details of database capabilities including but not limited to:</p> <ul style="list-style-type: none"> <li>• database software;</li> <li>• storage capacity (both in raw terms [e.g., MB, GB] and in number of registrations / registration transactions);</li> <li>• maximum transaction throughput (in total and by type of transaction);</li> <li>• scalability;</li> <li>• procedures for object creation, editing, and deletion, and user and credential management;</li> <li>• high availability;</li> <li>• change management procedures;</li> <li>• reporting capabilities; and</li> <li>• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A registry database data model can be included to provide additional clarity to this response.</p> <p>Note: Database capabilities described should be in reference to registry services and not necessarily related support functions such as Personnel or Accounting, unless such services are inherently intertwined with the delivery of registry services.</p> <p>To be eligible for a score of 2, answers must also</p>	N		0-2	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of database capabilities to meet the registry technical requirements;</p> <p>(2) database capabilities consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</p>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and includes</p> <p>(1) Highly developed and detailed description of database capabilities that are able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for registry startup; and</p> <p>(2) Evidence of comprehensive database capabilities, including high scalability and redundant database infrastructure, regularly reviewed operational and reporting procedures following leading practices.</p> <p><b>1 - meets requirements:</b> Response includes</p> <p>(1) An adequate description of database capabilities that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</p> <p>(2) Plans for database capabilities</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>include evidence of database capabilities that greatly reduce the risk profile of the proposed registry by providing a level of scalability and adaptability that far exceeds the minimum configuration necessary for the expected volume.</p> <p>A complete answer is expected to be no more than 5 pages.</p>					<p>describe all necessary elements;</p> <p>(3) Descriptions demonstrate adequate database capabilities, with database throughput, scalability, and database operations with limited operational governance;</p> <p>(4) Database capabilities are consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(5) Demonstrates that an adequate level of resources that are on hand, or committed or readily available to carry out this function.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>
	34	<p>Geographic Diversity: provide a description of plans for geographic diversity of:</p> <p>a. name servers, and</p> <p>b. operations centers.</p> <p>Answers should include, but are not limited to:</p> <ul style="list-style-type: none"> <li>the intended physical locations of systems, primary and back-up operations centers (including security attributes), and other infrastructure;</li> <li>any registry plans to use Anycast or other topological and geographical diversity measures, in which case, the configuration of the relevant service must be included;</li> <li>resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>To be eligible for a score of 2, answers must also include evidence of a geographic diversity plan that greatly reduces the risk profile of the proposed registry by ensuring the continuance of all vital business functions (as identified in the applicant's continuity plan in Question 39) in the event of a natural or other disaster) at the principal place of business or point of presence.</p>	N		0-2	<p>Complete answer demonstrates:</p> <p>(1) geographic diversity of nameservers and operations centers;</p> <p>(2) proposed geo-diversity measures are consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</p>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and includes</p> <p>(1) Evidence of highly developed measures for geo-diversity of operations, with locations and functions to continue all vital business functions in the event of a natural or other disaster at the principal place of business or point of presence; and</p> <p>(2) A high level of availability, security, and bandwidth.</p> <p><b>1 - meets requirements:</b> Response includes</p> <p>(1) An adequate description of Geographic Diversity that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</p> <p>(2) Plans provide adequate geo-diversity of name servers and operations to continue critical registry functions in the event of a temporary outage at the principal place of business or point of presence;</p> <p>(3) Geo-diversity plans are consistent</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>A complete answer is expected to be no more than 5 pages.</p>					<p>with technical, operational, and financial approach as described in the application, and</p> <p>(4) Demonstrates adequate resources that are on hand, or committed or readily available to carry out this function.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>
	35	<p>DNS Service: describe the configuration and operation of nameservers, including how the applicant will comply with relevant RFCs.</p> <p>All name servers used for the new gTLD must be operated in compliance with the DNS protocol specifications defined in the relevant RFCs, including but not limited to: 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 3901, 4343, and 4472.</p> <ul style="list-style-type: none"> <li>Provide details of the intended DNS Service including, but not limited to: A description of the DNS services to be provided, such as query rates to be supported at initial operation, and reserve capacity of the system. Describe how your nameserver update methods will change at various scales. Describe how DNS performance will change at various scales.</li> <li>RFCs that will be followed – describe how services are compliant with RFCs and if these are dedicated or shared with any other functions (capacity/performance) or DNS zones.</li> <li>The resources used to implement the services - describe complete server hardware and software, including network bandwidth and addressing plans for servers. Also include resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> <li>Demonstrate how the system will</li> </ul>	N	<p>Note that the use of DNS wildcard resource records as described in RFC 4592 or any other method or technology for synthesizing DNS resource records or using redirection within the DNS by the registry is prohibited in the Registry Agreement.</p> <p>Also note that name servers for the new gTLD must comply with IANA Technical requirements for authoritative name servers: <a href="http://www.iana.org/procedures/nameserver-requirements.html">http://www.iana.org/procedures/nameserver-requirements.html</a>.</p>	0-1	<p>Complete answer demonstrates:</p> <p>(1) adequate description of configurations of nameservers and compliance with respective DNS protocol-related RFCs;</p> <p>(2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry;</p> <p>(3) a technical plan that is adequately resourced in the financial section;</p> <p>(4) evidence of compliance with Specification 6 to the Registry Agreement; and</p> <p>(5) evidence of complete knowledge and understanding of requirements for DNS service, one of the five critical registry functions.</p>	<p><b>1 - meets requirements:</b> Response includes:</p> <p>(1) Adequate description of DNS service that that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) Plans are sufficient to result in compliance with DNS protocols (Specification 6, section 1.1) and required performance specifications Specification 10, Service Level Matrix;</p> <p>(3) Plans are consistent with technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>function - describe how the proposed infrastructure will be able to deliver the performance described in Specification 10 (section 2) attached to the Registry Agreement.</p> <p>Examples of evidence include:</p> <ul style="list-style-type: none"> <li>• Server configuration standard (i.e., planned configuration).</li> <li>• Network addressing and bandwidth for query load and update propagation.</li> <li>• Headroom to meet surges.</li> </ul> <p>A complete answer is expected to be no more than 10 pages.</p>					
	36	<p>IPv6 Reachability: provide a description of plans for providing IPv6 transport including, but not limited to:</p> <ul style="list-style-type: none"> <li>• How the registry will support IPv6 access to Whois, Web-based Whois and any other Registration Data Publication Service as described in Specification 6 (section 1.5) to the Registry Agreement.</li> <li>• How the registry will comply with the requirement in Specification 6 for having at least two nameservers reachable over IPv6.</li> <li>• List all services that will be provided over IPv6, and describe the IPv6 connectivity and provider diversity that will be used.</li> <li>• Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A complete answer is expected to be no more than 5 pages.</p>	N	<p>IANA nameserver requirements are available at <a href="http://www.iana.org/procedures/nameserver-requirements.html">http://www.iana.org/procedures/nameserver-requirements.html</a>.</p>	0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) complete knowledge and understanding of this aspect of registry technical requirements;</li> <li>(2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry;</li> <li>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and</li> <li>(4) evidence of compliance with Specification 6 to the Registry Agreement.</li> </ol>	<p><b>1 - meets requirements:</b> Response includes</p> <ol style="list-style-type: none"> <li>(1) Adequate description of IPv6 reachability that substantially demonstrates the applicant's capability and knowledge required to meet this element;</li> <li>(2) A description of an adequate implementation plan addressing requirements for IPv6 reachability, indicating IPv6 reachability allowing IPv6 transport in the network over two independent IPv6 capable networks in compliance to IPv4 IANA specifications, and Specification 10;</li> <li>(3) IPv6 plans consistent with the technical, operational, and financial approach as described in the application; and</li> <li>(4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	37	<p>Data Backup Policies &amp; Procedures: provide details of frequency and procedures for backup of data,</p> <ul style="list-style-type: none"> <li>• hardware, and systems used for backup,</li> <li>• data format,</li> <li>• data backup features,</li> <li>• backup testing procedures,</li> <li>• procedures for retrieval of data/rebuild of database,</li> <li>• storage controls and procedures, and</li> <li>• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A complete answer is expected to be no more than 5 pages.</p>	N		0-1	<p>Complete answer demonstrates:</p> <ul style="list-style-type: none"> <li>(1) detailed backup and retrieval processes deployed;</li> <li>(2) backup and retrieval process and frequency are consistent with the overall business approach and planned size of the registry; and</li> <li>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</li> </ul>	<p><b>1 - meets requirements:</b> Response includes</p> <ul style="list-style-type: none"> <li>(1) Adequate description of backup policies and procedures that substantially demonstrate the applicant's capabilities and knowledge required to meet this element;</li> <li>(2) A description of leading practices being or to be followed;</li> <li>(3) Backup procedures consistent with the technical, operational, and financial approach as described in the application; and</li> <li>(4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function.</li> </ul> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>
	38	<p>Data Escrow: describe</p> <ul style="list-style-type: none"> <li>• how the applicant will comply with the data escrow requirements documented in the Registry Data Escrow Specification (Specification 2 of the Registry Agreement); and</li> <li>• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A complete answer is expected to be no more than 5 pages</p>	N		0-1	<p>Complete answer demonstrates:</p> <ul style="list-style-type: none"> <li>(1) complete knowledge and understanding of data escrow, one of the five critical registry functions;</li> <li>(2) compliance with Specification 2 of the Registry Agreement;</li> <li>(3) a technical plan that is adequately resourced in the financial section; and</li> <li>(4) the escrow arrangement is consistent with the overall business approach and size/scope of the registry.</li> </ul>	<p><b>1 – meets requirements:</b> Response includes</p> <ul style="list-style-type: none"> <li>(1) Adequate description of a Data Escrow process that substantially demonstrates the applicant's capability and knowledge required to meet this element;</li> <li>(2) Data escrow plans are sufficient to result in compliance with the Data Escrow Specification (Specification 2 to the Registry Agreement);</li> <li>(3) Escrow capabilities are consistent with the technical, operational, and financial approach as described in the application; and</li> <li>(4) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function.</li> </ul> <p><b>0 – fails requirements:</b> Does not meet all the requirements to score a 1.</p>



#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
39	<p>Registry Continuity: describe how the applicant will comply with registry continuity obligations as described in Specification 6 (section 3) to the registry agreement. This includes conducting registry operations using diverse, redundant servers to ensure continued operation of critical functions in the case of technical failure.</p> <p>Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</p> <p>The response should include, but is not limited to, the following elements of the business continuity plan:</p> <ul style="list-style-type: none"> <li>• Identification of risks and threats to compliance with registry continuity obligations;</li> <li>• Identification and definitions of vital business functions (which may include registry services beyond the five critical registry functions) versus other registry functions and supporting operations and technology;</li> <li>• Definitions of Recovery Point Objectives and Recovery Time Objective; and</li> <li>• Descriptions of testing plans to promote compliance with relevant obligations.</li> </ul> <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> <li>• A highly detailed plan that provides for leading practice levels of availability; and</li> <li>• Evidence of concrete steps such as a contract with a backup provider (in addition to any currently designated service operator) or a maintained hot site.</li> </ul> <p>A complete answer is expected to be no more than 15 pages.</p>	N	<p>For reference, applicants should review the ICANN gTLD Registry Continuity Plan at <a href="http://www.icann.org/en/registres/continuity/gtld-registry-continuity-plan-25apr09-en.pdf">http://www.icann.org/en/registres/continuity/gtld-registry-continuity-plan-25apr09-en.pdf</a>.</p> <p>A Recovery Point Objective (RPO) refers to the point in time to which data should be recovered following a business disruption or disaster. The RPO allows an organization to define a window of time before a disruption or disaster during which data may be lost and is independent of the time it takes to get a system back on-line. If the RPO of a company is two hours, then when a system is brought back on-line after a disruption/disaster, all data must be restored to a point within two hours before the disaster.</p> <p>A Recovery Time Objective (RTO) is the duration of time within which a process must be restored after a business disruption or disaster to avoid what the entity may deem as unacceptable consequences. For example, pursuant to the draft Registry Agreement DNS service must not be down for longer than 4 hours. At 4 hours ICANN may invoke the use of an Emergency Back End Registry Operator to take over this function. The entity may deem this to be an unacceptable consequence therefore they may set their RTO to be something less than 4 hours and would build continuity plans accordingly.</p> <p>Vital business functions are functions that are critical to the success of the operation. For example, if a registry operator provides an additional service beyond the five critical registry functions, that it deems as central to its TLD, or supports an operation that is central to the TLD, this might be identified as a vital business function.</p>	0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) detailed description showing plans for compliance with registry continuity obligations;</li> <li>(2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry;</li> <li>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and</li> <li>(4) evidence of compliance with Specification 6 to the Registry Agreement.</li> </ol>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and includes:</p> <ol style="list-style-type: none"> <li>(1) Highly developed and detailed processes for maintaining registry continuity; and</li> <li>(2) Evidence of concrete steps, such as a contract with a backup service provider or a maintained hot site.</li> </ol> <p><b>1 - meets requirements:</b> Response includes:</p> <ol style="list-style-type: none"> <li>(1) Adequate description of a Registry Continuity plan that substantially demonstrates capability and knowledge required to meet this element;</li> <li>(2) Continuity plans are sufficient to result in compliance with requirements (Specification 6);</li> <li>(3) Continuity plans are consistent with the technical, operational, and financial approach as described in the application; and</li> <li>(4) Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>
40	Registry Transition: provide a Service Migration plan (as described in the Registry Transition Processes) that could be followed in the event	N		0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) complete knowledge and</li> </ol>	<p><b>1 - meets requirements:</b> Response includes</p> <ol style="list-style-type: none"> <li>(1) Adequate description of a registry</li> </ol>

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		<p>that it becomes necessary to permanently transition the proposed gTLD to a new operator. The plan must take into account, and be consistent with the vital business functions identified in the previous question.</p> <p>Elements of the plan may include, but are not limited to:</p> <ul style="list-style-type: none"> <li>• Preparatory steps needed for the transition of critical registry functions;</li> <li>• Monitoring during registry transition and efforts to minimize any interruption to critical registry functions during this time; and</li> <li>• Contingency plans in the event that any part of the registry transition is unable to move forward according to the plan.</li> </ul> <p>A complete answer is expected to be no more than 10 pages.</p>				<p>understanding of the Registry Transition Processes, and</p> <p>(2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry.</p>	<p>transition plan that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) A description of an adequate registry transition plan with appropriate monitoring during registry transition; and</p> <p>(3) Transition plan is consistent with the technical, operational, and financial approach as described in the application.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>
	41	<p>Failover Testing: provide</p> <ul style="list-style-type: none"> <li>• a description of the failover testing plan, including mandatory annual testing of the plan. Examples may include a description of plans to test failover of data centers or operations to alternate sites, from a hot to a cold facility, registry data escrow testing, or other mechanisms. The plan must take into account and be consistent with the vital business functions identified in Question 39; and</li> <li>• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>The failover testing plan should include, but is not limited to, the following elements:</p> <ul style="list-style-type: none"> <li>• Types of testing (e.g., walkthroughs, takedown of sites) and the frequency of testing;</li> <li>• How results are captured, what is done</li> </ul>	N		0-1	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of this aspect of registry technical requirements;</p> <p>(2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</p>	<p><b>1 - meets requirements:</b> Response includes</p> <p>(1) An adequate description of a failover testing plan that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) A description of an adequate failover testing plan with an appropriate level of review and analysis of failover testing results;</p> <p>(3) Failover testing plan is consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function.</p> <p><b>0 - fails requirements</b> Does not meet all the requirements to score a 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>with the results, and with whom results are shared;</p> <ul style="list-style-type: none"> <li>• How test plans are updated (e.g., what triggers an update, change management processes for making updates);</li> <li>• Length of time to restore critical registry functions;</li> <li>• Length of time to restore all operations, inclusive of critical registry functions; and</li> <li>• Length of time to migrate from one site to another.</li> </ul> <p>A complete answer is expected to be no more than 10 pages.</p>					
	42	<p>Monitoring and Fault Escalation Processes: provide</p> <ul style="list-style-type: none"> <li>• a description of the proposed (or actual) arrangements for monitoring critical registry systems (including SRS, database systems, DNS servers, Whois service, network connectivity, routers and firewalls). This description should explain how these systems are monitored and the mechanisms that will be used for fault escalation and reporting, and should provide details of the proposed support arrangements for these registry systems.</li> <li>• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> <li>• Meeting the fault tolerance / monitoring guidelines described</li> <li>• Evidence of commitment to provide a 24x7 fault response team.</li> </ul> <p>A complete answer is expected to be no more than 10 pages.</p>	N		0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) complete knowledge and understanding of this aspect of registry technical requirements;</li> <li>(2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry;</li> <li>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and</li> <li>(4) consistency with the commitments made to registrants and registrars regarding system maintenance.</li> </ol>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and includes</p> <ol style="list-style-type: none"> <li>(1) Evidence showing highly developed and detailed fault tolerance/monitoring and redundant systems deployed with real-time monitoring tools / dashboard (metrics) deployed and reviewed regularly;</li> <li>(2) A high level of availability that allows for the ability to respond to faults through a 24x7 response team.</li> </ol> <p><b>1 - meets requirements:</b> Response includes</p> <ol style="list-style-type: none"> <li>(1) Adequate description of monitoring and fault escalation processes that substantially demonstrates the applicant's capability and knowledge required to meet this element;</li> <li>(2) Evidence showing adequate fault tolerance/monitoring systems planned with an appropriate level of monitoring and limited periodic review being performed;</li> <li>(3) Plans are consistent with the technical, operational, and financial approach described in the application; and</li> <li>(4) Demonstrates an adequate level of resources that are on hand,</li> </ol>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
							<p>committed or readily available to carry out this function.  <b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>
	43	<p>DNSSEC: Provide</p> <ul style="list-style-type: none"> <li>The registry's DNSSEC policy statement (DPS), which should include the policies and procedures the proposed registry will follow, for example, for signing the zone file, for verifying and accepting DS records from child domains, and for generating, exchanging, and storing keying material;</li> <li>Describe how the DNSSEC implementation will comply with relevant RFCs, including but not limited to: RFCs 4033, 4034, 4035, 5910, 4509, 4641, and 5155 (the latter will only be required if Hashed Authenticated Denial of Existence will be offered); and</li> <li>resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A complete answer is expected to be no more than 5 pages. Note, the DPS is required to be submitted as part of the application</p>	N		0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>(1) complete knowledge and understanding of this aspect of registry technical requirements, one of the five critical registry functions;</li> <li>(2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry;</li> <li>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and</li> <li>(4) an ability to comply with relevant RFCs.</li> </ol>	<p><b>1 - meets requirements:</b> Response includes</p> <ol style="list-style-type: none"> <li>(1) An adequate description of DNSSEC that substantially demonstrates the applicant's capability and knowledge required to meet this element;</li> <li>(2) Evidence that TLD zone files will be signed at time of launch, in compliance with required RFCs, and registry offers provisioning capabilities to accept public key material from registrants through the SRS ;</li> <li>(3) An adequate description of key management procedures in the proposed TLD, including providing secure encryption key management (generation, exchange, and storage);</li> <li>(4) Technical plan is consistent with the technical, operational, and financial approach as described in the application; and</li> <li>(5) Demonstrates an adequate level of resources that are already on hand, committed or readily available to carry out this function.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	44	<p><b>OPTIONAL.</b> IDNs:</p> <ul style="list-style-type: none"> <li>State whether the proposed registry will support the registration of IDN labels in the TLD, and if so, how. For example, explain which characters will be supported, and provide the associated IDN Tables with variant characters identified, along with a corresponding registration policy. This includes public interfaces to the databases such as Whois and EPP.</li> <li>Describe how the IDN implementation will comply with RFCs 5809-5893 as well as the ICANN IDN Guidelines at <a href="http://www.icann.org/en/topics/idn/implementation-guidelines.htm">http://www.icann.org/en/topics/idn/implementation-guidelines.htm</a>.</li> <li>Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</li> </ul> <p>A complete answer is expected to be no more than 10 pages plus attachments.</p>	N	<p>IDNs are an optional service at time of launch. Absence of IDN implementation or plans will not detract from an applicant's score. Applicants who respond to this question with plans for implementation of IDNs at time of launch will be scored according to the criteria indicated here.</p> <p>IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.</p>	0-1	<p>IDNs are an optional service. Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (3) consistency with the commitments made to registrants and the technical, operational, and financial approach described in the application; (4) issues regarding use of scripts are settled and IDN tables are complete and publicly available; and (5) ability to comply with relevant RFCs.</p>	<p><b>1 - meets requirements for this optional element:</b> Response includes</p> <ol style="list-style-type: none"> <li>Adequate description of IDN implementation that substantially demonstrates the applicant's capability and knowledge required to meet this element;</li> <li>An adequate description of the IDN procedures, including complete IDN tables, compliance with IDNA/IDN guidelines and RFCs, and periodic monitoring of IDN operations;</li> <li>Evidence of ability to resolve rendering and known IDN issues or spoofing attacks;</li> <li>IDN plans are consistent with the technical, operational, and financial approach as described in the application; and</li> <li>Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>
<p><b>Demonstration of Financial Capability</b></p>	45	<p>Financial Statements: provide</p> <ul style="list-style-type: none"> <li>audited or independently certified financial statements for the most recently completed fiscal year for the applicant, and</li> <li>audited or unaudited financial statements for the most recently ended interim financial period for the applicant for which this information may be released.</li> </ul> <p>For newly-formed applicants, or where financial statements are not audited, provide:</p> <ul style="list-style-type: none"> <li>the latest available unaudited financial statements; and</li> <li>an explanation as to why audited or independently certified financial statements are not available.</li> </ul> <p>At a minimum, the financial statements should be provided for the legal entity listed as the applicant.</p>	N	<p>The questions in this section (45-50) are intended to give applicants an opportunity to demonstrate their financial capabilities to run a registry.</p> <p>Supporting documentation for this question should be submitted in the original language.</p>	0-1	<p>Audited or independently certified financial statements are prepared in accordance with International Financial Reporting Standards (IFRS) adopted by the International Accounting Standards Board (IASB) or nationally recognized accounting standards (e.g., GAAP). This will include a balance sheet and income statement reflecting the applicant's financial position and results of operations, a statement of shareholders equity/partner capital, and a cash flow statement. In the event the applicant is an entity newly formed for the purpose of applying for a gTLD and with little to no operating history</p>	<p><b>1 - meets requirements:</b> Complete audited or independently certified financial statements are provided, at the highest level available in the applicant's jurisdiction. Where such audited or independently certified financial statements are not available, such as for newly-formed entities, the applicant has provided an explanation and has provided, at a minimum, unaudited financial statements.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>Financial statements are used in the analysis of projections and costs.</p> <p>A complete answer should include:</p> <ul style="list-style-type: none"> <li>• balance sheet;</li> <li>• income statement;</li> <li>• statement of shareholders equity/partner capital;</li> <li>• cash flow statement, and</li> <li>• letter of auditor or independent certification, if applicable.</li> </ul>				(less than one year), the applicant must submit, at a minimum, pro forma financial statements including all components listed in the question. Where audited or independently certified financial statements are not available, applicant has provided an adequate explanation as to the accounting practices in its jurisdiction and has provided, at a minimum, unaudited financial statements.	
	46	<p>Projections Template: provide financial projections for costs and funding using Template 1, Most Likely Scenario (attached).</p> <p>Note, if certain services are outsourced, reflect this in the relevant cost section of the template.</p> <p>The template is intended to provide commonality among TLD applications and thereby facilitate the evaluation process.</p> <p>A complete answer is expected to be no more than 10 pages in addition to the template.</p>	N		0-1	<p>Applicant has provided a thorough model that demonstrates a sustainable business (even if break-even is not achieved through the first three years of operation).</p> <p>Applicant's description of projections development is sufficient to show due diligence.</p>	<p><b>1 - meets requirements:</b></p> <ol style="list-style-type: none"> <li>(1) Financial projections adequately describe the cost, funding and risks for the application</li> <li>(2) Demonstrates resources and plan for sustainable operations; and</li> <li>(3) Financial assumptions about the registry operations, funding and market are identified, explained, and supported.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all of the requirements to score a 1.</p>
	47	<p>Costs and capital expenditures: in conjunction with the financial projections template, describe and explain:</p> <ul style="list-style-type: none"> <li>• the expected operating costs and capital expenditures of setting up and operating the proposed registry;</li> <li>• any functions to be outsourced, as indicated in the cost section of the template, and the reasons for outsourcing;</li> <li>• any significant variances between years in any category of expected costs; and</li> <li>• a description of the basis / key assumptions including rationale for the costs provided in the projections template. This may include an</li> </ul>	N	This question is based on the template submitted in question 46.	0-2	<p>Costs identified are consistent with the proposed registry services, adequately fund technical requirements, and are consistent with proposed mission/purpose of the registry. Costs projected are reasonable for a registry of size and scope described in the application. Costs identified include the funding costs (interest expenses and fees) related to the continued operations instrument described in Question 50 below.</p>	<p><b>2 - exceeds requirements:</b> Response meets all of the attributes for a score of 1 and:</p> <ol style="list-style-type: none"> <li>(1) Estimated costs and assumptions are conservative and consistent with an operation of the registry volume/scope/size as described by the applicant;</li> <li>(2) Estimates are derived from actual examples of previous or existing registry operations or equivalent; and</li> <li>(3) Conservative estimates are based on those experiences and describe a range of anticipated costs and use the high end of those estimates.</li> </ol>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made.</p> <p>As described in the Applicant Guidebook, the information provided will be considered in light of the entire application and the evaluation criteria. Therefore, this answer should agree with the information provided in Template 1 to: 1) maintain registry operations, 2) provide registry services described above, and 3) satisfy the technical requirements described in the Demonstration of Technical &amp; Operational Capability section. Costs should include both fixed and variable costs.</p> <p>To be eligible for a score of two points, answers must demonstrate a conservative estimate of costs based on actual examples of previous or existing registry operations with similar approach and projections for growth and costs or equivalent. Attach reference material for such examples.</p> <p>A complete answer is expected to be no more than 10 pages.</p>				<p>Key assumptions and their rationale are clearly described and may include, but are not limited to:</p> <ul style="list-style-type: none"> <li>• Key components of capital expenditures;</li> <li>• Key components of operating costs, unit operating costs, headcount, number of technical/operating/equipment units, marketing, and other costs; and</li> <li>• Costs of outsourcing, if any.</li> </ul>	<p><b>1 - meets requirements:</b></p> <ol style="list-style-type: none"> <li>(1) Cost elements are reasonable and complete (i.e., cover all of the aspects of registry operations: registry services, technical requirements and other aspects as described by the applicant);</li> <li>(2) Estimated costs and assumptions are consistent and defensible with an operation of the registry volume/scope/size as described by the applicant; and</li> <li>(3) Projections are reasonably aligned with the historical financial statements provided in Question 45.</li> </ol> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>
		<p>(b) Describe anticipated ranges in projected costs. Describe factors that affect those ranges.</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N				
	48	<p>(a) Funding and Revenue: Funding can be derived from several sources (e.g., existing capital or proceeds/revenue from operation of the proposed registry).</p> <p>Describe:</p> <ol style="list-style-type: none"> <li>I) How existing funds will provide resources for both: a) start-up of operations, and b) ongoing operations;</li> <li>II) the revenue model including projections for transaction volumes and price (if the applicant does not intend to rely on registration revenue in order to cover the costs of the registry's</li> </ol>	N	Supporting documentation for this question should be submitted in the original language.	0-2	<p>Funding resources are clearly identified and adequately provide for registry cost projections. Sources of capital funding are clearly identified, held apart from other potential uses of those funds and available. The plan for transition of funding sources from available capital to revenue from operations (if applicable) is described.</p>	<p><b>2 - exceeds requirements:</b> Response meets all the attributes for a score of 1 and</p> <ol style="list-style-type: none"> <li>(1) Existing funds (specifically all funds required for start-up) are quantified, on hand, segregated in an account available only to the applicant for purposes of the application only. ;</li> <li>(2) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is segregated and</li> </ol>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>operation, it must clarify how the funding for the operation will be developed and maintained in a stable and sustainable manner);</p> <p>III) outside sources of funding (the applicant must, where applicable, provide evidence of the commitment by the party committing the funds). Secured vs unsecured funding should be clearly identified, including associated sources of funding (i.e., different types of funding, level and type of security/collateral, and key items) for each type of funding;</p> <p>IV) Any significant variances between years in any category of funding and revenue; and</p> <p>V) A description of the basis / key assumptions including rationale for the funding and revenue provided in the projections template. This may include an executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made; and</p> <p>VI) Assurances that funding and revenue projections cited in this application are consistent with other public and private claims made to promote the business and generate support. To be eligible for a score of 2 points, answers must demonstrate:</p> <p>I) A conservative estimate of funding and revenue; and</p> <p>II) Ongoing operations that are not dependent on projected revenue.</p> <p>A complete answer is expected to be no more than 10 pages.</p>				<p>Outside sources of funding are documented and verified. Examples of evidence for funding sources include, but are not limited to:</p> <ul style="list-style-type: none"> <li>• Executed funding agreements;</li> <li>• A letter of credit;</li> <li>• A commitment letter; or</li> <li>• A bank statement.</li> </ul> <p>Funding commitments may be conditional on the approval of the application. Sources of capital funding required to sustain registry operations on an on-going basis are identified. The projected revenues are consistent with the size and projected penetration of the target markets.</p> <p>Key assumptions and their rationale are clearly described and address, at a minimum:</p> <ul style="list-style-type: none"> <li>• Key components of the funding plan and their key terms; and</li> <li>• Price and number of registrations.</li> </ul>	<p>earmarked for this purpose only in an amount adequate for three years operation;</p> <p>(3) If ongoing operations are to be at least partially resourced from revenues, assumptions made are conservative and take into consideration studies, reference data, or other steps taken to develop the response and validate any assumptions made; and</p> <p>(4) Cash flow models are prepared which link funding and revenue assumptions to projected actual business activity.</p> <p><b>1 - meets requirements:</b></p> <p>(1) Assurances provided that materials provided to investors and/or lenders are consistent with the projections and assumptions included in the projections templates;</p> <p>(2) Existing funds (specifically all funds required for start-up) are quantified, committed, identified as available to the applicant;</p> <p>(3) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is quantified and its sources identified in an amount adequate for three years operation;</p> <p>(4) If ongoing operations are to be at least partially resourced from revenues, assumptions made are reasonable and are directly related to projected business volumes, market size and penetration; and</p> <p>(5) Projections are reasonably aligned with the historical financial statements provided in Question 45.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>



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		<p>(b) Describe anticipated ranges in projected funding and revenue. Describe factors that affect those ranges.</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N				
	49	<p>(a) Contingency Planning: describe your contingency planning:</p> <ul style="list-style-type: none"> <li>• Identify any projected barriers/risks to implementation of the business approach described in the application and how they affect cost, funding, revenue, or timeline in your planning;</li> <li>• Identify the impact of any particular regulation, law or policy that might impact the Registry Services offering; and</li> <li>• Describe the measures to mitigate the key risks as described in this question.</li> </ul> <p>A complete answer should include, for each contingency, a clear description of the impact to projected revenue, funding, and costs for the 3-year period presented in Template 1 (Most Likely Scenario).</p> <p>To be eligible for a score of 2 points, answers must demonstrate that action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur.</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N		0-2	<p>Contingencies and risks are identified, quantified, and included in the cost, revenue, and funding analyses. Action plans are identified in the event contingencies occur. The model is resilient in the event those contingencies occur. Responses address the probability and resource impact of the contingencies identified.</p>	<p><b>2 - exceeds requirements:</b> Response meets all attributes for a score of 1 and:</p> <p>(1) Action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur.</p> <p><b>1 - meets requirements:</b></p> <p>(1) Model adequately identifies the key risks (including operational, business, legal, jurisdictional, financial, and other relevant risks);</p> <p>(2) Response gives consideration to probability and resource impact of contingencies identified; and</p> <p>(3) If resources are not available to fund contingencies in the existing plan, funding sources and a plan for obtaining them are identified.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>
		<p>(b) Describe your contingency planning where funding sources are so significantly reduced that material deviations from the implementation model are required. In particular, describe:</p> <ul style="list-style-type: none"> <li>• how on-going technical requirements will be met; and</li> <li>• what alternative funding can be reasonably raised at a later time.</li> </ul> <p>Provide an explanation if you do not believe there is any chance of reduced funding.</p>	N				

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		<p>Complete a financial projections template (Template 2, Worst Case Scenario)</p> <p>A complete answer is expected to be no more than 10 pages, in addition to the template.</p>					
		<p>(c) Describe your contingency planning where activity volumes so significantly exceed the high projections that material deviation from the implementation model are required. In particular, how will on-going technical requirements be met?</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N				
	50	<p>(a) Provide a cost estimate for funding critical registry functions on an annual basis, and a rationale for these cost estimates commensurate with the technical, operational, and financial approach described in the application.</p> <p>The critical functions of a registry which must be supported even if an applicant's business and/or funding fails are:</p> <p>(1) DNS resolution for registered domain names</p> <p>Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.</p> <p>(2) Operation of the Shared Registration System</p> <p>Applicants should consider ranges of volume of daily EPP transactions (e.g., 0-200K, 200K-2M, 2M+), the incremental costs associated with</p>	N	<p>Registrant protection is critical and thus new gTLD applicants are requested to provide evidence indicating that the critical functions will continue to be performed even if the registry fails. Registrant needs are best protected by a clear demonstration that the basic registry functions are sustained for an extended period even in the face of registry failure. Therefore, this section is weighted heavily as a clear, objective measure to protect and serve registrants.</p> <p>The applicant has two tasks associated with adequately making this demonstration of continuity for critical registry functions. First, costs for maintaining critical registrant protection functions are to be estimated (Part a). In evaluating the application, the evaluators will adjudge whether the estimate is reasonable given the systems architecture and overall business approach described elsewhere in the application.</p> <p>The Continuing Operations Instrument (COI) is invoked by ICANN if necessary to pay for an Emergency Back End Registry Operator (EBERO) to maintain the five critical registry functions for a period of three to five years. Thus, the cost estimates are tied to the cost for a third party to provide the functions, not</p>	0-3	<p>Figures provided are based on an accurate estimate of costs. Documented evidence or detailed plan for ability to fund on-going critical registry functions for registrants for a period of three years in the event of registry failure, default or until a successor operator can be designated. Evidence of financial wherewithal to fund this requirement prior to delegation. This requirement must be met prior to or concurrent with the execution of the Registry Agreement.</p>	<p><b>3 - exceeds requirements:</b> Response meets all the attributes for a score of 1 and:</p> <p>(1) Financial instrument is secured and in place to provide for on-going operations for at least three years in the event of failure.</p> <p><b>1 - meets requirements:</b></p> <p>(1) Costs are commensurate with technical, operational, and financial approach as described in the application; and</p> <p>(2) Funding is identified and instrument is described to provide for on-going operations of at least three years in the event of failure.</p> <p><b>0 - fails requirements:</b> Does not meet all the requirements to score a 1.</p>

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		<p>increasing levels of such queries, and the ability to meet SLA performance metrics.</p> <p>(3) Provision of Whois service</p> <p>Applicants should consider ranges of volume of daily Whois queries (e.g., 0-100K, 100K-1M, 1M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics for both web-based and port-43 services.</p> <p>(4) Registry data escrow deposits</p> <p>Applicants should consider administration, retention, and transfer fees as well as daily deposit (e.g., full or incremental) handling. Costs may vary depending on the size of the files in escrow (i.e., the size of the registry database).</p> <p>(5) Maintenance of a properly signed zone in accordance with DNSSEC requirements.</p> <p>Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.</p> <p>List the estimated annual cost for each of these functions (specify currency used).</p> <p>A complete answer is expected to be no more than 10 pages.</p>		<p>to the applicant's actual in-house or subcontracting costs for provision of these functions.</p> <p>Refer to guidelines at <a href="http://www.icann.org/en/announcements/announcement-3-23dec11-en.htm">http://www.icann.org/en/announcements/announcement-3-23dec11-en.htm</a> regarding estimation of costs. However, the applicant must provide its own estimates and explanation in response to this question.</p>			
		<p>(b) Applicants must provide evidence as to how the funds required for performing these critical registry functions will be available and guaranteed to fund registry operations (for the protection of registrants in the new gTLD) for a</p>	N	<p>Second (Part b), methods of securing the funds required to perform those functions for at least three years are to be described by the applicant in accordance with the criteria below. Two types of instruments will fulfill</p>			

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		<p>minimum of three years following the termination of the Registry Agreement. ICANN has identified two methods to fulfill this requirement:</p> <p><u>(i) Irrevocable standby letter of credit</u> (LOC) issued by a reputable financial institution.</p> <ul style="list-style-type: none"> <li>• The amount of the LOC must be equal to or greater than the amount required to fund the registry operations specified above for at least three years. In the event of a draw upon the letter of credit, the actual payout would be tied to the cost of running those functions.</li> <li>• The LOC must name ICANN or its designee as the beneficiary. Any funds paid out would be provided to the designee who is operating the required registry functions.</li> <li>• The LOC must have a term of at least five years from the delegation of the TLD. The LOC may be structured with an annual expiration date if it contains an evergreen provision providing for annual extensions, without amendment, for an indefinite number of periods until the issuing bank informs the beneficiary of its final expiration or until the beneficiary releases the LOC as evidenced in writing. If the expiration date occurs prior to the fifth anniversary of the delegation of the TLD, applicant will be required to obtain a replacement instrument.</li> <li>• The LOC must be issued by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated).</li> <li>• The LOC will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee.</li> <li>• Applicant should attach an original copy of the executed letter of credit or a draft of the letter of credit containing the full terms and conditions. If not yet executed, the Applicant will be required to provide ICANN with an original copy of the executed LOC prior to or concurrent with the execution of the Registry Agreement.</li> <li>• The LOC must contain at least the following required elements: <ul style="list-style-type: none"> <li>○ Issuing bank and date of issue.</li> <li>○ Beneficiary: ICANN / 4676 Admiralty</li> </ul> </li> </ul>		<p>this requirement. The applicant must identify which of the two methods is being described. The instrument is required to be in place at the time of the execution of the Registry Agreement.</p> <p>Financial Institution Ratings: The instrument must be issued or held by a financial institution with a rating beginning with "A" (or the equivalent) by any of the following rating agencies: A.M. Best, Dominion Bond Rating Service, Egan-Jones, Fitch Ratings, Kroll Bond Rating Agency, Moody's, Morningstar, Standard &amp; Poor's, and Japan Credit Rating Agency.</p> <p>If an applicant cannot access a financial institution with a rating beginning with "A," but a branch or subsidiary of such an institution exists in the jurisdiction of the applying entity, then the instrument may be issued by the branch or subsidiary or by a local financial institution with an equivalent or higher rating to the branch or subsidiary.</p> <p>If an applicant cannot access any such financial institutions, the instrument may be issued by the highest-rated financial institution in the national jurisdiction of the applying entity, if accepted by ICANN.</p> <p>Execution by ICANN: For any financial instruments that contemplate ICANN being a party, upon the written request of the applicant, ICANN may (but is not obligated to) execute such agreement prior to submission of the applicant's application if the agreement is on terms acceptable to ICANN. ICANN encourages applicants to deliver a written copy of any such agreement (only if it requires ICANN's signature) to ICANN as soon as possible to facilitate ICANN's review. If the financial instrument requires ICANN's signature, then the applicant will receive 3 points for question 50 (for the instrument being "secured and in place") only if ICANN executes the agreement prior to submission of the application. ICANN will determine, in</p>			

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		<p>Way, Suite 330 / Marina del Rey, CA 90292 / US, or its designee.</p> <ul style="list-style-type: none"> <li>o Applicant's complete name and address.</li> <li>o LOC identifying number.</li> <li>o Exact amount in USD.</li> <li>o Expiry date.</li> <li>o Address, procedure, and required forms whereby presentation for payment is to be made.</li> <li>o Conditions: <ul style="list-style-type: none"> <li>▪ Partial drawings from the letter of credit may be made provided that such payment shall reduce the amount under the standby letter of credit.</li> <li>▪ All payments must be marked with the issuing bank name and the bank's standby letter of credit number.</li> <li>▪ LOC may not be modified, amended, or amplified by reference to any other document, agreement, or instrument.</li> <li>▪ The LOC is subject to the International Standby Practices (ISP 98) International Chamber of Commerce (Publication No. 590), or to an alternative standard that has been demonstrated to be reasonably equivalent.</li> </ul> </li> </ul> <p>(ii) A <u>deposit into an irrevocable cash escrow account</u> held by a reputable financial institution.</p> <ul style="list-style-type: none"> <li>• The amount of the deposit must be equal to or greater than the amount required to fund registry operations for at least three years.</li> <li>• Cash is to be held by a third party financial institution which will not allow the funds to be commingled with the Applicant's operating funds or other funds and may only be accessed by ICANN or its designee if certain conditions are met.</li> <li>• The account must be held by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated).</li> <li>• The escrow agreement relating to the escrow account will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee.</li> <li>• The escrow agreement must have a term</li> </ul>		<p>its sole discretion, whether to execute and become a party to a financial instrument.</p> <p>The financial instrument should be submitted in the original language.</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>of five years from the delegation of the TLD.</p> <ul style="list-style-type: none"> <li>• The funds in the deposit escrow account are not considered to be an asset of ICANN.</li> <li>• Any interest earnings less bank fees are to accrue to the deposit, and will be paid back to the applicant upon liquidation of the account to the extent not used to pay the costs and expenses of maintaining the escrow.</li> <li>• The deposit plus accrued interest, less any bank fees in respect of the escrow, is to be returned to the applicant if the funds are not used to fund registry functions due to a triggering event or after five years, whichever is greater.</li> <li>• The Applicant will be required to provide ICANN an explanation as to the amount of the deposit, the institution that will hold the deposit, and the escrow agreement for the account at the time of submitting an application.</li> <li>• Applicant should attach evidence of deposited funds in the escrow account, or evidence of provisional arrangement for deposit of funds. Evidence of deposited funds and terms of escrow agreement must be provided to ICANN prior to or concurrent with the execution of the Registry Agreement.</li> </ul>					

## Instructions: TLD Applicant – Financial Projections

The application process requires the applicant to submit two cash basis Financial Projections.

The first projection (Template 1) should show the Financial Projections associated with the Most Likely scenario expected. This projection should include the forecasted registration volume, registration fee, and all costs and capital expenditures expected during the start-up period and during the first three years of operations. Template 1 relates to Question 46 (Projections Template) in the application.

We also ask that applicants show as a separate projection (Template 2) the Financial Projections associated with a realistic Worst Case scenario. Template 2 relates to Question 49 (Contingency Planning) in the application.

For each Projection prepared, please include Comments and Notes on the bottom of the projection (in the area provided) to provide those reviewing these projections with information regarding:

1. Assumptions used, significant variances in Operating Cash Flows and Capital Expenditures from year-to-year;
2. How you plan to fund operations;
3. Contingency planning

As you complete Template 1 and Template 2, please reference data points and/or formulas used in your calculations (where appropriate).

## Section I – Projected Cash inflows and outflows

### Projected Cash Inflows

**Lines A and B.** Provide the number of forecasted registrations and the registration fee for years 1, 2, and 3. Leave the *Start-up* column blank. The start-up period is for cash costs and capital expenditures only; there should be no cash projections input to this column.

**Line C.** Multiply lines A and B to arrive at the *Registration Cash Inflow* for line C.

**Line D.** Provide projected cash inflows from any other revenue source for years 1, 2, and 3. For any figures provided on line D, please disclose the source in the *Comments/Notes* box of Section I. Note, do not include funding in Line D as that is covered in Section VI.

**Line E.** Add lines C and D to arrive at the total cash inflow.

### Projected Operating Cash Outflows

**Start up costs** - For all line items (F thru L) Please describe the total period of time this start-up cost is expected to cover in the *Comments/Notes* box.

**Line F.** Provide the projected labor costs for marketing, customer support, and technical support for start-up, year 1, year 2, and year 3. Note, other labor costs should be put in line *L (Other Costs)* and specify the type of labor and associated projected costs in the *Comments/Notes* box of this section.

**Line G.** *Marketing Costs* represent the amount spent on advertising, promotions, and other marketing activities. This amount should not include labor costs included in Marketing Labor (line *F*).

**Lines H through K.** Provide projected costs for facilities, G&A, interests and taxes, and Outsourcing for start-up as well as for years 1, 2, and 3. Be sure to list the type of activities that are being outsourced. You may combine certain activities from the same provider as long as an appropriate description of the services being combined is listed in the *Comments/Notes* box.

**Line L.** Provide any other projected operating costs for start-up, year 1, year 2, year 3. Be sure to specify the type of cost in the *Comments/Notes* box.

**Line M.** Add lines *F* through *L* to arrive at the total costs for line *M*.

**Line N.** Subtract line *E* from line *M* to arrive at the projected net operation number for line *N*.

## **Section IIa – Breakout of Fixed and Variable Operating Cash Outflows**

**Line A.** Provide the projected variable operating cash outflows including labor and other costs that are not fixed in nature. Variable operating cash outflows are expenditures that fluctuate in relationship with increases or decreases in production or level of operations.

**Line B.** Provide the projected fixed operating cash outflows. Fixed operating cash outflows are expenditures that do not generally fluctuate in relationship with increases or decreases in production or level of operations. Such costs are generally necessary to be incurred in order to operate the base line operations of the organization or are expected to be incurred based on contractual commitments.

**Line C –** Add lines *A* and *B* to arrive at total Fixed and Variable Operating Cash Outflows for line *C*. This must equal Total Operating Cash Outflows from Section I, Line *M*.

## **Section IIb – Breakout of Critical Registry Function Operating Cash Outflows**

**Lines A – E.** Provide the projected cash outflows for the five critical registry functions. If these functions are outsourced, the component of the outsourcing fee representing these functions must be separately identified and provided. These costs are based on the applicant's cost to manage these functions and should be calculated separately from the Continued Operations Instrument (COI) for Question 50.

**Line F.** If there are other critical registry functions based on the applicant's registry business model then the projected cash outflow for this function must be provided with a description added to the *Comment/Notes* box. This projected cash outflow may also be included in the 3-year reserve.

**Line G.** Add lines *A* through *F* to arrive at the Total Critical Registry Function Cash Outflows.



### Section III – Projected Capital Expenditures

**Lines A through C.** Provide projected hardware, software, and furniture & equipment capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

**Line D.** Provide any projected capital expenditures as a result of outsourcing. This should be included for start-up and years 1, 2, and 3. Specify the type of expenditure and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section III.

**Line E** – Please describe “other” capital expenditures in the *Comments/Notes* box.

**Line F.** Add lines A through E to arrive at the Total Capital Expenditures.

### Section IV – Projected Assets & Liabilities

**Lines A through C.** Provide projected cash, account receivables, and other current assets for start-up as well as for years 1, 2, and 3. For *Other Current Assets*, specify the type of asset and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

**Line D.** Add lines A, B, C to arrive at the Total Current Assets.

**Lines E through G.** Provide projected accounts payable, short-term debt, and other current liabilities for start-up as well as for years 1, 2, and 3. For *Other Current Liabilities*, specify the type of liability and describe the total period of time the start-up up cost is expected to cover in the *Comments/Notes* box.

**Line H.** Ad lines E through G to arrive at the total current liabilities.

**Lines I through K.** Provide the projected fixed assets (PP&E), the 3-year reserve, and long-term assets for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

**Line L.** Ad lines I through K to arrive at the total long-term assets.

**Line M.** Provide the projected long-term debt for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box

### Section V – Projected Cash Flow

Cash flow is driven by *Projected Net Operations* (Section I), *Projected Capital Expenditures* (Section III), and *Projected Assets & Liabilities* (Section IV).

**Line A.** Provide the projected net operating cash flows for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

**Line B.** Provide the projected capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section V.

**Lines C through F.** Provide the projected change in non-cash current assets, total current liabilities, debt adjustments, and other adjustments for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

**Line G.** Add lines A through F to arrive at the projected net cash flow for line H.

## **Section VI – Sources of Funds**

**Lines A & B.** Provide projected funds from debt and equity at start-up. Describe the sources of debt and equity funding as well as the total period of time the start-up is expected to cover in the *Comments/Notes* box. Please also provide evidence the funding (e.g., letter of commitment).

**Line C.** Add lines A and B to arrive at the total sources of funds for line C.

## **General Comments – Regarding Assumptions Used, Significant Variances Between Years, etc.**

Provide explanations for any significant variances between years (or expected in years beyond the timeframe of the template) in any category of costing or funding.

## **General Comments – Regarding how the Applicant Plans to Fund Operations**

Provide general comments explaining how you will fund operations. Funding should be explained in detail in response to question 48.

## **General Comments – Regarding Contingencies**

Provide general comments to describe your contingency planning. Contingency planning should be explained in detail in response to question 49.

TLD Applicant -- Financial Projections Sample					Comments / Notes	
In local currency (unless noted otherwise)					Live / Operational	
Sec.	Reference / Formula	Start-up Costs	Year 1	Year 2	Year 3	Pov de name of local currency used.
<b>Projected Cash Inflows and Outflows</b>						
A) Forecasted registration volume			62,000	81,600	105,180	Reg st at on was fo ecased based on recent market surveys with which we have attached and discussed below.
B) Registration fee		\$ -	\$ 5.00	\$ 5.50	\$ 6.05	We do not anticipate significant increases in Reg st at on Fees subsequent to year 3.
C) Registration cash inflows	A * B	-	310,000	448,800	636,139	Other cash inflows represent advertising revenues expected from display ads on our website.
D) Other cash inflows		-	35,000	48,000	62,000	
E) Total Cash Inflows		-	345,000	496,800	698,139	
<b>Projected Operating Cash Outflows</b>						
F) Labor						Costs are for the detail and explanation response to question 47.
G) Marketing Labor		25,000	66,000	72,000	81,000	
H) Customer Support Labor		5,000	68,000	71,000	74,000	
I) Technical Labor		32,000	45,000	47,000	49,000	
J) Marketing		40,000	44,000	26,400	31,600	
K) Facilities		7,000	10,000	12,000	14,400	
L) General & Administrative		14,000	112,000	122,500	136,000	
M) Interest and Taxes		27,500	29,000	29,800	30,760	
N) Outsourcing Operating Costs, if any (list the type of activities being outsourced)						Provide a list and associated cost for each outsourced function.
O) Not site maintenance		9,000	7,500	7,500	7,500	Outsource to host to ABC Company, cost based on number of servers hosted and customer support.
P) Partial Registry Functions		32,000	37,500	41,000	43,000	Outsource certain registry and other functions to ABC registry (applicant should list outsource and functions). Costs for each year are based on expected domain under management.
Q) (if type of activity being outsourced)		-	-	-	-	
R) (if type of activity being outsourced)		-	-	-	-	
S) (if type of activity being outsourced)		-	-	-	-	
T) (if type of activity being outsourced)		-	-	-	-	
U) Other Operating Costs		12,200	18,000	21,600	25,200	
V) Total Operating Cash Outflows		199,700	437,000	450,800	493,260	
W) Projected Net Operating Cash Flow	E - M	(199,700)	(92,000)	46,000	205,079	
<b>Break out of Fixed and Variable Operating Cash Outflows</b>						
A) Total Variable Operating Costs		92,000	195,250	198,930	217,416	Variable Costs - Staffing equals all labor plus 70% of marketing. - Year 1 through 3 equal 75% of all labor plus 50% of Marketing and 30% of G&A and Other Operating Costs. Fixed Costs equals Total Costs less Variable Costs.
B) Total Fixed Operating Costs		107,700	241,750	251,870	275,844	
C) Total Operating Cash Outflows	= Sec. H) M CHECK	199,700	437,000	450,800	493,260	Check that H) equals I) N.
<b>Break out of Critical Registry Function Operating Cash Outflows</b>						
A) Operation of SRS			5,000	5,500	6,050	Commissureate with Question 24
B) Provision of Whois			6,000	6,600	7,260	Commissureate with Question 26
C) DNS Resolution for Registered Domain Names			7,000	7,700	8,470	Commissureate with Question 35
D) Registry Data Escrow			8,000	8,800	9,680	Commissureate with Question 38
E) Maintenance of Zone in accordance with DNSSEC			9,000	9,900	10,890	Commissureate with Question 43
F) Other						
G) Total Critical Function Cash Outflows			35,000	38,500	42,350	
<b>Projected Capital Expenditures</b>						
A) Hardware		98,000	21,000	16,000	58,000	Hardware & Software have a useful life of 3 years
B) Software		32,000	18,000	24,000	11,000	Future equipment have a useful life of 5 years
C) Furniture & Other Equipment		43,000	22,000	14,000	16,000	
D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)						List and describe each identifiable type of outsource.
E) (i)		-	-	-	-	List and describe each identifiable type of outsource.
F) (ii)		-	-	-	-	List and describe each identifiable type of outsource.
G) (iv)		-	-	-	-	List and describe each identifiable type of outsource.
H) (v)		-	-	-	-	List and describe each identifiable type of outsource.
I) (vi)		-	-	-	-	List and describe each identifiable type of outsource.
J) (vii)		-	-	-	-	List and describe each identifiable type of outsource.
K) Other Capital Expenditures						
L) Total Capital Expenditures		173,000	61,000	54,000	85,000	
<b>Projected Assets &amp; Liabilities</b>						
A) Cash		668,300	474,300	413,300	471,679	
B) Accounts receivable			70,000	108,000	160,000	
C) Other current assets			40,000	60,000	80,000	
D) Total Current Assets		668,300	584,300	579,300	711,679	
E) Accounts payable		41,000	110,000	113,000	125,300	
F) Short-term Debt						
G) Other Current Liabilities		41,000	110,000	113,000	125,300	
H) Total Current Liabilities		41,000	110,000	113,000	125,300	
I) Total Property, Plant & Equipment (PP&E)	= Sec III) F cumulative Prior Years - Cur Yr	173,000	234,000	288,000	373,000	
J) 3-year Reserve		186,000	186,000	186,000	186,000	Should equal amount calculated for Question 50
K) Other Long-term Assets		359,000	420,000	474,000	559,000	
L) Total Long-term Assets		359,000	420,000	474,000	559,000	
M) Total Long-term Debt		1,000,000	1,000,000	1,000,000	1,000,000	Principal payments on the line of credit with XYZ Bank will not be incurred until Year 5. Interest will be paid as incurred and is reflected in Sec. I).
<b>Projected Cash Flow (excl. 3-year Reserve)</b>						
A) Net operating cash flows	= Sec. G) N	(199,700)	(92,000)	46,000	205,079	
B) Capital expenditures	= Sec. H) FE	(173,000)	(61,000)	(54,000)	(85,000)	
C) Change in Non-Cash Current Assets	= Sec. IV) (B) C) Prior Yr - Cur Yr	n/a	(110,000)	(56,000)	(74,000)	
D) Change in Total Current Liabilities	= Sec. IV) H) Cur Yr - Prior Yr	41,000	69,000	3,000	12,300	The \$41k in Start-up Costs represents an offset of the Accounts Payable reflected in the Projected balance sheet. Subsequent years are based on changes in Current Liabilities where P.O. Year is subtracted from the Current year.
E) Debt Adjustments	= Sec IV) F and M Cur Yr - Prior Yr	n/a	-	-	-	
F) Other Adjustments						
G) Projected Net Cash Flow		(331,700)	(194,000)	(61,000)	58,379	
<b>Sources of funds</b>						
A) Debt						See below for comments on funding. Revenues are for the detail and explanation response to question 48.
B) Contingent and/or committed but not yet on-hand						
C) Equity						
D) On-hand at time of application		1,000,000				
E) Contingent and/or committed but not yet on-hand						
F) Total Sources of Funds		1,000,000				
<b>General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.)</b>						
We expect the number of registrations to grow at approximately 30% per year with an increase in the registration fee of \$1 per year for the first three years. These volume assumptions are based on the attached market data and published benchmarks regarding growth. Fee assumptions are aligned with the growth plan and anticipated demand based on the registration volume. We anticipate costs will increase at a controlled pace over the first three years except for marketing costs which will be higher in the start-up and first year as we establish our brand and name and work to increase registrations. Operating costs are supported by the attached benchmark report for a basket of similar registries and (a) a build-up of costs based on our operations. Our capital expenditures will be entered in the start-up phase and then our need to invest in compute hardware and software will level off after the start-up period. Capital expenses are based on cost of assets and discuss held with vendors. We have included and deferred the hardware costs to support the test market. Our investment in furniture and equipment will be entered in the start-up period as we build our infrastructure and then decrease in the following periods. Start-up: Our start-up phase is anticipated to complete [X] months in line with benchmark growth curves indicated by prior start-ups and published market data. Our assumptions were derived from the attached support.						
<b>Comments regarding how the Applicant plans to fund operations</b>						
We have recently negotiated a line of credit with XYZ Bank (a copy of the fully executed line of credit agreement has been included with this funding request) to allow us to incur necessary equipment and pay for employees and other operating costs during the start-up period and thereafter for the first year of operations. We expect that our business operations will be self-funded (i.e., revenues from operations will cover all anticipated costs and capital expenditures) by the second half of our second year of operations and we also expect to become profitable within the first cash flow year thereafter.						
<b>General Comments regarding contingencies</b>						
Although we expect to be cash flow positive by the end of year 2, the recently negotiated line of credit will cover our operating costs for the first 4 years of operations if necessary. We have also entered into an agreement with XYZ Co. to assume our registration business model not have the ability to sustain itself in a future year. An agreement with XYZ Co. has been included with our application. A full description of risks and a range of potential outcomes and impacts are included in our responses to Question 49. These responses have quantified the impacts of certain probabilities and our negotiated funding and action plans as shown, a adequate to fund our operations. We do not have a contingency plan.						

Template 1 - Financial Projections: Most Likely						Comments / Notes
In local currency (unless noted otherwise)						Provide name of local currency used.
Sec.	Reference / Formula	Start-up Costs	Live / Operational			
			Year 1	Year 2	Year 3	
<b>I) Projected Cash inflows and outflows</b>						
A)	Forecasted registration volume					
B)	Registration fee					
C)	Registration cash inflows					
D)	Other cash inflows					
	E) Total Cash Inflows					
<b>Projected Operating Cash Outflows</b>						
F) Labor:						
i)	Marketing Labor					
ii)	Customer Support Labor					
iii)	Technical Labor					
G)	Marketing					
H)	Facilities					
I)	General & Administrative					
J)	Interest and Taxes					
K)	Outsourcing Operating Costs, if any (list the type of activities being outsourced):					
i)	(list type of activities being outsourced)					
ii)	(list type of activities being outsourced)					
iii)	(list type of activities being outsourced)					
iv)	(list type of activities being outsourced)					
v)	(list type of activities being outsourced)					
vi)	(list type of activities being outsourced)					
L)	Other Operating costs					
	M) Total Operating Cash Outflows					
	N) Projected Net Operating Cash flow					
<b>IIa) Break out of Fixed and Variable Operating Cash Outflows</b>						
A)	Total Variable Operating Costs					
B)	Total Fixed Operating Costs					
	C) Total Operating Cash Outflows					
		CHECK				
<b>IIb) Break out of Critical Function Operating Cash Outflows</b>						
A)	Operation of SRS					
B)	Provision of Whois					
C)	DNS Resolution for Registered Domain Names					
D)	Registry Data Escrow					
E)	Maintenance of Zone in accordance with DNSSEC					
	G) Total Critical Registry Function Cash Outflows					
	H) 3-year Total					
<b>III) Projected Capital Expenditures</b>						
A)	Hardware					
B)	Software					
C)	Furniture & Other Equipment					
D)	Outsourcing Capital Expenditures, if any (list the type of capital expenditures)					
i)						
ii)						
iii)						
iv)						
v)						
vi)						
E)	Other Capital Expenditures					
	F) Total Capital Expenditures					
<b>IV) Projected Assets &amp; Liabilities</b>						
A) Cash						
B) Accounts receivable						
C) Other current assets						
	D) Total Current Assets					
E) Accounts payable						
F) Short-term Debt						
G) Other Current Liabilities						
	H) Total Current Liabilities					
I) Total Property, Plant & Equipment (PP&E)						
J) 3-year Reserve						
K) Other Long-term Assets						
	L) Total Long-term Assets					
M) Total Long-term Debt						
<b>V) Projected Cash flow (excl. 3-year Reserve)</b>						
A) Net operating cash flows						
B) Capital expenditures						
C) Change in Non Cash Current Assets						
D) Change in Total Current Liabilities						
E) Debt Adjustments						
F) Other Adjustments						
	G) Projected Net Cash flow					
<b>VI) Sources of funds</b>						
A) Debt:						
i) On-hand at time of application						
ii) Contingent and/or committed but not yet on-hand						
B) Equity:						
i) On-hand at time of application						
ii) Contingent and/or committed but not yet on-hand						
	C) Total Sources of funds					
General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):						
Comments regarding how the Applicant plans to Fund operations:						
General Comments regarding contingencies:						

Template 2 - Financial Projections: Worst Case						Comments / Notes	
In local currency (unless noted otherwise)			Live / Operational				Provide name of local currency used.
Sec.	Reference / Formula	Start-up Costs	Year 1	Year 2	Year 3		
<b>I) Projected Cash inflows and outflows</b>							
A)	Forecasted registration volume						
B)	Registration fee						
C)	Registration cash inflows						
D)	Other cash inflows						
	E) Total Cash Inflows						
<b>Projected Operating Cash Outflows</b>							
F) Labor:							
	i) Marketing Labor						
	ii) Customer Support Labor						
	iii) Technical Labor						
G)	Marketing						
H)	Facilities						
I)	General & Administrative						
J)	Interest and Taxes						
K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):							
	i) (list type of activities being outsourced)						
	ii) (list type of activities being outsourced)						
	iii) (list type of activities being outsourced)						
	iv) (list type of activities being outsourced)						
	v) (list type of activities being outsourced)						
	vi) (list type of activities being outsourced)						
L)	Other Operating costs						
	M) Total Operating Cash Outflows						
	N) Projected Net Operating Cash flow						
<b>IIa) Break out of Fixed and Variable Operating Cash Outflows</b>							
A)	Total Variable Operating Costs						
B)	Total Fixed Operating Costs						
	C) Total Operating Cash Outflows						
		CHECK					
<b>IIb) Break out of Critical Function Operating Cash Outflows</b>							
A)	Operation of SRS						
B)	Provision of Whois						
C)	DNS Resolution for Registered Domain Names						
D)	Registry Data Escrow						
E)	Maintenance of Zone in accordance with DNSSEC						
	G) Total Critical Registry Function Cash Outflows						
	H) 3-year Total						
<b>III) Projected Capital Expenditures</b>							
A)	Hardware						
B)	Software						
C)	Furniture & Other Equipment						
D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)							
	i)						
	ii)						
	iii)						
	iv)						
	v)						
	vi)						
E)	Other Capital Expenditures						
	F) Total Capital Expenditures						
<b>IV) Projected Assets &amp; Liabilities</b>							
A) Cash							
B)	Accounts receivable						
C)	Other current assets						
	D) Total Current Assets						
E)	Accounts payable						
F)	Short-term Debt						
G)	Other Current Liabilities						
	H) Total Current Liabilities						
I)	Total Property, Plant & Equipment (PP&E)						
J)	3-year Reserve						
K)	Other Long-term Assets						
	L) Total Long-term Assets						
M)	Total Long-term Debt						
<b>V) Projected Cash flow (excl. 3-year Reserve)</b>							
A)	Net operating cash flows						
C)	Capital expenditures						
D)	Change in Non Cash Current Assets	n/a					
E)	Change in Total Current Liabilities						
F)	Debt Adjustments	n/a					
G)	Other Adjustments						
	H) Projected Net Cash flow						
<b>VI) Sources of funds</b>							
A) Debt:							
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
B) Equity:							
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
	C) Total Sources of funds						
General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):							
Comments regarding how the Applicant plans to Fund operations:							
General Comments regarding contingencies:							



# gTLD Applicant Guidebook

(v. 2012-06-04)

## Module 3

4 June 2012

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# Module 3

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## Objection Procedures

This module describes two types of mechanisms that may affect an application:

- I. The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. This module describes the purpose of this procedure, and how GAC Advice on New gTLDs is considered by the ICANN Board once received.
- II. The dispute resolution procedure triggered by a formal objection to an application by a third party. This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.

### 3.1 *GAC Advice on New gTLDs*

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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. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

GAC Advice may take one of the following forms:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.
- II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.
- III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.

Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).



## 3.2 *Public Objection and Dispute Resolution Process*

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The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.

A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

As described in section 3.1 above, ICANN's Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

### 3.2.1 *Grounds for Objection*

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A formal objection may be filed on any one of the following four grounds:

**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.

**Legal Rights Objection** – The applied-for gTLD string infringes the existing legal rights of the objector.

**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.

**Community Objection** – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these objection grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see

<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

### 3.2.2 *Standing to Object*

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD application, the Fast Track requestor will be granted standing.
Legal rights	Rightsholders
Limited public interest	No limitations on who may file – however, subject to a “quick look” designed for early conclusion of frivolous and/or abusive objections
Community	Established institution associated with a clearly delineated community

#### 3.2.2.1 *String Confusion Objection*

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.
- Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation. That is, an applicant does not have standing to object to another application with which it is already in a contention set as a result of the Initial Evaluation.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible

outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.

### *3.2.2.2 Legal Rights Objection*

A rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming (which may include either registered or unregistered trademarks) are infringed by the applied-for gTLD must be included in the filing.

An intergovernmental organization (IGO) is eligible to file a legal rights objection if it meets the criteria for registration of a .INT domain name<sup>1</sup>:

- a) An international treaty between or among national governments must have established the organization; and
- b) The organization that is established must be widely considered to have independent international legal personality and must be the subject of and governed by international law.

The specialized agencies of the UN and the organizations having observer status at the UN General Assembly are also recognized as meeting the criteria.

### *3.2.2.3 Limited Public Interest Objection*

Anyone may file a Limited Public Interest Objection. Due to the inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.

A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection (see subsection 3.5.3).

A Limited Public Interest objection that is manifestly unfounded may also be an abuse of the right to object. An objection may be framed to fall within one of the

<sup>1</sup> See also <http://www.iana.org/domains/int/policy/>.

accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law. An objection that attacks the applicant, rather than the applied-for string, could be an abuse of the right to object.<sup>2</sup>

The quick look is the Panel's first task, after its appointment by the DRSP and is a review on the merits of the objection. The dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be an Expert Determination, rendered in accordance with Article 21 of the New gTLD Dispute Resolution Procedure.

In the case where the quick look review does lead to the dismissal of the objection, the proceedings that normally follow the initial submissions (including payment of the full advance on costs) will not take place, and it is currently contemplated that the filing fee paid by the applicant would be refunded, pursuant to Procedure Article 14(e).

#### *3.2.2.4 Community Objection*

Established institutions associated with clearly delineated communities are eligible to file a community objection. 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. To qualify for standing for a community objection, the objector must prove both of the following:

<sup>2</sup> The jurisprudence of the European Court of Human Rights offers specific examples of how the term "manifestly ill-founded" has been interpreted in disputes relating to human rights. Article 35(3) of the European Convention on Human Rights provides: "The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application." The ECHR renders reasoned decisions on admissibility, pursuant to Article 35 of the Convention. (Its decisions are published on the Court's website <http://www.echr.coe.int>.) In some cases, the Court briefly states the facts and the law and then announces its decision, without discussion or analysis. E.g., Decision as to the Admissibility of Application No. 34328/96 by Egbert Peree against the Netherlands (1998). In other cases, the Court reviews the facts and the relevant legal rules in detail, providing an analysis to support its conclusion on the admissibility of an application. Examples of such decisions regarding applications alleging violations of Article 10 of the Convention (freedom of expression) include: *Décision sur la recevabilité de la requête no 65831/01 présentée par Roger Garaudy contre la France* (2003); *Décision sur la recevabilité de la requête no 65297/01 présentée par Eduardo Fernando Alves Costa contre le Portugal* (2004).

The jurisprudence of the European Court of Human Rights also provides examples of the abuse of the right of application being sanctioned, in accordance with ECHR Article 35(3). See, for example, *Décision partielle sur la recevabilité de la requête no 61164/00 présentée par Gérard Duringer et autres contre la France et de la requête no 18589/02 contre la France* (2003).

***It is an established institution*** – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

***It has an ongoing relationship with a clearly delineated community*** – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

### ***3.2.3 Dispute Resolution Service Providers***

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To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate DRSP for each objection ground.

- The International Centre for Dispute Resolution has agreed to administer disputes brought pursuant to string confusion objections.
- The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed to administer disputes brought pursuant to legal rights objections.

- The International Center of Expertise of the International Chamber of Commerce has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program. The selection process began with a public call for expressions of interest<sup>3</sup> followed by dialogue with those candidates who responded. The call for expressions of interest specified several criteria for providers, including established services, subject matter expertise, global capacity, and operational capabilities. An important aspect of the selection process was the ability to recruit panelists who will engender the respect of the parties to the dispute.

### *3.2.4 Options in the Event of Objection*

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Applicants whose applications are the subject of an objection have the following options:

The applicant can work to reach a settlement with the objector, resulting in withdrawal of the objection or the application;

The applicant can file a response to the objection and enter the dispute resolution process (refer to Section 3.2); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

### *3.2.5 Independent Objector*

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A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community.

<sup>3</sup> See <http://www.icann.org/en/announcements/announcement-21dec07.htm>.

Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

**Mandate and Scope** - The IO may file objections against “highly objectionable” gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Limited Public Interest objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. The IO will have access to application comments received during the comment period.

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.

**Selection** – The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant.

Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence.

The IO's (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

**Budget and Funding** – The IO's budget would comprise two principal elements: (a) salaries and operating expenses, and (b) dispute resolution procedure costs – both of which should be funded from the proceeds of new gTLD applications.

As an objector in dispute resolution proceedings, the IO is required to pay filing and administrative fees, as well as advance payment of costs, just as all other objectors are required to do. Those payments will be refunded by the DRSP in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before DRSP panels that will not be refunded, regardless of the outcome. These expenses include the fees and expenses of outside counsel (if retained) and the costs of legal research or factual investigations.

### ***3.3 Filing Procedures***

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The information included in this section provides a summary of procedures for filing:

- Objections; and
- Responses to objections.

For a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure ("Procedure") included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail.

Note that the rules and procedures of each DRSP specific to each objection ground must also be followed. See <http://newgtlds.icann.org/en/program-status/objection-dispute-resolution>.

#### ***3.3.1 Objection Filing Procedures***

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The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. Should an applicant wish to file a formal objection to another gTLD application, it would follow these same procedures.

- All objections must be filed electronically with the appropriate DRSP by the posted deadline date.



Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.
- Each objection must be filed separately. An objector wishing to object to several applications must file a separate objection and pay the accompanying filing fees for each application that is the subject of an objection. If an objector wishes to object to an application on more than one ground, the objector must file separate objections and pay the accompanying filing fees for each objection ground.

Each objection filed by an objector must include:

- The name and contact information of the objector.
- A statement of the objector's basis for standing; that is, why the objector believes it meets the standing requirements to object.
- A description of the basis for the objection, including:
  - A statement giving the specific ground upon which the objection is being filed.
  - A detailed explanation of the validity of the objection and why it should be upheld.
- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

An objector must provide copies of all submissions to the DRSP associated with the objection proceedings to the applicant.

The DRSP will publish, and regularly update a list on its website identifying all objections as they are filed. ICANN will post on its website a notice of all objections filed once the objection filing period has closed.

### ***3.3.2 Objection Filing Fees***

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At the time an objection is filed, the objector is required to pay a filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will

dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

Funding from ICANN for objection filing fees, as well as for advance payment of costs (see subsection 3.4.7 below) is available to the At-Large Advisory Committee (ALAC). Funding for ALAC objection filing and dispute resolution fees is contingent on publication by ALAC of its approved process for considering and making objections. At a minimum, the process for objecting to a gTLD application will require: bottom-up development of potential objections, discussion and approval of objections at the Regional At-Large Organization (RALO) level, and a process for consideration and approval of the objection by the At-Large Advisory Committee.

Funding from ICANN for objection filing fees, as well as for advance payment of costs, is available to individual national governments in the amount of USD 50,000 with the guarantee that a minimum of one objection per government will be fully funded by ICANN where requested. ICANN will develop a procedure for application and disbursement of funds.

Funding available from ICANN is to cover costs payable to the dispute resolution service provider and made directly to the dispute resolution service provider; it does not cover other costs such as fees for legal advice.

### ***3.3.3 Response Filing Procedures***

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Upon notification that ICANN has published the list of all objections filed (refer to subsection 3.3.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.
- Each response must be filed separately. That is, an applicant responding to several objections must file a separate response and pay the accompanying filing fee to respond to each objection.
- Responses must be filed electronically.

Each response filed by an applicant must include:

- The name and contact information of the applicant.

- A point-by-point response to the claims made by the objector.
- Any copies of documents that it considers to be a basis for the response.

Responses are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

Each applicant must provide copies of all submissions to the DRSP associated with the objection proceedings to the objector.

### ***3.3.4 Response Filing Fees***

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At the time an applicant files its response, it is required to pay a filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded, which will result in the objector prevailing.

## ***3.4 Objection Processing Overview***

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The information below provides an overview of the process by which DRSPs administer dispute proceedings that have been initiated. For comprehensive information, please refer to the New gTLD Dispute Resolution Procedure (included as an attachment to this module).

### ***3.4.1 Administrative Review***

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Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's right to submit a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for filing an objection.

### ***3.4.2 Consolidation of Objections***

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Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections. The DRSP shall endeavor to decide upon

consolidation prior to issuing its notice to applicants that the response should be filed and, where appropriate, shall inform the parties of the consolidation in that notice.

An example of a circumstance in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

ICANN continues to strongly encourage all of the DRSPs to consolidate matters whenever practicable.

### **3.4.3** *Mediation*

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The parties to a dispute resolution proceeding are encouraged—but not required—to participate in mediation aimed at settling the dispute. Each DRSP has experts who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel constituted to issue an expert determination in the related dispute.

There are no automatic extensions of time associated with the conduct of negotiations or mediation. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. Absent exceptional circumstances, the parties must limit their requests for extension to 30 calendar days.

The parties are free to negotiate without mediation at any time, or to engage a mutually acceptable mediator of their own accord.

### *3.4.4 Selection of Expert Panels*

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A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.

There will be one expert in proceedings involving a string confusion objection.

There will be one expert, or, if all parties agree, three experts with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection.

There will be three experts recognized as eminent jurists of international reputation, with expertise in relevant fields as appropriate, in proceedings involving a Limited Public Interest objection.

There will be one expert in proceedings involving a community objection.

Neither the experts, the DRSP, ICANN, nor their respective employees, directors, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

### *3.4.5 Adjudication*

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The panel may decide whether the parties shall submit any written statements in addition to the filed objection and response, and may specify time limits for such submissions.

In order to achieve the goal of resolving disputes rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the panel may require a party to produce additional evidence.

Disputes will usually be resolved without an in-person hearing. The panel may decide to hold such a hearing only in extraordinary circumstances.

### *3.4.6 Expert Determination*

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The DRSPs' final expert determinations will be in writing and will include:

- A summary of the dispute and findings;

- An identification of the prevailing party; and
- The reasoning upon which the expert determination is based.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.

### *3.4.7 Dispute Resolution Costs*

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Before acceptance of objections, each DRSP will publish a schedule of costs or statement of how costs will be calculated for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while Limited Public Interest and community objection proceedings will involve hourly rates charged by the panelists.

Within ten (10) calendar days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant. Each party must make its advance payment within ten (10) calendar days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the DRSP will sustain the objection and no fees paid by the applicant will be refunded.

After the hearing has taken place and the panel renders its expert determination, the DRSP will refund the advance payment of costs to the prevailing party.

### *3.5 Dispute Resolution Principles (Standards)*

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Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

#### *3.5.1 String Confusion Objection*

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A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

#### *3.5.2 Legal Rights Objection*

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In interpreting and giving meaning to GNSO Recommendation 3 ("Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law"), a DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark ("mark") or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector's mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector's mark or IGO name or acronym.

In the case where the objection is based on trademark rights, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to the objector's existing mark.
2. Whether the objector's acquisition and use of rights in the mark has been bona fide.
3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of the objector, of the applicant or of a third party.
4. Applicant's intent in applying for the gTLD, including whether the applicant, at the time of application for the gTLD, had knowledge of the objector's mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.
5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.
6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by the applicant is consistent with such acquisition or use.
7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide.
8. Whether the applicant's intended use of the gTLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.



In the case where a legal rights objection has been filed by an IGO, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound or meaning, to the name or acronym of the objecting IGO;
2. Historical coexistence of the IGO and the applicant's use of a similar name or acronym. Factors considered may include:
  - a. Level of global recognition of both entities;
  - b. Length of time the entities have been in existence;
  - c. Public historical evidence of their existence, which may include whether the objecting IGO has communicated its name or abbreviation under Article 6<sup>ter</sup> of the Paris Convention for the Protection of Industrial Property.
3. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise of the objecting IGO's name or acronym;
4. Whether and to what extent the applicant has been commonly known by the sign corresponding to the applied-for gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide; and
5. Whether the applicant's intended use of the applied-for gTLD would create a likelihood of confusion with the objecting IGO's name or acronym as to the source, sponsorship, affiliation, or endorsement of the TLD.

### ***3.5.3 Limited Public Interest Objection***

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An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.

Examples of instruments containing such general principles include:

- The Universal Declaration of Human Rights (UDHR)

- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination
- Declaration on the Elimination of Violence against Women
- The International Covenant on Economic, Social, and Cultural Rights
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
- Slavery Convention
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Rights of the Child

Note that these are included to serve as examples, rather than an exhaustive list. It should be noted that these instruments vary in their ratification status. Additionally, states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions. National laws not based on principles of international law are not a valid ground for a Limited Public Interest objection.

Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.

The grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of

discrimination that violate generally accepted legal norms recognized under principles of international law;

- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

The panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.

#### *3.5.4 Community Objection*

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The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For 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. Each of these tests is described in further detail below.

**Community** – 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.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

**Substantial Opposition** – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

**Targeting** – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be

balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

**Detriment** – The objector must prove that 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. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

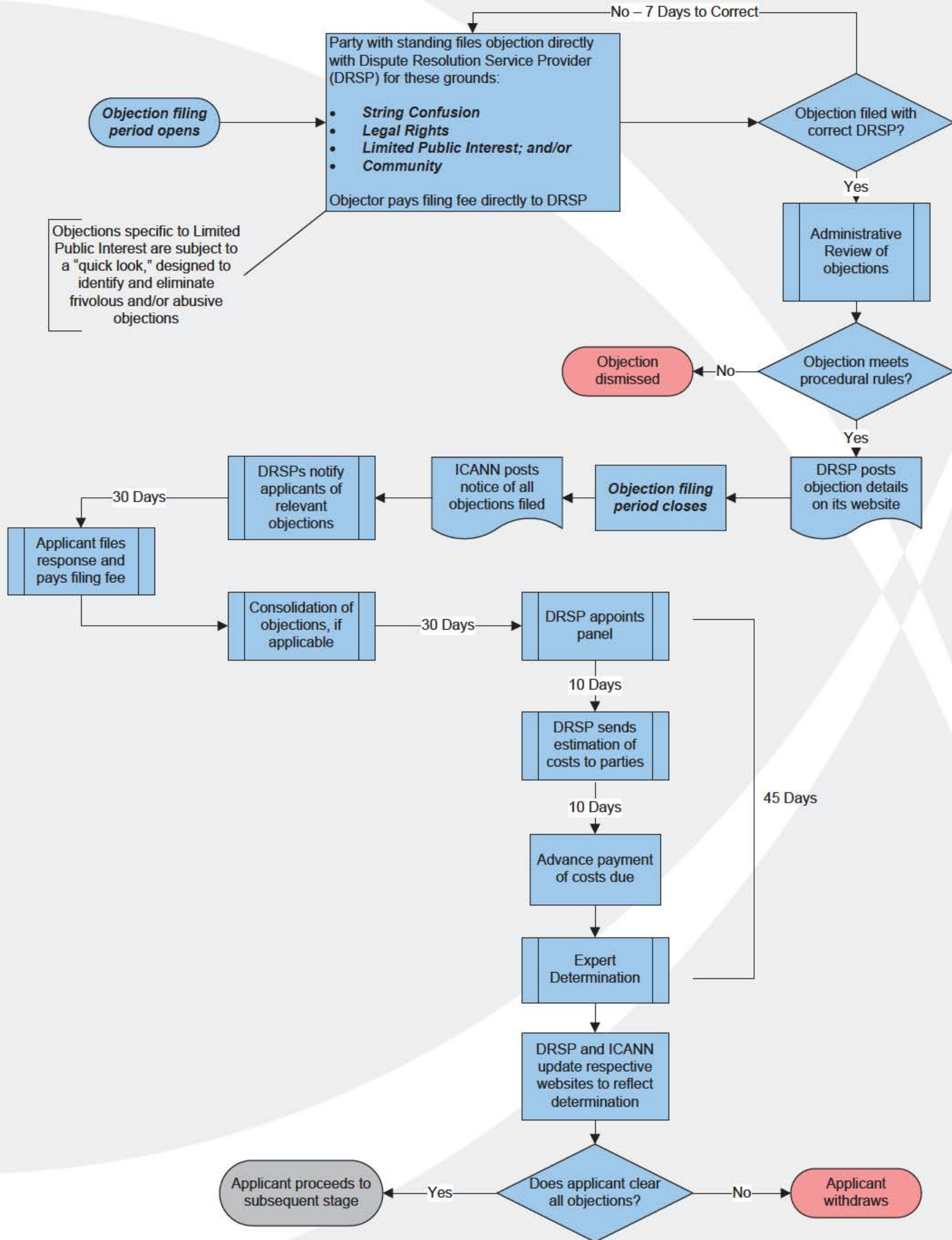
Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

# DRAFT - New gTLD Program – Objection and Dispute Resolution



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# *Attachment to Module 3*

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## *New gTLD Dispute Resolution Procedure*

These Procedures were designed with an eye toward timely and efficient dispute resolution. As part of the New gTLD Program, these Procedures apply to all proceedings administered by each of the dispute resolution service providers (DRSP). Each of the DRSPs has a specific set of rules that will also apply to such proceedings.



## NEW gTLD DISPUTE RESOLUTION PROCEDURE

### Article 1. ICANN's New gTLD Program

- (a) The Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a program for the introduction of new generic Top-Level Domain Names ("gTLDs") in the internet. There will be a succession of rounds, during which applicants may apply for new gTLDs, in accordance with terms and conditions set by ICANN.
- (b) The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the "Procedure").
- (c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ("DRSP") in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).
- (d) By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval of the relevant DRSP.

### Article 2. Definitions

- (a) The "Applicant" or "Respondent" is an entity that has applied to ICANN for a new gTLD and that will be the party responding to the Objection.
- (b) The "Objector" is one or more persons or entities who have filed an objection against a new gTLD for which an application has been submitted.
- (c) The "Panel" is the panel of Experts, comprising one or three "Experts," that has been constituted by a DRSP in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).
- (d) The "Expert Determination" is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).
- (e) The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook. Such grounds are identified in this Procedure, and are based upon the Final Report on the Introduction of New Generic Top-Level Domains, dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO), as follows:
  - (i) "String Confusion Objection" refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.
  - (ii) "Existing Legal Rights Objection" refers to the objection that the string comprising the potential new gTLD infringes the existing legal rights of others

that are recognized or enforceable under generally accepted and internationally recognized principles of law.

- (iii) "Limited Public Interest Objection" refers to the objection that the string comprising the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.
  - (iv) "Community Objection" refers to the objection that there is substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.
- (f) "DRSP Rules" are the rules of procedure of a particular DRSP that have been identified as being applicable to objection proceedings under this Procedure.

### **Article 3. Dispute Resolution Service Providers**

The various categories of disputes shall be administered by the following DRSPs:

- (a) String Confusion Objections shall be administered by the International Centre for Dispute Resolution.
- (b) Existing Legal Rights Objections shall be administered by the Arbitration and Mediation Center of the World Intellectual Property Organization.
- (c) Limited Public Interest Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.
- (d) Community Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.

### **Article 4. Applicable Rules**

- (a) All proceedings before the Panel shall be governed by this Procedure and by the DRSP Rules that apply to a particular category of objection. The outcome of the proceedings shall be deemed an Expert Determination, and the members of the Panel shall act as experts.
- (b) The applicable DRSP Rules are the following:
  - (i) For a String Confusion Objection, the applicable DRSP Rules are the ICDR Supplementary Procedures for ICANN's New gTLD Program.
  - (ii) For an Existing Legal Rights Objection, the applicable DRSP Rules are the WIPO Rules for New gTLD Dispute Resolution.
  - (iii) For a Limited Public Interest Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.
  - (iv) For a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.
- (c) In the event of any discrepancy between this Procedure and the applicable DRSP Rules, this Procedure shall prevail.

- (d) The place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.
- (e) In all cases, the Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position.

#### **Article 5. Language**

- (a) The language of all submissions and proceedings under this Procedure shall be English.
- (b) Parties may submit supporting evidence in its original language, provided and subject to the authority of the Panel to determine otherwise, that such evidence is accompanied by a certified or otherwise official English translation of all relevant text.

#### **Article 6. Communications and Time Limits**

- (a) All communications by the Parties with the DRSPs and Panels must be submitted electronically. A Party that wishes to make a submission that is not available in electronic form (e.g., evidentiary models) shall request leave from the Panel to do so, and the Panel, in its sole discretion, shall determine whether to accept the non-electronic submission.
- (b) The DRSP, Panel, Applicant, and Objector shall provide copies to one another of all correspondence (apart from confidential correspondence between the Panel and the DRSP and among the Panel) regarding the proceedings.
- (c) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day that it is transmitted in accordance with paragraphs (a) and (b) of this Article.
- (d) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched in accordance with paragraphs (a) and (b) of this Article prior to or on the day of the expiration of the time limit.
- (e) For the purpose of calculating a period of time under this Procedure, such period shall begin to run on the day following the day when a notice or other communication is received.
- (f) Unless otherwise stated, all time periods provided in the Procedure are calculated on the basis of calendar days

#### **Article 7. Filing of the Objection**

- (a) A person wishing to object to a new gTLD for which an application has been submitted may file an objection ("Objection"). Any Objection to a proposed new gTLD must be filed before the published closing date for the Objection Filing period.
- (b) The Objection must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Applicant.
- (c) The electronic addresses for filing Objections (the specific addresses shall be made available once they are created by providers):
  - (i) A String Confusion Objection must be filed at: [●].

- (ii) An Existing Legal Rights Objection must be filed at: [●].
  - (iii) A Limited Public Interest Objection must be filed at: [●].
  - (iv) A Community Objection must be filed at: [●].
- (d) All Objections must be filed separately:
- (i) An Objector who wishes to object to an application on more than one ground must file separate objections with the appropriate DRSP(s).
  - (ii) An Objector who wishes to object to more than one gTLD must file separate objections to each gTLD with the appropriate DRSP(s).
- (e) If an Objection is filed with the wrong DRSP, that DRSP shall promptly notify the Objector of the error and that DRSP shall not process the incorrectly filed Objection. The Objector may then cure the error by filing its Objection with the correct DRSP within seven (7) days of receipt of the error notice, failing which the Objection shall be disregarded. If the Objection is filed with the correct DRSP within seven (7) days of receipt of the error notice but after the lapse of the time for submitting an Objection stipulation by Article 7(a) of this Procedure, it shall be deemed to be within this time limit.

#### **Article 8. Content of the Objection**

- (a) The Objection shall contain, *inter alia*, the following information:
- (i) The names and contact information (address, telephone number, email address, etc.) of the Objector;
  - (ii) A statement of the Objector's basis for standing; and
  - (iii) A description of the basis for the Objection, including:
    - (aa) A statement of the ground upon which the Objection is being filed, as stated in Article 2(e) of this Procedure;
    - (bb) An explanation of the validity of the Objection and why the objection should be upheld.
- (b) The substantive portion of the Objection shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Objector shall also describe and provide copies of any supporting or official documents upon which the Objection is based.
- (c) At the same time as the Objection is filed, the Objector shall pay a filing fee in the amount set in accordance with the applicable DRSP Rules and include evidence of such payment in the Objection. In the event that the filing fee is not paid within ten (10) days of the receipt of the Objection by the DRSP, the Objection shall be dismissed without prejudice.

#### **Article 9. Administrative Review of the Objection**

- (a) The DRSP shall conduct an administrative review of the Objection for the purpose of verifying compliance with Articles 5-8 of this Procedure and the applicable DRSP Rules, and inform the Objector, the Applicant and ICANN of the result of its review within

fourteen (14) days of its receipt of the Objection. The DRSP may extend this time limit for reasons explained in the notification of such extension.

- (b) If the DRSP finds that the Objection complies with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall confirm that the Objection shall be registered for processing.
- (c) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Objection be corrected within five (5) days. If the deficiencies in the Objection are cured within the specified period but after the lapse of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure, the Objection shall be deemed to be within this time limit.
- (d) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, and the deficiencies in the Objection are not corrected within the period specified in Article 9(c), the DRSP shall dismiss the Objection and close the proceedings, without prejudice to the Objector's submission of a new Objection that complies with this Procedure, provided that the Objection is filed within the deadline for filing such Objections. The DRSP's review of the Objection shall not interrupt the running of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure.
- (e) Immediately upon registering an Objection for processing, pursuant to Article 9(b), the DRSP shall post the following information about the Objection on its website: (i) the proposed string to which the Objection is directed; (ii) the names of the Objector and the Applicant; (iii) the grounds for the Objection; and (iv) the dates of the DRSP's receipt of the Objection.

#### **Article 10. ICANN's Dispute Announcement**

- (a) Within thirty (30) days of the deadline for filing Objections in relation to gTLD applications in a given round, ICANN shall publish a document on its website identifying all of the admissible Objections that have been filed (the "Dispute Announcement"). ICANN shall also directly inform each DRSP of the posting of the Dispute Announcement.
- (b) ICANN shall monitor the progress of all proceedings under this Procedure and shall take steps, where appropriate, to coordinate with any DRSP in relation to individual applications for which objections are pending before more than one DRSP.

#### **Article 11. Response to the Objection**

- (a) Upon receipt of the Dispute Announcement, each DRSP shall promptly send a notice to: (i) each Applicant for a new gTLD to which one or more admissible Objections have been filed with that DRSP; and (ii) the respective Objector(s).
- (b) The Applicant shall file a response to each Objection (the "Response"). The Response shall be filed within thirty (30) days of the transmission of the notice by the DRSP pursuant to Article 11(a).
- (c) The Response must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Objector.

- (d) The Response shall contain, inter alia, the following information:
  - (i) The names and contact information (address, telephone number, email address, etc.) of the Applicant; and
  - (ii) A point-by-point response to the statements made in the Objection.
- (e) The substantive portion of the Response shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Applicant shall also describe and provide copies of any supporting or official documents upon which the Response is based.
- (f) At the same time as the Response is filed, the Applicant shall pay a filing fee in the amount set and published by the relevant DRSP (which shall be the same as the filing fee paid by the Objector) and include evidence of such payment in the Response. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the DRSP, the Applicant shall be deemed to be in default, any Response disregarded and the Objection shall be deemed successful.
- (g) If the DRSP finds that the Response does not comply with Articles 11(c) and (d)(1) of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Response be corrected within five (5) days. If the administrative deficiencies in the Response are cured within the specified period but after the lapse of the time limit for submitting a Response pursuant to this Procedure, the Response shall be deemed to be within this time limit.
- (g) If the Applicant fails to file a Response to the Objection within the 30-day time limit, the Applicant shall be deemed to be in default and the Objection shall be deemed successful. No fees paid by the Applicant will be refunded in case of default.

## **Article 12. Consolidation of Objections**

- (a) The DRSP is encouraged, whenever possible and practicable, and as may be further stipulated in the applicable DRSP Rules, to consolidate Objections, for example, when more than one Objector has filed an Objection to the same gTLD on the same grounds. The DRSP shall endeavor to decide upon consolidation prior to issuing its notice pursuant to Article 11(a) and, where appropriate, shall inform the parties of the consolidation in that notice.
- (b) If the DRSP itself has not decided to consolidate two or more Objections, any Applicant or Objector may propose the consolidation of Objections within seven (7) days of the notice given by the DRSP pursuant to Article 11(a). If, following such a proposal, the DRSP decides to consolidate certain Objections, which decision must be made within 14 days of the notice given by the DRSP pursuant to Article 11(a), the deadline for the Applicant's Response in the consolidated proceeding shall be thirty (30) days from the Applicant's receipt of the DRSP's notice of consolidation.
- (c) In deciding whether to consolidate Objections, the DRSP shall weigh the benefits (in terms of time, cost, consistency of decisions, etc.) that may result from the consolidation against the possible prejudice or inconvenience that the consolidation may cause. The DRSP's determination on consolidation shall be final and not subject to appeal.
- (d) Objections based upon different grounds, as summarized in Article 2(e), shall not be consolidated.

**Article 13. The Panel**

- (a) The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response.
- (b) Number and specific qualifications of Expert(s):
  - (i) There shall be one Expert in proceedings involving a String Confusion Objection.
  - (ii) There shall be one Expert or, if all of the Parties so agree, three Experts with relevant experience in intellectual property rights disputes in proceedings involving an Existing Legal Rights Objection.
  - (iii) There shall be three Experts recognized as eminent jurists of international reputation, one of whom shall be designated as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Objector, in proceedings involving a Limited Public Interest Objection.
  - (iv) There shall be one Expert in proceedings involving a Community Objection.
- (c) All Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.
- (d) The applicable DRSP Rules stipulate the procedures for challenging an Expert and replacing an Expert.
- (e) Unless required by a court of law or authorized in writing by the parties, an Expert shall not act in any capacity whatsoever, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the matter referred to expert determination under this Procedure.

**Article 14. Costs**

- (a) Each DRSP shall determine the costs for the proceedings that it administers under this Procedure in accordance with the applicable DRSP Rules. Such costs shall cover the fees and expenses of the members of the Panel, as well as the administrative fees of the DRSP (the "Costs").
- (b) Within ten (10) days of constituting the Panel, the DRSP shall estimate the total Costs and request the Objector and the Applicant/Respondent each to pay in advance the full amount of the Costs to the DRSP. Each party shall make its advance payment of Costs within ten (10) days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the Parties shall be credited against the amounts due for this advance payment of Costs.
- (c) The DRSP may revise its estimate of the total Costs and request additional advance payments from the parties during the proceedings.
- (d) Failure to make an advance payment of Costs:
  - (i) If the Objector fails to make the advance payment of Costs, its Objection shall be dismissed and no fees that it has paid shall be refunded.



- (ii) If the Applicant fails to make the advance payment of Costs, the Objection will be deemed to have been sustained and no fees that the Applicant has paid shall be refunded.
- (e) Upon the termination of the proceedings, after the Panel has rendered its Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Panel, its advance payment(s) of Costs.

#### **Article 15. Representation and Assistance**

- (a) The parties may be represented or assisted by persons of their choice.
- (b) Each party or party representative shall communicate the name, contact information and function of such persons to the DRSP and the other party (or parties in case of consolidation).

#### **Article 16. Negotiation and Mediation**

- (a) The parties are encouraged, but not required, to participate in negotiations and/or mediation at any time throughout the dispute resolution process aimed at settling their dispute amicably.
- (b) Each DRSP shall be able to propose, if requested by the parties, a person who could assist the parties as mediator.
- (c) A person who acts as mediator for the parties shall not serve as an Expert in a dispute between the parties under this Procedure or any other proceeding under this Procedure involving the same gTLD.
- (d) The conduct of negotiations or mediation shall not, *ipso facto*, be the basis for a suspension of the dispute resolution proceedings or the extension of any deadline under this Procedure. Upon the joint request of the parties, the DRSP or (after it has been constituted) the Panel may grant the extension of a deadline or the suspension of the proceedings. Absent exceptional circumstances, such extension or suspension shall not exceed thirty (30) days and shall not delay the administration of any other Objection.
- (e) If, during negotiations and/or mediation, the parties agree on a settlement of the matter referred to the DRSP under this Procedure, the parties shall inform the DRSP, which shall terminate the proceedings, subject to the parties' payment obligation under this Procedure having been satisfied, and inform ICANN and the parties accordingly.

#### **Article 17. Additional Written Submissions**

- (a) The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.
- (b) The time limits fixed by the Panel for additional written submissions shall not exceed thirty (30) days, unless the Panel, having consulted the DRSP, determines that exceptional circumstances justify a longer time limit.



**Article 18. Evidence**

In order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.

**Article 19. Hearings**

- (a) Disputes under this Procedure and the applicable DRSP Rules will usually be resolved without a hearing.
- (b) The Panel may decide, on its own initiative or at the request of a party, to hold a hearing only in extraordinary circumstances.
- (c) In the event that the Panel decides to hold a hearing:
  - (i) The Panel shall decide how and where the hearing shall be conducted.
  - (ii) In order to expedite the proceedings and minimize costs, the hearing shall be conducted by videoconference if possible.
  - (iii) The hearing shall be limited to one day, unless the Panel decides, in exceptional circumstances, that more than one day is required for the hearing.
  - (iv) The Panel shall decide whether the hearing will be open to the public or conducted in private.

**Article 20. Standards**

- (a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.
- (b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.
- (c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

**Article 21. The Expert Determination**

- (a) The DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed.
- (b) The Panel shall submit its Expert Determination in draft form to the DRSP's scrutiny as to form before it is signed, unless such scrutiny is specifically excluded by the applicable DRSP Rules. The modifications proposed by the DRSP to the Panel, if any, shall address only the form of the Expert Determination. The signed Expert Determination shall be communicated to the DRSP, which in turn will communicate that Expert Determination to the Parties and ICANN.
- (c) When the Panel comprises three Experts, the Expert Determination shall be made by a majority of the Experts.

- (d) The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.
- (e) The Expert Determination shall state the date when it is made, and it shall be signed by the Expert(s). If any Expert fails to sign the Expert Determination, it shall be accompanied by a statement of the reason for the absence of such signature.
- (f) In addition to providing electronic copies of its Expert Determination, the Panel shall provide a signed hard copy of the Expert Determination to the DRSP, unless the DRSP Rules provide for otherwise.
- (g) Unless the Panel decides otherwise, the Expert Determination shall be published in full on the DRSP's website.

## **Article 22. Exclusion of Liability**

In addition to any exclusion of liability stipulated by the applicable DRSP Rules, neither the Expert(s), nor the DRSP and its employees, nor ICANN and its Board members, employees and consultants shall be liable to any person for any act or omission in connection with any proceeding conducted under this Procedure.

## **Article 23. Modification of the Procedure**

- (a) ICANN may from time to time, in accordance with its Bylaws, modify this Procedure.
- (b) The version of this Procedure that is applicable to a dispute resolution proceeding is the version that was in effect on the day when the relevant application for a new gTLD is submitted.



# gTLD Applicant Guidebook

(v. 2012-06-04)

## Module 4

4 June 2012

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# Module 4

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## *String Contention Procedures*

This module describes situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.

### *4.1 String Contention*

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String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

(In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

#### *4.1.1 Identification of Contention Sets*

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Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

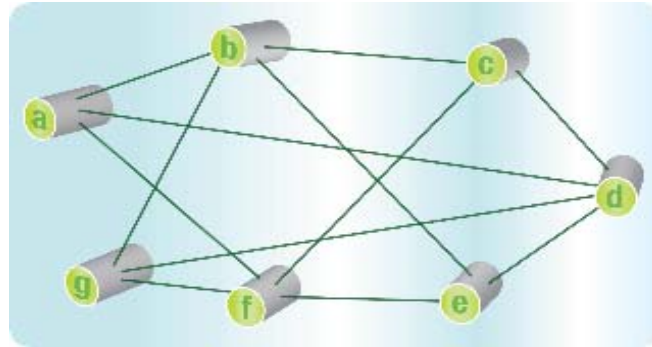
Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. That is, two or more applicants whose applied-for strings or designated variants are variant strings according to an IDN table submitted to ICANN would be considered in direct contention with one another. For example, if one applicant applies for string A and another applies for string B, and strings A and B are variant TLD strings as defined in Module 1, then the two applications are in direct contention.

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or similar to one another. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. The example that follows explains direct and indirect contention in greater detail.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.



**Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.**

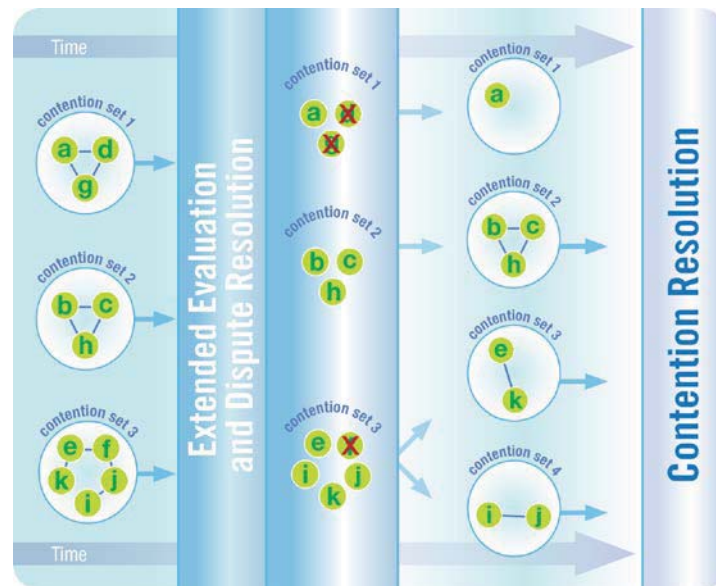
While preliminary contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process stages have concluded. This is because any application excluded through those processes might modify a contention set identified earlier.

A contention set may be augmented, split into two sets, or eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding. The composition of a contention set may also be modified as some applications may be voluntarily withdrawn throughout the process.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.



**Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.**

The remaining contention cases must then be resolved through community priority evaluation or by other means, depending on the circumstances. In the string contention resolution stage, ICANN addresses each contention set to achieve an unambiguous resolution.

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

#### **4.1.2 Impact of String Confusion Dispute Resolution Proceedings on Contention Sets**

If an applicant files a string confusion objection against another application (refer to Module 3), and the panel finds that user confusion is probable (that is, finds in favor of the objector), the two applications will be placed in direct contention with each other. Thus, the outcome of a dispute resolution proceeding based on a string confusion objection would be a new contention set structure for the relevant applications, augmenting the original contention set.

If an applicant files a string confusion objection against another application, and the panel finds that string

confusion does not exist (that is, finds in favor of the responding applicant), the two applications will not be considered in direct contention with one another.

A dispute resolution outcome in the case of a string confusion objection filed by another applicant will not result in removal of an application from a previously established contention set.

#### ***4.1.3 Self-Resolution of String Contention***

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Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention. However, material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.

#### ***4.1.4 Possible Contention Resolution Outcomes***

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An application that has successfully completed all previous stages and is no longer part of a contention set due to changes in the composition of the contention set (as described in subsection 4.1.1) or self-resolution by applicants in the contention set (as described in subsection 4.1.3) may proceed to the next stage.

An application that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.



In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, consider a case where string A is in contention with B, and B is in contention with C, but C is not in contention with A. If A wins the contention resolution procedure, B is eliminated but C can proceed since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

## ***4.2 Community Priority Evaluation***

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Community priority evaluation will only occur if a community-based applicant selects this option. Community priority evaluation can begin once all applications in the contention set have completed all previous stages of the process.

The community priority evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the community priority evaluation. Each application participating in the community priority evaluation begins with a score of zero.

### ***4.2.1 Eligibility for Community Priority Evaluation***

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As described in subsection 1.2.3 of Module 1, all applicants are required to identify whether their application type is:

- Community-based; or
- Standard.

Applicants designating their applications as community-based are also asked to respond to a set of questions in the application form to provide relevant information if a community priority evaluation occurs.

Only community-based applicants are eligible to participate in a community priority evaluation.

At the start of the contention resolution stage, all community-based applicants within remaining contention sets will be notified of the opportunity to opt for a community priority evaluation via submission of a deposit by a specified date. Only those applications for which a deposit has been received by the deadline will be scored in the community priority evaluation. Following the evaluation, the deposit will be refunded to applicants that score 14 or higher.

Before the community priority evaluation begins, the applicants who have elected to participate may be asked to provide additional information relevant to the community priority evaluation.

#### *4.2.2 Community Priority Evaluation Procedure*

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Community priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications. The panel's role is to determine whether any of the community-based applications fulfills the community priority criteria. Standard applicants within the contention set, if any, will not participate in the community priority evaluation.

If a single community-based application is found to meet the community priority criteria (see subsection 4.2.3 below), that applicant will be declared to prevail in the community priority evaluation 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 follows:

- In the case where the applications are in indirect contention with one another (see subsection 4.1.1), they will both be allowed to proceed to the next stage. In this case, applications that are in direct contention with any of these community-based applications will be eliminated.
- In the case where the applications are in direct contention with one another, these applicants will proceed to an auction. If all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. This is a one-time option; ICANN will grant no more than one such request for each set of contending applications.

If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction.

Results of each community priority evaluation will be posted when completed.

Applicants who are eliminated as a result of a community priority evaluation are eligible for a partial refund of the gTLD evaluation fee (see Module 1).

### ***4.2.3 Community Priority Evaluation Criteria***

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The Community Priority Panel will review and score the one or more community-based applications having elected the community priority evaluation against four criteria as listed below.

The scoring process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). This calls for a holistic approach, taking multiple criteria into account, as reflected in the process. The scoring will be performed by a panel and be based on information provided in the application plus other relevant information available (such as public information regarding the community represented). The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.

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, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.

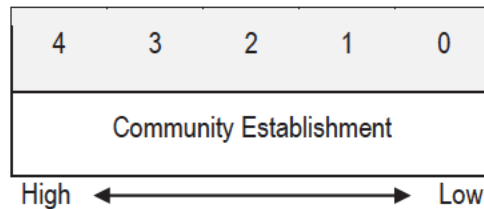
The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any “double-counting” - any negative aspect found in assessing an application for one criterion

should only be counted there and should not affect the assessment for other criteria.

An application must score at least 14 points to prevail in a community priority evaluation. The outcome will be determined according to the procedure described in subsection 4.2.2.

**Criterion #1: Community Establishment (0-4 points)**

A maximum of 4 points is possible on the Community Establishment criterion:



As measured by:

A. Delineation (2)

2	1	0
Clearly delineated, organized, and pre-existing community.	Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.	Insufficient delineation and pre-existence for a score of 1.

B. Extension (2)

2	1	0
Community of considerable size and longevity.	Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.	Community of neither considerable size nor longevity.

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not

considered here, but taken into account when scoring Criterion #2, "Nexus between Proposed String and Community.")

**Criterion 1 Definitions**

- "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.
- "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.
- "Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.
- "Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.
- "Extension" relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.
- "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 - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."

- "Longevity" means that the pursuits of a community are of a lasting, non-transient nature.

**Criterion 1 Guidelines**

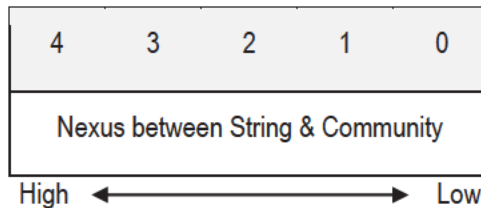
With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."

With respect to "Delineation," if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.

With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.

**Criterion #2: Nexus between Proposed String and Community (0-4 points)**

A maximum of 4 points is possible on the Nexus criterion:



As measured by:

A. Nexus (3)

3	2	0
The string matches the name of the community or is a well-known short-form or abbreviation of the community	String identifies the community, but does not qualify for a score of 3.	String nexus does not fulfill the requirements for a score of 2.

3	2	0
name.		

B. Uniqueness (1)

1	0
String has no other significant meaning beyond identifying the community described in the application.	String does not fulfill the requirement for a score of 1.

This section evaluates the relevance of the string to the specific community that it claims to represent.

**Criterion 2 Definitions**

- "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.
- "Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.

**Criterion 2 Guidelines**

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 / name of the community.

With respect to "Nexus," for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching 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 qualify for a 2.

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. 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."

### Criterion #3: Registration Policies (0-4 points)

A maximum of 4 points is possible on the Registration Policies criterion:

4	3	2	1	0
Registration Policies				
High ←		→ Low		

As measured by:

#### A. Eligibility (1)

1	0
Eligibility restricted to community members.	Largely unrestricted approach to eligibility.



B. Name selection (1)

1	0
Policies include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

C. Content and use (1)

1	0
Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

D. Enforcement (1)

1	0
Policies include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.	Policies do not fulfill the requirements for a score of 1.

This section evaluates the applicant's registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

**Criterion 3 Definitions**

- "Eligibility" means the qualifications that entities or individuals must have in order to be allowed as registrants by the registry.
- "Name selection" means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.
- "Content and use" means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.
- "Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

**Criterion 3 Guidelines**

With respect to "Eligibility," the limitation to community "members" can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant's physical address is within the boundaries of the location.

With respect to "Name selection," "Content and use," and "Enforcement," scoring of applications against these sub-criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. 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.

**Criterion #4: Community Endorsement (0-4 points)**

4	3	2	1	0
Community Endorsement				
High ←		→ Low		

As measured by:

**A. Support (2)**

2	1	0
Applicant is, or has documented support from, the recognized community institution(s)/ member organization(s) or has otherwise documented authority to represent the community.	Documented support from at least one group with relevance, but insufficient support for a score of 2.	Insufficient proof of support for a score of 1.

**B. Opposition (2)**

2	1	0
No opposition of relevance.	Relevant opposition from one group of non-negligible size.	Relevant opposition from two or more groups of non-negligible size.

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed as stated in the application, with due regard for the communities implicitly addressed by the string.

**Criterion 4 Definitions**

- "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by

the community members as representative of the community.

- "Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied-for string would be considered relevant.

#### **Criterion 4 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. A 0 will be scored on "Support" 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. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

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.

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. 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.

### ***4.3 Auction: Mechanism of Last Resort***

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It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

An auction will not take place to resolve contention in the case where the contending applications are for geographic names (as defined in Module 2). In this case, the applications will be suspended pending resolution by the applicants.

An auction will take place, where contention has not already been resolved, in the case where an application for a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching the auction stage. However, there is a possibility that significant funding will accrue to ICANN as a result of one or more auctions.<sup>1</sup>

<sup>1</sup> The purpose of an auction is to resolve contention in a clear, objective manner. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

### *4.3.1 Auction Procedures*

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An auction of two or more applications within a contention set is conducted as follows. The auctioneer successively increases the prices associated with applications within the contention set, and the respective applicants indicate their willingness to pay these prices. As the prices rise, applicants will successively choose to exit from the auction. When a sufficient number of applications have been eliminated so that no direct contentions remain (i.e., the remaining applications are no longer in contention with one another and all the relevant strings can be delegated as TLDs), the auction will be deemed to conclude. At the auction's conclusion, the applicants with remaining applications will pay the resulting prices and proceed toward delegation. This procedure is referred to as an "ascending-clock auction."

This section provides applicants an informal introduction to the practicalities of participation in an ascending-clock auction. It is intended only as a general introduction and is only preliminary. The detailed set of Auction Rules will be available prior to the commencement of any auction proceedings. If any conflict arises between this module and the auction rules, the auction rules will prevail.

For simplicity, this section will describe the situation where a contention set consists of two or more applications for identical strings.

All auctions will be conducted over the Internet, with participants placing their bids remotely using a web-based software system designed especially for auction. The auction software system will be compatible with current versions of most prevalent browsers, and will not require the local installation of any additional software.

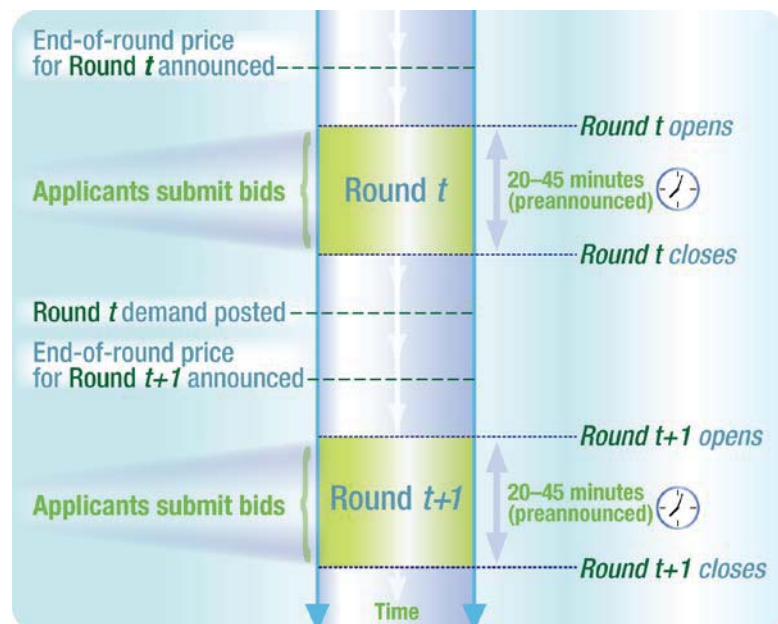
Auction participants ("bidders") will receive instructions for access to the online auction site. Access to the site will be password-protected and bids will be encrypted through SSL. If a bidder temporarily loses connection to the Internet, that bidder may be permitted to submit its bids in a given auction round by fax, according to procedures described

The amount of funding resulting from auctions, if any, will not be known until all relevant applications have completed this step. Thus, a detailed mechanism for allocation of these funds is not being created at present. However, a process can be pre-established to enable community consultation in the event that such funds are collected. This process will include, at a minimum, publication of data on any funds collected, and public comment on any proposed models.

in the auction rules. The auctions will generally be conducted to conclude quickly, ideally in a single day.

The auction will be carried out in a series of auction rounds, as illustrated in Figure 4-3. The sequence of events is as follows:

1. For each auction round, the auctioneer will announce in advance: (1) the start-of-round price, (2) the end-of-round price, and (3) the starting and ending times of the auction round. In the first auction round, the start-of-round price for all bidders in the auction will be USD 0. In later auction rounds, the start-of-round price will be its end-of-round price from the previous auction round.



**Figure 4-3 – Sequence of events during an ascending-clock auction.**

2. During each auction round, bidders will be required to submit a bid or bids representing their willingness to pay within the range of intermediate prices between the start-of-round and end-of-round prices. In this way a bidder indicates its willingness to stay in the auction at all prices through and including the end-of-auction round price, or its wish to exit the auction at a price less than the end-of-auction round price, called the exit bid.
3. Exit is irrevocable. If a bidder exited the auction in a previous auction round, the bidder is not permitted to re-enter in the current auction round.

4. Bidders may submit their bid or bids at any time during the auction round.
5. Only bids that comply with all aspects of the auction rules will be considered valid. If more than one valid bid is submitted by a given bidder within the time limit of the auction round, the auctioneer will treat the last valid submitted bid as the actual bid.
6. At the end of each auction round, bids become the bidders' legally-binding offers to secure the relevant gTLD strings at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction rules. In later auction rounds, bids may be used to exit from the auction at subsequent higher prices.
7. After each auction round, the auctioneer will disclose the aggregate number of bidders remaining in the auction at the end-of-round prices for the auction round, and will announce the prices and times for the next auction round.
  - Each bid should consist of a single price associated with the application, and such price must be greater than or equal to the start-of-round price.
  - If the bid amount is strictly less than the end-of-round price, then the bid is treated as an exit bid at the specified amount, and it signifies the bidder's binding commitment to pay up to the bid amount if its application is approved.
  - If the bid amount is greater than or equal to the end-of-round price, then the bid signifies that the bidder wishes to remain in the auction at all prices in the current auction round, and it signifies the bidder's binding commitment to pay up to the end-of-round price if its application is approved. Following such bid, the application cannot be eliminated within the current auction round.
  - To the extent that the bid amount exceeds the end-of-round price, then the bid is also treated as a proxy bid to be carried forward to the next auction round. The bidder will be permitted to change the proxy bid amount in the next auction round, and the amount of the proxy bid will not constrain the bidder's ability to submit any valid bid amount in the next auction round.



- No bidder is permitted to submit a bid for any application for which an exit bid was received in a prior auction round. That is, once an application has exited the auction, it may not return.
  - If no valid bid is submitted within a given auction round for an application that remains in the auction, then the bid amount is taken to be the amount of the proxy bid, if any, carried forward from the previous auction round or, if none, the bid is taken to be an exit bid at the start-of-round price for the current auction round.
8. This process continues, with the auctioneer increasing the price range for each given TLD string in each auction round, until there is one remaining bidder at the end-of-round price. After an auction round in which this condition is satisfied, the auction concludes and the auctioneer determines the clearing price. The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price.

Figure 4-4 illustrates how an auction for five contending applications might progress.

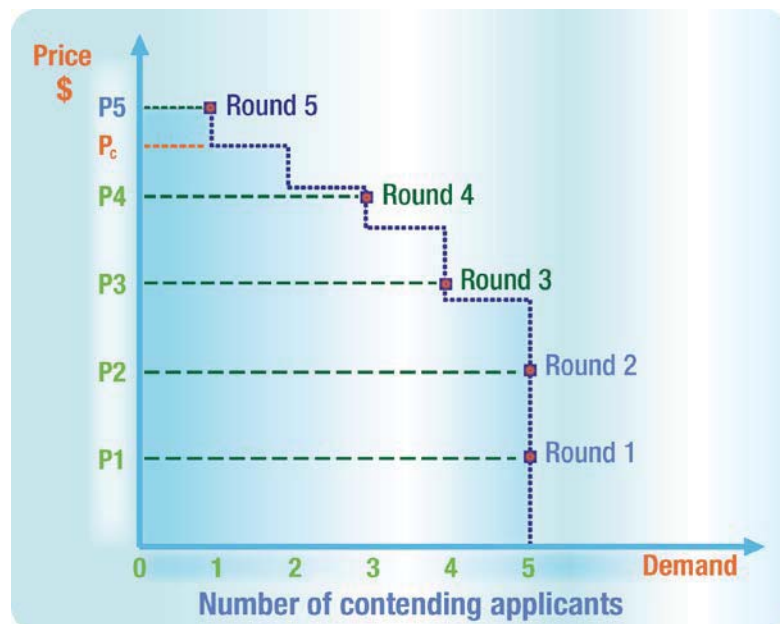


Figure 4-4 – Example of an auction for five mutually-contending applications.

- Before the first auction round, the auctioneer announces the end-of-round price  $P_1$ .
- During Auction round 1, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least  $P_1$ . Since the aggregate demand exceeds one, the auction proceeds to Auction round 2. The auctioneer discloses that five contending applications remained at  $P_1$  and announces the end-of-round price  $P_2$ .
- During Auction round 2, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least  $P_2$ . The auctioneer discloses that five contending applications remained at  $P_2$  and announces the end-of-round price  $P_3$ .
- During Auction round 3, one of the bidders submits an exit bid at slightly below  $P_3$ , while the other four bidders submit bids of at least  $P_3$ . The auctioneer discloses that four contending applications remained at  $P_3$  and announces the end-of-round price  $P_4$ .
- During Auction round 4, one of the bidders submits an exit bid midway between  $P_3$  and  $P_4$ , while the other three remaining bidders submit bids of at least  $P_4$ . The auctioneer discloses that three contending applications remained at  $P_4$  and announces the end-of-auction round price  $P_5$ .
- During Auction round 5, one of the bidders submits an exit bid at slightly above  $P_4$ , and one of the bidders submits an exit bid at  $P_c$  midway between  $P_4$  and  $P_5$ . The final bidder submits a bid greater than  $P_c$ . Since the aggregate demand at  $P_5$  does not exceed one, the auction concludes in Auction round 5. The application associated with the highest bid in Auction round 5 is deemed the successful application. The clearing price is  $P_c$ , as this is the lowest price at which aggregate demand can be met.

To the extent possible, auctions to resolve multiple string contention situations will be conducted simultaneously.

#### 4.3.1.1 *Currency*

For bids to be comparable, all bids in the auction will be submitted in any integer (whole) number of US dollars.

#### *4.3.1.2 Fees*

A bidding deposit will be required of applicants participating in the auction, in an amount to be determined. The bidding deposit must be transmitted by wire transfer to a specified bank account specified by ICANN or its auction provider at a major international bank, to be received in advance of the auction date. The amount of the deposit will determine a bidding limit for each bidder: the bidding deposit will equal 10% of the bidding limit; and the bidder will not be permitted to submit any bid in excess of its bidding limit.

In order to avoid the need for bidders to pre-commit to a particular bidding limit, bidders may be given the option of making a specified deposit that will provide them with unlimited bidding authority for a given application. The amount of the deposit required for unlimited bidding authority will depend on the particular contention set and will be based on an assessment of the possible final prices within the auction.

All deposits from non-defaulting losing bidders will be returned following the close of the auction.

#### *4.3.2 Winning Bid Payments*

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Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins (i.e., if its application is approved), and to enter into the prescribed registry agreement with ICANN— together with a specified penalty for defaulting on payment of its winning bid or failing to enter into the required registry agreement.

The winning bidder in any auction will be required to pay the full amount of the final price within 20 business days of the end of the auction. Payment is to be made by wire transfer to the same international bank account as the bidding deposit, and the applicant's bidding deposit will be credited toward the final price.

In the event that a bidder anticipates that it would require a longer payment period than 20 business days due to verifiable government-imposed currency restrictions, the bidder may advise ICANN well in advance of the auction and ICANN will consider applying a longer payment period to all bidders within the same contention set.

Any winning bidder for whom the full amount of the final price is not received within 20 business days of the end of an auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that receipt of full payment is imminent.

Any winning bidder for whom the full amount of the final price is received within 20 business days of the end of an auction retains the obligation to execute the required registry agreement within 90 days of the end of auction. Such winning bidder who does not execute the agreement within 90 days of the end of the auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that execution of the registry agreement is imminent.

### *4.3.3 Post-Default Procedures*

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Once declared in default, any winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price. The same default procedures and penalties are in place for any runner-up bidder receiving such an offer.

Each bidder that is offered the relevant gTLD will be given a specified period—typically, four business days—to respond as to whether it wants the gTLD. A bidder who responds in the affirmative will have 20 business days to submit its full payment. A bidder who declines such an offer cannot revert on that statement, has no further obligations in this context and will not be considered in default.

The penalty for defaulting on a winning bid will equal 10% of the defaulting bid.<sup>2</sup> Default penalties will be charged against any defaulting applicant's bidding deposit before the associated bidding deposit is returned.

<sup>2</sup> If bidders were given the option of making a specified deposit that provided them with unlimited bidding authority for a given application and if the winning bidder utilized this option, then the penalty for defaulting on a winning bid will be the lesser of the following: (1) 10% of the defaulting bid, or (2) the specified deposit amount that provided the bidder with unlimited bidding authority.

#### *4.4 Contention Resolution and Contract Execution*

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An applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step. (Refer to section 5.1 of Module 5.)

If a winner of the contention resolution procedure has not executed a contract within 90 calendar days of the decision, ICANN has the right to deny that application and extend an offer to the runner-up applicant, if any, to proceed with its application. For example, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time. If the winning applicant can demonstrate that it is working diligently and in good faith toward successful completion of the steps necessary for entry into the registry agreement, ICANN may extend the 90-day period at its discretion. Runner-up applicants have no claim of priority over the winning application, even after what might be an extended period of negotiation.

# DRAFT - New gTLD Program - String Contention

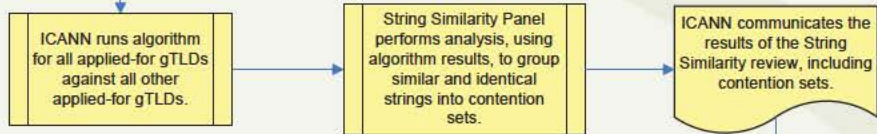
Ex. R-ER-3



Application/  
Admin Check



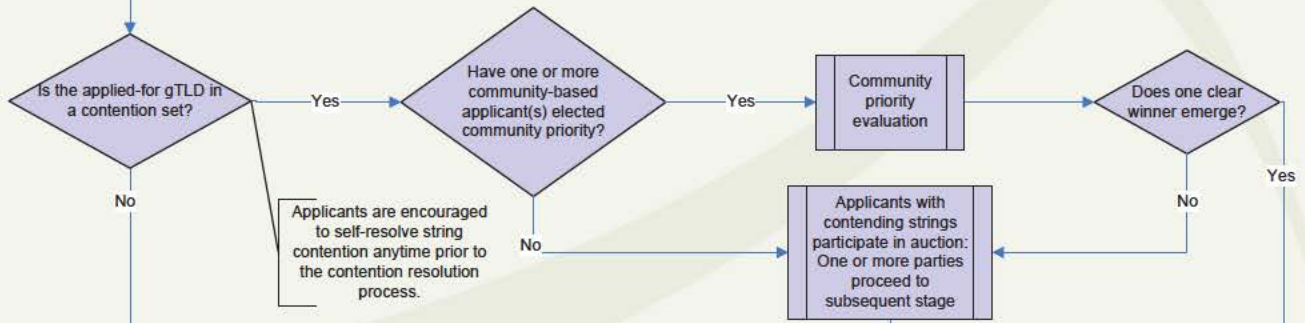
Initial Evaluation (IE)  
String Review



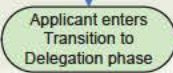
IE + EE  
+ Dispute Res

IE, Extended Evaluation (EE), and Dispute Resolution continue. Some applications may not pass certain elements of the review process, which may alter the contention sets.

String Contention



Transition to Delegation





# gTLD Applicant Guidebook

(v. 2012-06-04)

## Module 5

4 June 2012

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# Module 5

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## *Transition to Delegation*

This module describes the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.

### *5.1 Registry Agreement*

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All applicants that have successfully completed the evaluation process—including, if necessary, the dispute resolution and string contention processes—are required to enter into a registry agreement with ICANN before proceeding to delegation.

After the close of each stage in the process, ICANN will send a notification to those successful applicants that are eligible for execution of a registry agreement at that time.

To proceed, applicants will be asked to provide specified information for purposes of executing the registry agreement:

1. Documentation of the applicant's continued operations instrument (see Specification 8 to the agreement).
2. Confirmation of contact information and signatory to the agreement.
3. Notice of any material changes requested to the terms of the agreement.
4. The applicant must report: (i) any ownership interest it holds in any registrar or reseller of registered names, (ii) if known, any ownership interest that a registrar or reseller of registered names holds in the applicant, and (iii) if the applicant controls, is controlled by, or is under common control with any registrar or reseller of registered names. ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement if it is determined that the registry-registrar cross-ownership



arrangements might raise competition issues. For this purpose "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

To ensure that an applicant continues to be a going concern in good legal standing, ICANN reserves the right to ask the applicant to submit additional updated documentation and information before entering into the registry agreement.

ICANN will begin processing registry agreements one month after the date of the notification to successful applicants. Requests will be handled in the order the complete information is received.

Generally, the process will include formal approval of the agreement without requiring additional Board review, so long as: the application passed all evaluation criteria; there are no material changes in circumstances; and there are no material changes to the base agreement. There may be other cases where the Board requests review of an application.

Eligible applicants are expected to have executed the registry agreement within nine (9) months of the notification date. Failure to do so may result in loss of eligibility, at ICANN's discretion. An applicant may request an extension of this time period for up to an additional nine (9) months if it can demonstrate, to ICANN's reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for entry into the registry agreement.

The registry agreement can be reviewed in the attachment to this module. Certain provisions in the agreement are labeled as applicable to governmental and intergovernmental entities only. Private entities, even if supported by a government or IGO, would not ordinarily be eligible for these special provisions.

All successful applicants are expected to enter into the agreement substantially as written. Applicants may request and negotiate terms by exception; however, this extends

the time involved in executing the agreement. In the event that material changes to the agreement are requested, these must first be approved by the ICANN Board of Directors before execution of the agreement.

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.

## *5.2 Pre-Delegation Testing*

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Each applicant will be required to complete pre-delegation technical testing as a prerequisite to delegation into the root zone. This pre-delegation test must be completed within the time period specified in the registry agreement.

The purpose of the pre-delegation technical test is to verify that the applicant has met its commitment to establish registry operations in accordance with the technical and operational criteria described in Module 2.

The test is also intended to indicate that the applicant can operate the gTLD in a stable and secure manner. All applicants will be tested on a pass/fail basis according to the requirements that follow.

The test elements cover both the DNS server operational infrastructure and registry system operations. In many cases the applicant will perform the test elements as instructed and provide documentation of the results to ICANN to demonstrate satisfactory performance. At ICANN's discretion, aspects of the applicant's self-certification documentation can be audited either on-site at the services delivery point of the registry or elsewhere as determined by ICANN.

### *5.2.1 Testing Procedures*

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The applicant may initiate the pre-delegation test by submitting to ICANN the Pre-Delegation form and accompanying documents containing all of the following information:

- All name server names and IPv4/IPv6 addresses to be used in serving the new TLD data;
- If using anycast, the list of names and IPv4/IPv6 unicast addresses allowing the identification of each individual server in the anycast sets;
- If IDN is supported, the complete IDN tables used in the registry system;
- A test zone for the new TLD must be signed at test time and the valid key-set to be used at the time of testing must be provided to ICANN in the documentation, as well as the TLD DNSSEC Policy Statement (DPS);
- The executed agreement between the selected escrow agent and the applicant; and
- Self-certification documentation as described below for each test item.

ICANN will review the material submitted and in some cases perform tests in addition to those conducted by the applicant. After testing, ICANN will assemble a report with the outcome of the tests and provide that report to the applicant.

Any clarification request, additional information request, or other request generated in the process will be highlighted and listed in the report sent to the applicant.

ICANN may request the applicant to complete load tests considering an aggregated load where a single entity is performing registry services for multiple TLDs.

Once an applicant has met all of the pre-delegation testing requirements, it is eligible to request delegation of its applied-for gTLD.

If an applicant does not complete the pre-delegation steps within the time period specified in the registry agreement, ICANN reserves the right to terminate the registry agreement.

### *5.2.2 Test Elements: DNS Infrastructure*

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The first set of test elements concerns the DNS infrastructure of the new gTLD. In all tests of the DNS infrastructure, all requirements are independent of whether IPv4 or IPv6 is used. All tests shall be done both over IPv4 and IPv6, with reports providing results according to both protocols.

**UDP Support --** The DNS infrastructure to which these tests apply comprises the complete set of servers and network infrastructure to be used by the chosen providers to deliver DNS service for the new gTLD to the Internet. The documentation provided by the applicant must include the results from a system performance test indicating available network and server capacity and an estimate of expected capacity during normal operation to ensure stable service as well as to adequately address Distributed Denial of Service (DDoS) attacks.

Self-certification documentation shall include data on load capacity, latency and network reachability.

Load capacity shall be reported using a table, and a corresponding graph, showing percentage of queries responded against an increasing number of queries per second generated from local (to the servers) traffic generators. The table shall include at least 20 data points and loads of UDP-based queries that will cause up to 10% query loss against a randomly selected subset of servers within the applicant's DNS infrastructure. Responses must either contain zone data or be NXDOMAIN or NODATA responses to be considered valid.

Query latency shall be reported in milliseconds as measured by DNS probes located just outside the border routers of the physical network hosting the name servers, from a network topology point of view.

Reachability will be documented by providing information on the transit and peering arrangements for the DNS server locations, listing the AS numbers of the transit providers or peers at each point of presence and available bandwidth at those points of presence.

**TCP support --** TCP transport service for DNS queries and responses must be enabled and provisioned for expected load. ICANN will review the capacity self-certification documentation provided by the applicant and will perform TCP reachability and transaction capability tests across a

randomly selected subset of the name servers within the applicant's DNS infrastructure. In case of use of anycast, each individual server in each anycast set will be tested.

Self-certification documentation shall include data on load capacity, latency and external network reachability.

Load capacity shall be reported using a table, and a corresponding graph, showing percentage of queries that generated a valid (zone data, NODATA, or NXDOMAIN) response against an increasing number of queries per second generated from local (to the name servers) traffic generators. The table shall include at least 20 data points and loads that will cause up to 10% query loss (either due to connection timeout or connection reset) against a randomly selected subset of servers within the applicant's DNS infrastructure.

Query latency will be reported in milliseconds as measured by DNS probes located just outside the border routers of the physical network hosting the name servers, from a network topology point of view.

Reachability will be documented by providing records of TCP-based DNS queries from nodes external to the network hosting the servers. These locations may be the same as those used for measuring latency above.

**DNSSEC support --** Applicant must demonstrate support for EDNS(0) in its server infrastructure, the ability to return correct DNSSEC-related resource records such as DNSKEY, RRSIG, and NSEC/NSEC3 for the signed zone, and the ability to accept and publish DS resource records from second-level domain administrators. In particular, the applicant must demonstrate its ability to support the full life cycle of KSK and ZSK keys. ICANN will review the self-certification materials as well as test the reachability, response sizes, and DNS transaction capacity for DNS queries using the EDNS(0) protocol extension with the "DNSSEC OK" bit set for a randomly selected subset of all name servers within the applicant's DNS infrastructure. In case of use of anycast, each individual server in each anycast set will be tested.

Load capacity, query latency, and reachability shall be documented as for UDP and TCP above.

### 5.2.3 Test Elements: Registry Systems

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As documented in the registry agreement, registries must provide support for EPP within their Shared Registration System, and provide Whois service both via port 43 and a web interface, in addition to support for the DNS. This section details the requirements for testing these registry systems.

**System performance** -- The registry system must scale to meet the performance requirements described in Specification 10 of the registry agreement and ICANN will require self-certification of compliance. ICANN will review the self-certification documentation provided by the applicant to verify adherence to these minimum requirements.

**Whois support** -- Applicant must provision Whois services for the anticipated load. ICANN will verify that Whois data is accessible over IPv4 and IPv6 via both TCP port 43 and via a web interface and review self-certification documentation regarding Whois transaction capacity. Response format according to Specification 4 of the registry agreement and access to Whois (both port 43 and via web) will be tested by ICANN remotely from various points on the Internet over both IPv4 and IPv6.

Self-certification documents shall describe the maximum number of queries per second successfully handled by both the port 43 servers as well as the web interface, together with an applicant-provided load expectation.

Additionally, a description of deployed control functions to detect and mitigate data mining of the Whois database shall be documented.

**EPP Support** -- As part of a shared registration service, applicant must provision EPP services for the anticipated load. ICANN will verify conformance to appropriate RFCs (including EPP extensions for DNSSEC). ICANN will also review self-certification documentation regarding EPP transaction capacity.

Documentation shall provide a maximum Transaction per Second rate for the EPP interface with 10 data points corresponding to registry database sizes from 0 (empty) to the expected size after one year of operation, as determined by applicant.

Documentation shall also describe measures taken to handle load during initial registry operations, such as a land-rush period.

**IPv6 support --** The ability of the registry to support registrars adding, changing, and removing IPv6 DNS records supplied by registrants will be tested by ICANN. If the registry supports EPP access via IPv6, this will be tested by ICANN remotely from various points on the Internet.

**DNSSEC support --** ICANN will review the ability of the registry to support registrars adding, changing, and removing DNSSEC-related resource records as well as the registry's overall key management procedures. In particular, the applicant must demonstrate its ability to support the full life cycle of key changes for child domains. Inter-operation of the applicant's secure communication channels with the IANA for trust anchor material exchange will be verified.

The practice and policy document (also known as the DNSSEC Policy Statement or DPS), describing key material storage, access and usage for its own keys is also reviewed as part of this step.

**IDN support --** ICANN will verify the complete IDN table(s) used in the registry system. The table(s) must comply with the guidelines in <http://iana.org/procedures/idn-repository.html>.

Requirements related to IDN for Whois are being developed. After these requirements are developed, prospective registries will be expected to comply with published IDN-related Whois requirements as part of pre-delegation testing.

**Escrow deposit --** The applicant-provided samples of data deposit that include both a full and an incremental deposit showing correct type and formatting of content will be reviewed. Special attention will be given to the agreement with the escrow provider to ensure that escrowed data can be released within 24 hours should it be necessary. ICANN may, at its option, ask an independent third party to demonstrate the reconstitutability of the registry from escrowed data. ICANN may elect to test the data release process with the escrow agent.

### 5.3 *Delegation Process*

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Upon notice of successful completion of the ICANN pre-delegation testing, applicants may initiate the process for delegation of the new gTLD into the root zone database.

This will include provision of additional information and completion of additional technical steps required for delegation. Information about the delegation process is available at <http://iana.org/domains/root/>.

### 5.4 *Ongoing Operations*

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An applicant that is successfully delegated a gTLD will become a "Registry Operator." In being delegated the role of operating part of the Internet's domain name system, the applicant will be assuming a number of significant responsibilities. ICANN will hold all new gTLD operators accountable for the performance of their obligations under the registry agreement, and it is important that all applicants understand these responsibilities.

#### 5.4.1 *What is Expected of a Registry Operator*

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The registry agreement defines the obligations of gTLD registry operators. A breach of the registry operator's obligations may result in ICANN compliance actions up to and including termination of the registry agreement. Prospective applicants are encouraged to review the following brief description of some of these responsibilities.

Note that this is a non-exhaustive list provided to potential applicants as an introduction to the responsibilities of a registry operator. For the complete and authoritative text, please refer to the registry agreement.

A registry operator is obligated to:

**Operate the TLD in a stable and secure manner.** The registry operator is responsible for the entire technical operation of the TLD. As noted in RFC 1591<sup>1</sup>:

"The designated manager must do a satisfactory job of operating the DNS service for the domain. That is, the actual management of the assigning of domain names, delegating subdomains and operating nameservers must be done with technical competence. This includes keeping

<sup>1</sup> See <http://www.rfc-editor.org/rfc/rfc1591.txt>



the central IR<sup>2</sup> (in the case of top-level domains) or other higher-level domain manager advised of the status of the domain, responding to requests in a timely manner, and operating the database with accuracy, robustness, and resilience.”

The registry operator is required to comply with relevant technical standards in the form of RFCs and other guidelines. Additionally, the registry operator must meet performance specifications in areas such as system downtime and system response times (see Specifications 6 and 10 of the registry agreement).

**Comply with consensus policies and temporary policies.**

gTLD registry operators are required to comply with consensus policies. Consensus policies may relate to a range of topics such as issues affecting interoperability of the DNS, registry functional and performance specifications, database security and stability, or resolution of disputes over registration of domain names.

To be adopted as a consensus policy, a policy must be developed by the Generic Names Supporting Organization (GNSO)<sup>3</sup> following the process in Annex A of the ICANN Bylaws.<sup>4</sup> The policy development process involves deliberation and collaboration by the various stakeholder groups participating in the process, with multiple opportunities for input and comment by the public, and can take significant time.

Examples of existing consensus policies are the Inter-Registrar Transfer Policy (governing transfers of domain names between registrars), and the Registry Services Evaluation Policy (establishing a review of proposed new registry services for security and stability or competition concerns), although there are several more, as found at <http://www.icann.org/en/general/consensus-policies.htm>.

gTLD registry operators are obligated to comply with both existing consensus policies and those that are developed in the future. Once a consensus policy has been formally adopted, ICANN will provide gTLD registry operators with notice of the requirement to implement the new policy and the effective date.

<sup>2</sup> IR is a historical reference to “Internet Registry,” a function now performed by ICANN.

<sup>3</sup> <http://gns0.icann.org>

<sup>4</sup> <http://www.icann.org/en/general/bylaws.htm#AnnexA>

In addition, the ICANN Board may, when required by circumstances, establish a temporary policy necessary to maintain the stability or security of registry services or the DNS. In such a case, all gTLD registry operators will be required to comply with the temporary policy for the designated period of time.

For more information, see Specification 1 of the registry agreement.

**Implement start-up rights protection measures.** The registry operator must implement, at a minimum, a Sunrise period and a Trademark Claims service during the start-up phases for registration in the TLD, as provided in the registry agreement. These mechanisms will be supported by the established Trademark Clearinghouse as indicated by ICANN.

The Sunrise period allows eligible rightsholders an early opportunity to register names in the TLD.

The Trademark Claims service provides notice to potential registrants of existing trademark rights, as well as notice to rightsholders of relevant names registered. Registry operators may continue offering the Trademark Claims service after the relevant start-up phases have concluded.

For more information, see Specification 7 of the registry agreement and the Trademark Clearinghouse model accompanying this module.

**Implement post-launch rights protection measures.** The registry operator is required to implement decisions made under the Uniform Rapid Suspension (URS) procedure, including suspension of specific domain names within the registry. The registry operator is also required to comply with and implement decisions made according to the Trademark Post-Delegation Dispute Resolution Policy (PDDRP).

The required measures are described fully in the URS and PDDRP procedures accompanying this module. Registry operators may introduce additional rights protection measures relevant to the particular gTLD.

**Implement measures for protection of country and territory names in the new gTLD.** All new gTLD registry operators are required to provide certain minimum protections for country and territory names, including an initial reservation requirement and establishment of applicable rules and

procedures for release of these names. The rules for release can be developed or agreed to by governments, the GAC, and/or approved by ICANN after a community discussion. Registry operators are encouraged to implement measures for protection of geographical names in addition to those required by the agreement, according to the needs and interests of each gTLD's particular circumstances. (See Specification 5 of the registry agreement).

**Pay recurring fees to ICANN.** In addition to supporting expenditures made to accomplish the objectives set out in ICANN's mission statement, these funds enable the support required for new gTLDs, including: contractual compliance, registry liaison, increased registrar accreditations, and other registry support activities. The fees include both a fixed component (USD 25,000 annually) and, where the TLD exceeds a transaction volume, a variable fee based on transaction volume. See Article 6 of the registry agreement.

**Regularly deposit data into escrow.** This serves an important role in registrant protection and continuity for certain instances where the registry or one aspect of the registry operations experiences a system failure or loss of data. (See Specification 2 of the registry agreement.)

**Deliver monthly reports in a timely manner.** A registry operator must submit a report to ICANN on a monthly basis. The report includes registrar transactions for the month and is used by ICANN for calculation of registrar fees. (See Specification 3 of the registry agreement.)

**Provide Whois service.** A registry operator must provide a publicly available Whois service for registered domain names in the TLD. (See Specification 4 of the registry agreement.)

**Maintain partnerships with ICANN-accredited registrars.** A registry operator creates a Registry-Registrar Agreement (RRA) to define requirements for its registrars. This must include certain terms that are specified in the Registry Agreement, and may include additional terms specific to the TLD. A registry operator must provide non-discriminatory access to its registry services to all ICANN-accredited registrars with whom it has entered into an RRA, and who are in compliance with the requirements. This includes providing advance notice of pricing changes to all

registrars, in compliance with the time frames specified in the agreement. (See Article 2 of the registry agreement.)

**Maintain an abuse point of contact.** A registry operator must maintain and publish on its website a single point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller. A registry operator must also take reasonable steps to investigate and respond to any reports from law enforcement, governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. (See Article 2 and Specification 6 of the registry agreement.)

**Cooperate with contractual compliance audits.** To maintain a level playing field and a consistent operating environment, ICANN staff performs periodic audits to assess contractual compliance and address any resulting problems. A registry operator must provide documents and information requested by ICANN that are necessary to perform such audits. (See Article 2 of the registry agreement.)

**Maintain a Continued Operations Instrument.** A registry operator must, at the time of the agreement, have in place a continued operations instrument sufficient to fund basic registry operations for a period of three (3) years. This requirement remains in place for five (5) years after delegation of the TLD, after which time the registry operator is no longer required to maintain the continued operations instrument. (See Specification 8 to the registry agreement.)

**Maintain community-based policies and procedures.** If the registry operator designated its application as community-based at the time of the application, the registry operator has requirements in its registry agreement to maintain the community-based policies and procedures it specified in its application. The registry operator is bound by the Registry Restrictions Dispute Resolution Procedure with respect to disputes regarding execution of its community-based policies and procedures. (See Article 2 to the registry agreement.)

**Have continuity and transition plans in place.** This includes performing failover testing on a regular basis. In the event that a transition to a new registry operator becomes necessary, the registry operator is expected to cooperate

by consulting with ICANN on the appropriate successor, providing the data required to enable a smooth transition, and complying with the applicable registry transition procedures. (See Articles 2 and 4 of the registry agreement.)

***Make TLD zone files available via a standardized process.***

This includes provision of access to the registry's zone file to credentialed users, according to established access, file, and format standards. The registry operator will enter into a standardized form of agreement with zone file users and will accept credential information for users via a clearinghouse. (See Specification 4 of the registry agreement.)

***Implement DNSSEC.*** The registry operator is required to sign the TLD zone files implementing Domain Name System Security Extensions (DNSSEC) in accordance with the relevant technical standards. The registry must accept public key material from registrars for domain names registered in the TLD, and publish a DNSSEC Policy Statement describing key material storage, access, and usage for the registry's keys. (See Specification 6 of the registry agreement.)

#### ***5.4.2 What is Expected of ICANN***

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ICANN will continue to provide support for gTLD registry operators as they launch and maintain registry operations. ICANN's gTLD registry liaison function provides a point of contact for gTLD registry operators for assistance on a continuing basis.

ICANN's contractual compliance function will perform audits on a regular basis to ensure that gTLD registry operators remain in compliance with agreement obligations, as well as investigate any complaints from the community regarding the registry operator's adherence to its contractual obligations. See <http://www.icann.org/en/compliance/> for more information on current contractual compliance activities.

ICANN's Bylaws require ICANN to act in an open and transparent manner, and to provide equitable treatment among registry operators. ICANN is responsible for maintaining the security and stability of the global Internet, and looks forward to a constructive and cooperative relationship with future gTLD registry operators in furtherance of this goal.

# Draft – New gTLD Program - Transition to Delegation

(Timeframes are estimates only)

## Applicant Doc Prep 1 Month

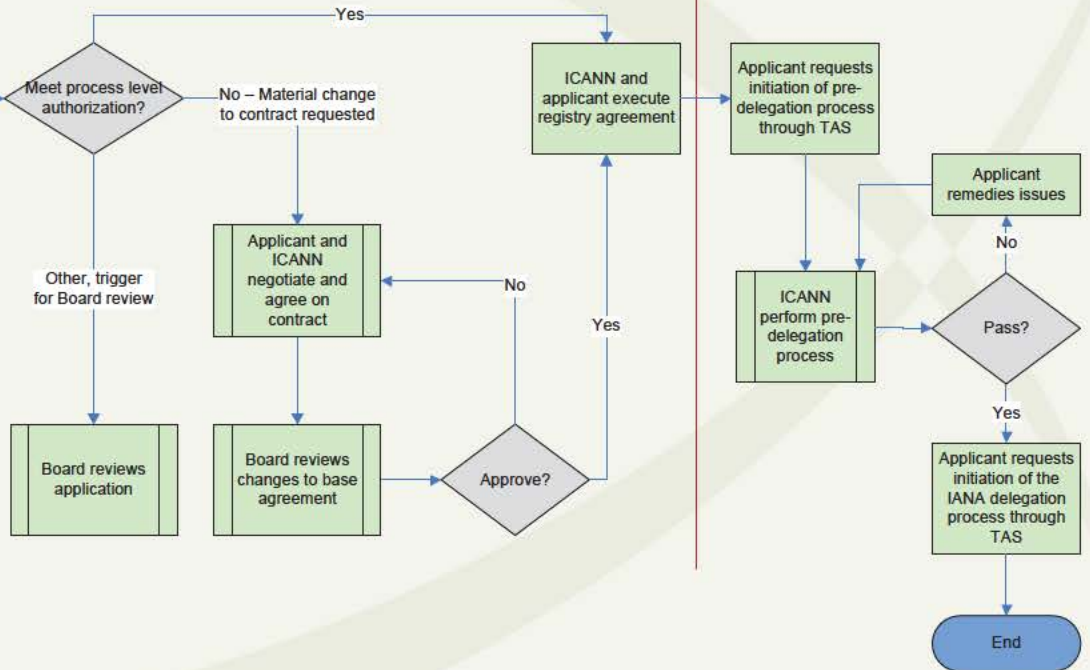
## Contracting – 1 day to 9 months

## Pre-Delegation Testing – 1 to 12 months

ICANN provides notice of eligibility to applicant

Applicant prepares documentation for contracting

- Includes:
- Material changes in circumstances
  - Continued Operations instrument
  - Designated contracting parties



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# *New gTLD Agreement*

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This document contains the registry agreement associated with the Applicant Guidebook for New gTLDs.

Successful gTLD applicants would enter into this form of registry agreement with ICANN prior to delegation of the new gTLD. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process).

## REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this “Agreement”) is entered into as of \_\_\_\_\_ (the “Effective Date”) between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation (“ICANN”), and \_\_\_\_\_, a \_\_\_\_\_ (“Registry Operator”).

### ARTICLE 1.

#### DELEGATION AND OPERATION OF TOP-LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

**1.1 Domain and Designation.** The Top-Level Domain to which this Agreement applies is \_\_\_\_\_ (the “TLD”). Upon the Effective Date and until the end of the Term (as defined in Section 4.1), ICANN designates Registry Operator as the registry operator for the TLD, subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone.

**1.2 Technical Feasibility of String.** While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.

#### **1.3 Representations and Warranties.**

(a) Registry Operator represents and warrants to ICANN as follows:

(i) all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

(ii) Registry Operator is duly organized, validly existing and in good standing under the laws of the jurisdiction set forth in the preamble hereto, and Registry Operator has all requisite power and authority and obtained all necessary approvals to enter into and duly execute and deliver this Agreement; and

(iii) Registry Operator has delivered to ICANN a duly executed instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the “Continued Operations Instrument”), and such instrument is a binding obligation of the parties thereto, enforceable against the parties thereto in accordance with its terms.

(b) ICANN represents and warrants to Registry Operator that ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of the State of California, United States of America. ICANN has all requisite power and authority and obtained all necessary corporate approvals to enter into and duly execute and deliver this Agreement.



## ARTICLE 2.

### COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

**2.1 Approved Services; Additional Services.** Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2.1 in the specification at [*see specification 6*] (“Specification 6”) and such other Registry Services set forth on Exhibit A (collectively, the “Approved Services”). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a modification to an Approved Service (each, an “Additional Service”), Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at <http://www.icann.org/en/registries/rsep/rsep.html>, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the “ICANN Bylaws”) applicable to Consensus Policies (the “RSEP”). Registry Operator may offer Additional Services only with the written approval of ICANN, and, upon any such approval, such Additional Services shall be deemed Registry Services under this Agreement. In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP, which amendment shall be in a form reasonably acceptable to the parties.

**2.2 Compliance with Consensus Policies and Temporary Policies.** Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with the ICANN Bylaws, provided such future Consensus Policies and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth at [*see specification 1*]\* (“Specification 1”).

**2.3 Data Escrow.** Registry Operator shall comply with the registry data escrow procedures posted at [*see specification 2*]\*.

**2.4 Monthly Reporting.** Within twenty (20) calendar days following the end of each calendar month, Registry Operator shall deliver to ICANN reports in the format posted in the specification at [*see specification 3*]\*.

**2.5 Publication of Registration Data.** Registry Operator shall provide public access to registration data in accordance with the specification posted at [*see specification 4*]\* (“Specification 4”).

**2.6 Reserved Names.** Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the restrictions on registration of character strings set forth at [*see specification 5*]\* (“Specification 5”). Registry Operator may establish policies concerning the reservation or blocking of additional character strings within the TLD at its discretion. If Registry Operator is the registrant for any domain names in the Registry TLD (other than the Second-Level Reservations for Registry Operations from Specification 5), such registrations must be through an ICANN accredited registrar. Any such registrations will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-Level Transaction Fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

**2.7 Registry Interoperability and Continuity.** Registry Operator shall comply with the Registry Interoperability and Continuity Specifications as set forth in Specification 6.

**2.8 Protection of Legal Rights of Third Parties.** Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth in the specification at [*see specification 7*]\* (“Specification 7”). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all remedies imposed by ICANN pursuant to Section 2 of Specification 7, subject to Registry Operator’s right to challenge such remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.

**2.9 Registrars.**

(a) Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided, that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD. Such agreement may be revised by Registry Operator from time to time; provided, however, that any such revisions must be approved in advance by ICANN.

(b) If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will not disclose such contracts to any third party other than relevant competition authorities. ICANN reserves the right, but not the obligation, to refer any such contract, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, transaction or other arrangement might raise competition issues.

(c) For the purposes of this Agreement: (i) “Affiliate” means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

**2.10 Pricing for Registry Services.**

(a) With respect to initial domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars, unless such refunds, rebates, discounts, product tying or other programs are of a limited

duration that is clearly and conspicuously disclosed to the registrar when offered) of no less than thirty (30) calendar days. Registry Operator shall offer registrars the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(b) With respect to renewal of domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying, Qualified Marketing Programs or other programs which had the effect of reducing the price charged to registrars) of no less than one hundred eighty (180) calendar days. Notwithstanding the foregoing sentence, with respect to renewal of domain name registrations: (i) Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to (A) for the period beginning on the Effective Date and ending twelve (12) months following the Effective Date, the initial price charged for registrations in the TLD, or (B) for subsequent periods, a price for which Registry Operator provided a notice pursuant to the first sentence of this Section 2.10(b) within the twelve (12) month period preceding the effective date of the proposed price increase; and (ii) Registry Operator need not provide notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(c) In addition, Registry Operator must have uniform pricing for renewals of domain name registrations (“Renewal Pricing”). For the purposes of determining Renewal Pricing, the price for each domain registration renewal must be identical to the price of all other domain name registration renewals in place at the time of such renewal, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs in place at the time of renewal. The foregoing requirements of this Section 2.10(c) shall not apply for (i) purposes of determining Renewal Pricing if the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to higher Renewal Pricing at the time of the initial registration of the domain name following clear and conspicuous disclosure of such Renewal Pricing to such registrant, and (ii) discounted Renewal Pricing pursuant to a Qualified Marketing Program (as defined below). The parties acknowledge that the purpose of this Section 2.10(c) is to prohibit abusive and/or discriminatory Renewal Pricing practices imposed by Registry Operator without the written consent of the applicable registrant at the time of the initial registration of the domain and this Section 2.10(c) will be interpreted broadly to prohibit such practices. For purposes of this Section 2.10(c), a “Qualified Marketing Program” is a marketing program pursuant to which Registry Operator offers discounted Renewal Pricing, provided that each of the following criteria is satisfied: (i) the program and related discounts are offered for a period of time not to exceed one hundred eighty (180) calendar days (with consecutive substantially similar programs aggregated for purposes of determining the number of calendar days of the program), (ii) all ICANN accredited registrars are provided the same opportunity to qualify for such discounted Renewal Pricing; and (iii) the intent or effect of the program is not to exclude any particular class(es) of registrations (e.g., registrations held by large corporations) or increase the renewal price of any particular class(es) of registrations. Nothing in this Section 2.10(c) shall limit Registry Operator’s obligations pursuant to Section 2.10(b).

(d) Registry Operator shall provide public query-based DNS lookup service for the TLD (that is, operate the Registry TLD zone servers) at its sole expense.

## **2.11 Contractual and Operational Compliance Audits.**

(a) ICANN may from time to time (not to exceed twice per calendar year) conduct, or engage a third party to conduct, contractual compliance audits to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN will (a) give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN, and (b) use commercially reasonable efforts to conduct such audit in such a manner as to not unreasonably disrupt the operations of Registry Operator. As part of such audit and upon request by ICANN, Registry Operator shall timely provide all responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than five (5) business days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement.

(b) Any audit conducted pursuant to Section 2.11(a) will be at ICANN's expense, unless (i) Registry Operator (A) controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates, or (B) has subcontracted the provision of Registry Services to an ICANN accredited registrar or registrar reseller or any of their respective Affiliates, and, in either case of (A) or (B) above, the audit relates to Registry Operator's compliance with Section 2.14, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the portion of the audit related to Registry Operator's compliance with Section 2.14, or (ii) the audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% to ICANN's detriment, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the entirety of such audit. In either such case of (i) or (ii) above, such reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

(c) Notwithstanding Section 2.11(a), if Registry Operator is found not to be in compliance with its representations and warranties contained in Article 1 of this Agreement or its covenants contained in Article 2 of this Agreement in two consecutive audits conducted pursuant to this Section 2.11, ICANN may increase the number of such audits to one per calendar quarter.

(d) Registry Operator will give ICANN immediate notice of the commencement of any of the proceedings referenced in Section 4.3(d) or the occurrence of any of the matters specified in Section 4.3(f).

**2.12 Continued Operations Instrument.** Registry Operator shall comply with the terms and conditions relating to the Continued Operations Instrument set forth in the specification at [*see specification 8*].

**2.13 Emergency Transition.** Registry Operator agrees that in the event that any of the registry functions set forth in Section 6 of Specification 10 fails for a period longer than the emergency threshold for such function set forth in Section 6 of Specification 10, ICANN may designate an emergency interim registry operator of the registry for the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process (available at \_\_\_\_\_) (as the same may be amended from time to time, the "Registry Transition Process") until such time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process,

provided that Registry Operator pays all reasonable costs incurred (i) by ICANN as a result of the designation of the Emergency Operator and (ii) by the Emergency Operator in connection with the operation of the registry for the TLD, which costs shall be documented in reasonable detail in records that shall be made available to Registry Operator. In the event ICANN designates an Emergency Operator pursuant to this Section 2.13 and the Registry Transition Process, Registry Operator shall provide ICANN or any such Emergency Operator with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such Emergency Operator. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event that an Emergency Operator is designated pursuant to this Section 2.13. In addition, in the event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

**2.14 Registry Code of Conduct.** In connection with the operation of the registry for the TLD, Registry Operator shall comply with the Registry Code of Conduct as set forth in the specification at [*see specification 9*].

**2.15 Cooperation with Economic Studies.** If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data reasonably necessary for the purposes of such study requested by ICANN or its designee, provided, that Registry Operator may withhold any internal analyses or evaluations prepared by Registry Operator with respect to such data. Any data delivered to ICANN or its designee pursuant to this Section 2.15 shall be fully aggregated and anonymized by ICANN or its designee prior to any disclosure of such data to any third party.

**2.16 Registry Performance Specifications.** Registry Performance Specifications for operation of the TLD will be as set forth in the specification at [*see specification 10*]\*. Registry Operator shall comply with such Performance Specifications and, for a period of at least one year, shall keep technical and operational records sufficient to evidence compliance with such specifications for each calendar year during the Term.

**2.17 Personal Data.** Registry Operator shall (i) notify each ICANN-accredited registrar that is a party to the registry-registrar agreement for the TLD of the purposes for which data about any identified or identifiable natural person (“Personal Data”) submitted to Registry Operator by such registrar is collected and used under this Agreement or otherwise and the intended recipients (or categories of recipients) of such Personal Data, and (ii) require such registrar to obtain the consent of each registrant in the TLD for such collection and use of Personal Data. Registry Operator shall take reasonable steps to protect Personal Data collected from such registrar from loss, misuse, unauthorized disclosure, alteration or destruction. Registry Operator shall not use or authorize the use of Personal Data in a way that is incompatible with the notice provided to registrars.

**2.18 [Note: For Community-Based TLDs Only] Obligations of Registry Operator to TLD Community.** Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration



policies, and shall enforce such registration policies. Registry Operator agrees to implement and be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at [*insert applicable URL*] with respect to disputes arising pursuant to this Section 2.18.]

### ARTICLE 3.

#### COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

**3.1 Open and Transparent.** Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

**3.2 Equitable Treatment.** ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

**3.3 TLD Nameservers.** ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by Registry Operator (in a format and with required technical elements specified by ICANN at <http://www.iana.org/domains/root/> will be implemented by ICANN within seven (7) calendar days or as promptly as feasible following technical verifications.

**3.4 Root-zone Information Publication.** ICANN's publication of root-zone contact information for the TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at <http://www.iana.org/domains/root/>.

**3.5 Authoritative Root Database.** To the extent that ICANN is authorized to set policy with regard to an authoritative root server system, ICANN shall use commercially reasonable efforts to (a) ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD, (b) maintain a stable, secure, and authoritative publicly available database of relevant information about the TLD, in accordance with ICANN publicly available policies and procedures, and (c) coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner; provided, that ICANN shall not be in breach of this Agreement and ICANN shall have no liability in the event that any third party (including any governmental entity or internet service provider) blocks or restricts access to the TLD in any jurisdiction.

### ARTICLE 4.

#### TERM AND TERMINATION

**4.1 Term.** The term of this Agreement will be ten years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

**4.2 Renewal.**

(a) This Agreement will be renewed for successive periods of ten years upon the expiration of the initial Term set forth in Section 4.1 and each successive Term, unless:

(i) Following notice by ICANN to Registry Operator of a fundamental and material breach of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement, which notice shall include with specificity the details of the alleged breach, and such breach has not been cured within thirty (30) calendar days of such notice, (A) an arbitrator or court has finally determined that Registry Operator has been in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (B) Registry Operator has failed to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court; or

(ii) During the then current Term, Registry Operator shall have been found by an arbitrator (pursuant to Section 5.2 of this Agreement) on at least three (3) separate occasions to have been in fundamental and material breach (whether or not cured) of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement.

(b) Upon the occurrence of the events set forth in Section 4.2(a) (i) or (ii), the Agreement shall terminate at the expiration of the then current Term.

#### **4.3 Termination by ICANN.**

(a) ICANN may, upon notice to Registry Operator, terminate this Agreement if: (i) Registry Operator fails to cure (A) any fundamental and material breach of Registry Operator's representations and warranties set forth in Article 1 or covenants set forth in Article 2, or (B) any breach of Registry Operator's payment obligations set forth in Article 6 of this Agreement, each within thirty (30) calendar days after ICANN gives Registry Operator notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that Registry Operator is in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (iii) Registry Operator fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b) ICANN may, upon notice to Registry Operator, terminate this Agreement if Registry Operator fails to complete all testing and procedures (identified by ICANN in writing to Registry Operator prior to the date hereof) for delegation of the TLD into the root zone within twelve (12) months of the Effective Date. Registry Operator may request an extension for up to additional twelve (12) months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

(c) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator fails to cure a material breach of Registry Operator's obligations set forth in Section 2.12 of this Agreement within thirty (30) calendar days of delivery of notice of such breach by ICANN, or if the Continued Operations Instrument is not in effect for greater than sixty (60) consecutive calendar days at any time following the Effective Date, (ii) an arbitrator or court has finally determined that Registry Operator is in material breach of such covenant, and (iii) Registry Operator fails to cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(d) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, which proceedings are a material threat to Registry Operator's ability to operate the registry for the TLD, and are not dismissed within sixty (60) days of their commencement, (iii) a trustee, receiver, liquidator or equivalent is appointed in place of Registry Operator or maintains control over any of Registry Operator's property, (iv) execution is levied upon any property of Registry Operator, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors and such proceedings are not dismissed within thirty (30) days of their commencement, or (vi) Registry Operator files for protection under the United States Bankruptcy Code, 11 U.S.C. Section 101 et seq., or a foreign equivalent or liquidates, dissolves or otherwise discontinues its operations or the operation of the TLD.

(e) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such termination as set forth in the applicable procedure described therein.

(f) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer that is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such officer is not terminated within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, or (ii) any member of Registry Operator's board of directors or similar governing body is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such member is not removed from Registry Operator's board of directors or similar governing body within thirty (30) calendar days of Registry Operator's knowledge of the foregoing.

(g) *[Applicable to intergovernmental organizations or governmental entities only.]*  
ICANN may terminate this Agreement pursuant to Section 7.14.

#### **4.4 Termination by Registry Operator.**

(a) Registry Operator may terminate this Agreement upon notice to ICANN if, (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that ICANN is in fundamental and material breach of such covenants, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b) Registry Operator may terminate this Agreement for any reason upon one hundred eighty (180) calendar day advance notice to ICANN.

**4.5 Transition of Registry upon Termination of Agreement.** Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, Registry Operator shall provide ICANN or any successor registry operator that may be designated by ICANN for the TLD in accordance with this Section 4.5 with all data (including the data



escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process; provided, however, that if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) transitioning operation of the TLD is not necessary to protect the public interest, then ICANN may not transition operation of the TLD to a successor registry operator upon the expiration or termination of this Agreement without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed). For the avoidance of doubt, the foregoing sentence shall not prohibit ICANN from delegating the TLD pursuant to a future application process for the delegation of top-level domains, subject to any processes and objection procedures instituted by ICANN in connection with such application process intended to protect the rights of third parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement.

*[Alternative Section 4.5 Transition of Registry upon Termination of Agreement text for intergovernmental organizations or governmental entities or other special circumstances:*

**“Transition of Registry upon Termination of Agreement.** Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, in connection with ICANN's designation of a successor registry operator for the TLD, Registry Operator and ICANN agree to consult each other and work cooperatively to facilitate and implement the transition of the TLD in accordance with this Section 4.5. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process. In the event ICANN determines to transition operation of the TLD to a successor registry operator, upon Registry Operator's consent (which shall not be unreasonably withheld, conditioned or delayed), Registry Operator shall provide ICANN or such successor registry operator for the TLD with any data regarding operations of the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator in addition to data escrowed in accordance with Section 2.3 hereof. In the event that Registry Operator does not consent to provide such data, any registry data related to the TLD shall be returned to Registry Operator, unless otherwise agreed upon by the parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement.”]

**4.6 Effect of Termination.** Upon any expiration of the Term or termination of this Agreement, the obligations and rights of the parties hereto shall cease, provided that such expiration or termination of this Agreement shall not relieve the parties of any obligation or breach of this Agreement accruing prior to such expiration or termination, including, without limitation, all accrued payment obligations arising under Article 6. In addition, Article 5, Article 7, Section 2.12, Section 4.5, and this

Section 4.6 shall survive the expiration or termination of this Agreement. For the avoidance of doubt, the rights of Registry Operator to operate the registry for the TLD shall immediately cease upon any expiration of the Term or termination of this Agreement.

## ARTICLE 5.

### DISPUTE RESOLUTION

**5.1 Cooperative Engagement.** Before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.

**5.2 Arbitration.** Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

[Alternative **Section 5.2 Arbitration** text for intergovernmental organizations or governmental entities or other special circumstances:

**“Arbitration.** Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the

arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Geneva, Switzerland, unless an another location is mutually agreed upon by Registry Operator and ICANN; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction."}]

**5.3 Limitation of Liability.** ICANN's aggregate monetary liability for violations of this Agreement will not exceed an amount equal to the Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any). Registry Operator's aggregate monetary liability to ICANN for breaches of this Agreement will be limited to an amount equal to the fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any), and punitive and exemplary damages, if any, awarded in accordance with Section 5.2. In no event shall either party be liable for special, punitive, exemplary or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided in Section 5.2. Except as otherwise provided in this Agreement, neither party makes any warranty, express or implied, with respect to the services rendered by itself, its servants or agents, or the results obtained from their work, including, without limitation, any implied warranty of merchantability, non-infringement or fitness for a particular purpose.

**5.4 Specific Performance.** Registry Operator and ICANN agree that irreparable damage could occur if any of the provisions of this Agreement was not performed in accordance with its specific terms. Accordingly, the parties agree that they each shall be entitled to seek from the arbitrator specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).

## ARTICLE 6.

### FEES

**6.1 Registry-Level Fees.** Registry Operator shall pay ICANN a Registry-Level Fee equal to (i) the Registry Fixed Fee of US\$6,250 per calendar quarter and (ii) the Registry-Level Transaction Fee. The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US\$0.25; provided, however that the Registry-Level Transaction Fee shall not apply until and unless more than 50,000 Transactions have occurred in the TLD during any calendar quarter or any four calendar quarter period (the "Transaction Threshold") and shall apply to each Transaction that occurred during each quarter in which the Transaction Threshold has been met, but shall not apply to each quarter in which the Transaction Threshold has not been met. Registry Operator shall pay the Registry-

Level Fees on a quarterly basis by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN.

**6.2 Cost Recovery for RSTEP.** Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at <http://www.icann.org/en/registries/rsep/>. In the event that such requests are referred to RSTEP, Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within ten (10) business days of receipt of a copy of the RSTEP invoice from ICANN, unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

**6.3 Variable Registry-Level Fee.**

(a) If the ICANN accredited registrars (as a group) do not approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a Variable Registry-Level Fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year. The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars who are party to a registry-registrar agreement with Registry Operator (which agreement may specifically provide for the reimbursement of Variable Registry-Level Fees paid by Registry Operator pursuant to this Section 6.3); provided, that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator's ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

(b) The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US\$0.25 per domain name registration (including renewals associated with transfers from one ICANN-accredited registrar to another) per year.

**6.4 Adjustments to Fees.** Notwithstanding any of the fee limitations set forth in this Article 6, commencing upon the expiration of the first year of this Agreement, and upon the expiration of each year thereafter during the Term, the then current fees set forth in Section 6.1 and Section 6.3 may be

adjusted, at ICANN's discretion, by a percentage equal to the percentage change, if any, in (i) the Consumer Price Index for All Urban Consumers, U.S. City Average (1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, or any successor index (the "CPI") for the month which is one (1) month prior to the commencement of the applicable year, over (ii) the CPI published for the month which is one (1) month prior to the commencement of the immediately prior year. In the event of any such increase, ICANN shall provide notice to Registry Operator specifying the amount of such adjustment. Any fee adjustment under this Section 6.4 shall be effective as of the first day of the year in which the above calculation is made.

**6.5 Additional Fee on Late Payments.** For any payments thirty (30) calendar days or more overdue under this Agreement, Registry Operator shall pay an additional fee on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

## ARTICLE 7.

### MISCELLANEOUS

#### 7.1 Indemnification of ICANN.

(a) Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to indemnify or defend any Indemnatee to the extent the claim, damage, liability, cost or expense arose: (i) due to the actions or omissions of ICANN, its subcontractors, panelists or evaluators specifically related to and occurring during the registry TLD application process (other than actions or omissions requested by or for the benefit of Registry Operator), or (ii) due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.

[Alternative **Section 7.1(a)** text for intergovernmental organizations or governmental entities:

"Registry Operator shall use its best efforts to cooperate with ICANN in order to ensure that ICANN does not incur any costs associated with claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to provide such cooperation to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any of its obligations contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any



litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.”]

(b) For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator’s aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN’s total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof are engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator’s liability under Section 7.1(a) pursuant to this Section 7.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN’s reasonable satisfaction, such other registry operators’ culpability for such actions or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 7.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence. [*Note: This Section 7.1(b) is inapplicable to intergovernmental organizations or governmental entities.*]

**7.2 Indemnification Procedures.** If any third-party claim is commenced that is indemnified under Section 7.1 above, ICANN shall provide notice thereof to Registry Operator as promptly as practicable. Registry Operator shall be entitled, if it so elects, in a notice promptly delivered to ICANN, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys reasonably acceptable to ICANN to handle and defend the same, at Registry Operator’s sole cost and expense, provided that in all events ICANN will be entitled to control at its sole cost and expense the litigation of issues concerning the validity or interpretation of ICANN’s policies, Bylaws or conduct. ICANN shall cooperate, at Registry Operator’s cost and expense, in all reasonable respects with Registry Operator and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom, and may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy affecting ICANN other than the payment of money in an amount that is fully indemnified by Registry Operator will be entered into without the consent of ICANN. If Registry Operator does not assume full control over the defense of a claim subject to such defense in accordance with this Section 7.2, ICANN will have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Registry Operator and Registry Operator shall cooperate in such defense. [*Note: This Section 7.2 is inapplicable to intergovernmental organizations or governmental entities.*]

**7.3 Defined Terms.** For purposes of this Agreement, unless such definitions are amended pursuant to a Consensus Policy at a future date, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

(a) For the purposes of this Agreement, an effect on “Security” shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

(b) For purposes of this Agreement, an effect on “Stability” shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments (“RFCs”) sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

**7.4 No Offset.** All payments due under this Agreement will be made in a timely manner throughout the Term and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

**7.5 Change in Control; Assignment and Subcontracting.** Neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. Notwithstanding the foregoing, ICANN may assign this Agreement in conjunction with a reorganization or re-incorporation of ICANN to another nonprofit corporation or similar entity organized in the same legal jurisdiction in which ICANN is currently organized for the same or substantially the same purposes. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any material subcontracting arrangement with respect to the operation of the registry for the TLD shall be deemed an assignment. ICANN shall be deemed to have reasonably withheld its consent to any such a direct or indirect change of control or subcontracting arrangement in the event that ICANN reasonably determines that the person or entity acquiring control of Registry Operator or entering into such subcontracting arrangement (or the ultimate parent entity of such acquiring or subcontracting entity) does not meet the ICANN-adopted registry operator criteria or qualifications then in effect. In addition, without limiting the foregoing, Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any material subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder, and Registry Operator shall continue to be bound by such covenants, obligations and agreements. Without limiting the foregoing, Registry Operator must also provide no less than thirty (30) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of control of Registry Operator. Such change of control notification shall include a statement that affirms that the ultimate parent entity of the party acquiring such control meets the ICANN-adopted specification or policy on registry operator criteria then in effect, and affirms that Registry Operator is in compliance with its obligations under this Agreement. Within thirty (30) calendar days of such notification, ICANN may request additional information from Registry Operator establishing compliance with this Agreement, in which case Registry Operator must supply the requested information within fifteen (15) calendar days. If ICANN fails to expressly provide or withhold its consent to any direct or indirect change of control of Registry Operator or any material subcontracting arrangement within thirty (30) (or, if ICANN has requested additional information from Registry Operator as set forth above, sixty (60)) calendar days of the receipt of written notice of such transaction from Registry Operator, ICANN shall be deemed to have consented to such transaction. In connection with any such transaction, Registry Operator shall comply with the Registry Transition Process.

**7.6 Amendments and Waivers.**

(a) If ICANN determines that an amendment to this Agreement (including to the Specifications referred to herein) and all other registry agreements between ICANN and the Applicable

Registry Operators (the “Applicable Registry Agreements”) is desirable (each, a “Special Amendment”), ICANN may submit a Special Amendment for approval by the Applicable Registry Operators pursuant to the process set forth in this Section 7.6, provided that a Special Amendment is not a Restricted Amendment (as defined below). Prior to submitting a Special Amendment for such approval, ICANN shall first consult in good faith with the Working Group (as defined below) regarding the form and substance of a Special Amendment. The duration of such consultation shall be reasonably determined by ICANN based on the substance of the Special Amendment. Following such consultation, ICANN may propose the adoption of a Special Amendment by publicly posting such amendment on its website for no less than thirty (30) calendar days (the “Posting Period”) and providing notice of such amendment by ICANN to the Applicable Registry Operators in accordance with Section 7.8. ICANN will consider the public comments submitted on a Special Amendment during the Posting Period (including comments submitted by the Applicable Registry Operators).

(b) If, within two (2) calendar years of the expiration of the Posting Period (the “Approval Period”), (i) the ICANN Board of Directors approves a Special Amendment (which may be in a form different than submitted for public comment) and (ii) such Special Amendment receives Registry Operator Approval (as defined below), such Special Amendment shall be deemed approved (an “Approved Amendment”) by the Applicable Registry Operators (the last date on which such approvals are obtained is herein referred to as the “Amendment Approval Date”) and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator (the “Amendment Effective Date”). In the event that a Special Amendment is not approved by the ICANN Board of Directors or does not receive Registry Operator Approval within the Approval Period, the Special Amendment will have no effect. The procedure used by ICANN to obtain Registry Operator Approval shall be designed to document the written approval of the Applicable Registry Operators, which may be in electronic form.

(c) During the thirty (30) calendar day period following the Amendment Approval Date, Registry Operator (so long as it did not vote in favor of the Approved Amendment) may apply in writing to ICANN for an exemption from the Approved Amendment (each such request submitted by Registry Operator hereunder, an “Exemption Request”). Each Exemption Request will set forth the basis for such request and provide detailed support for an exemption from the Approved Amendment. An Exemption Request may also include a detailed description and support for any alternatives to, or a variation of, the Approved Amendment proposed by such Registry Operator. An Exemption Request may only be granted upon a clear and convincing showing by Registry Operator that compliance with the Approved Amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registry Operator. No Exemption Request will be granted if ICANN determines, in its reasonable discretion, that granting such Exemption Request would be materially harmful to registrants or result in the denial of a direct benefit to registrants. Within ninety (90) calendar days of ICANN’s receipt of an Exemption Request, ICANN shall either approve (which approval may be conditioned or consist of alternatives to or a variation of the Approved Amendment) or deny the Exemption Request in writing, during which time the Approved Amendment will not amend this Agreement; provided, that any such conditions, alternatives or variations shall be effective and, to the extent applicable, will amend this Agreement as of the Amendment Effective Date. If the Exemption Request is approved by ICANN, the Approved Amendment will not amend this Agreement. If such Exemption Request is denied by ICANN, the Approved Amendment will amend this Agreement as of the Amendment Effective Date (or, if such date has passed, such Approved Amendment shall be deemed effective immediately on the date of such denial), provided that Registry Operator may, within thirty (30) calendar days following receipt of ICANN’s determination, appeal ICANN’s decision to deny the Exemption Request pursuant to the dispute resolution procedures set forth in Article 5. The Approved



Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process. For avoidance of doubt, only Exemption Requests submitted by Registry Operator that are approved by ICANN pursuant to this Section 7.6(c) or through an arbitration decision pursuant to Article 5 shall exempt Registry Operator from any Approved Amendment, and no exemption request granted to any other Applicable Registry Operator (whether by ICANN or through arbitration) shall have any effect under this Agreement or exempt Registry Operator from any Approved Amendment.

(d) Except as set forth in this Section 7.6, no amendment, supplement or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties, and nothing in this Section 7.6 shall restrict ICANN and Registry Operator from entering into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided. For the avoidance of doubt, nothing in this Section 7.6 shall be deemed to limit Registry Operator's obligation to comply with Section 2.2.

(e) For purposes of this Section 7.6, the following terms shall have the following meanings:

(i) "Applicable Registry Operators" means, collectively, the registry operators of the top-level domains party to a registry agreement that contains a provision similar to this Section 7.6, including Registry Operator.

(ii) "Registry Operator Approval" means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained. For avoidance of doubt, with respect to clause (B), each Applicable Registry Operator shall have one vote for each top-level domain operated by such Registry Operator pursuant to an Applicable Registry Agreement.

(iii) "Restricted Amendment" means the following: (i) an amendment of Specification 1, (ii) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (iii) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2.1 of Specification 6, or (iv) an amendment to the length of the Term.

(iv) "Working Group" means representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments to the Applicable Registry Agreements (excluding bilateral amendments pursuant to Section 7.6(d)).

**7.7 No Third-Party Beneficiaries.** This Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

**7.8 General Notices.** Except for notices pursuant to Section 7.6, all notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this agreement. All notices under Section 7.6 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail. Any change in the contact information for notice below will be given by the party within thirty (30) calendar days of such change. Notices, designations, determinations, and specifications made under this Agreement will be in the English language. Other than notices under Section 7.6, any notice required by this Agreement 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 facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server, provided that such notice via facsimile or electronic mail shall be followed by a copy sent by regular postal mail service within two (2) business days. Any notice required by Section 7.6 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

If to ICANN, addressed to:  
 Internet Corporation for Assigned Names and Numbers  
 4676 Admiralty Way, Suite 330  
 Marina Del Rey, California 90292  
 Telephone: 1-310-823-9358  
 Facsimile: 1-310-823-8649  
 Attention: President and CEO

With a Required Copy to: General Counsel  
 Email: (As specified from time to time.)

If to Registry Operator, addressed to:

[  
 ]  
 [  
 ]  
 [  
 ]

Telephone:  
 Facsimile:  
 Attention:

With a Required Copy to:  
 Email: (As specified from time to time.)

**7.9 Entire Agreement.** This Agreement (including those specifications and documents incorporated by reference to URL locations which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.

**7.10 English Language Controls.** Notwithstanding any translated version of this Agreement and/or specifications that may be provided to Registry Operator, the English language version of this Agreement and all referenced specifications are the official versions that bind the parties hereto. In the event of any conflict or discrepancy between any translated version of this Agreement and the English language version, the English language version controls. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

**7.11 Ownership Rights.** Nothing contained in this Agreement shall be construed as establishing or granting to Registry Operator any property ownership rights or interests in the TLD or the letters, words, symbols or other characters making up the TLD string.

**7.12 Severability.** This Agreement shall be deemed severable; the invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the balance of this Agreement or of any other term hereof, which shall remain in full force and effect. If any of the provisions hereof are determined to be invalid or unenforceable, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible.

**7.13 Court Orders.** ICANN will respect any order from a court of competent jurisdiction, including any orders from any jurisdiction where the consent or non-objection of the government was a requirement for the delegation of the TLD. Notwithstanding any other provision of this Agreement, ICANN's implementation of any such order will not be a breach of this Agreement.

*[Note: The following section is applicable to intergovernmental organizations or governmental entities only.]*

**7.14 Special Provision Relating to Intergovernmental Organizations or Governmental Entities.**

(a) ICANN acknowledges that Registry Operator is an entity subject to public international law, including international treaties applicable to Registry Operator (such public international law and treaties, collectively hereinafter the "Applicable Laws"). Nothing in this Agreement and its related specifications shall be construed or interpreted to require Registry Operator to violate Applicable Laws or prevent compliance therewith. The Parties agree that Registry Operator's compliance with Applicable Laws shall not constitute a breach of this Agreement.

(b) In the event Registry Operator reasonably determines that any provision of this Agreement and its related specifications, or any decisions or policies of ICANN referred to in this Agreement, including but not limited to Temporary Policies and Consensus Policies (such provisions, specifications and policies, collectively hereinafter, "ICANN Requirements"), may conflict with or violate Applicable Law (hereinafter, a "Potential Conflict"), Registry Operator shall provide detailed notice (a "Notice") of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy. In the event Registry Operator determines that there is Potential Conflict between a proposed Applicable Law and any ICANN Requirement, Registry Operator shall provide detailed Notice of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy.

(c) As soon as practicable following such review, the parties shall attempt to resolve the Potential Conflict by cooperative engagement pursuant to the procedures set forth in Section 5.1. In

addition, Registry Operator shall use its best efforts to eliminate or minimize any impact arising from such Potential Conflict between Applicable Laws and any ICANN Requirement. If, following such cooperative engagement, Registry Operator determines that the Potential Conflict constitutes an actual conflict between any ICANN Requirement, on the one hand, and Applicable Laws, on the other hand, then ICANN shall waive compliance with such ICANN Requirement (provided that the parties shall negotiate in good faith on a continuous basis thereafter to mitigate or eliminate the effects of such non-compliance on ICANN), unless ICANN reasonably and objectively determines that the failure of Registry Operator to comply with such ICANN Requirement would constitute a threat to the Security and Stability of Registry Services, the Internet or the DNS (hereinafter, an "ICANN Determination"). Following receipt of notice by Registry Operator of such ICANN Determination, Registry Operator shall be afforded a period of ninety (90) calendar days to resolve such conflict with an Applicable Law. If the conflict with an Applicable Law is not resolved to ICANN's complete satisfaction during such period, Registry Operator shall have the option to submit, within ten (10) calendar days thereafter, the matter to binding arbitration as defined in subsection (d) below. If during such period, Registry Operator does not submit the matter to arbitration pursuant to subsection (d) below, ICANN may, upon notice to Registry Operator, terminate this Agreement with immediate effect.

(d) If Registry Operator disagrees with an ICANN Determination, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2, except that the sole issue presented to the arbitrator for determination will be whether or not ICANN reasonably and objectively reached the ICANN Determination. For the purposes of such arbitration, ICANN shall present evidence to the arbitrator supporting the ICANN Determination. If the arbitrator determines that ICANN did not reasonably and objectively reach the ICANN Determination, then ICANN shall waive Registry Operator's compliance with the subject ICANN Requirement. If the arbitrators or pre-arbitral referee, as applicable, determine that ICANN did reasonably and objectively reach the ICANN Determination, then, upon notice to Registry Operator, ICANN may terminate this Agreement with immediate effect.

(e) Registry Operator hereby represents and warrants that, to the best of its knowledge as of the date of execution of this Agreement, no existing ICANN Requirement conflicts with or violates any Applicable Law.

(f) Notwithstanding any other provision of this Section 7.14, following an ICANN Determination and prior to a finding by an arbitrator pursuant to Section 7.14(d) above, ICANN may, subject to prior consultations with Registry Operator, take such reasonable technical measures as it deems necessary to ensure the Security and Stability of Registry Services, the Internet and the DNS. These reasonable technical measures shall be taken by ICANN on an interim basis, until the earlier of the date of conclusion of the arbitration procedure referred to in Section 7.14(d) above or the date of complete resolution of the conflict with an Applicable Law. In case Registry Operator disagrees with such technical measures taken by ICANN, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2 above, during which process ICANN may continue to take such technical measures. In the event that ICANN takes such measures, Registry Operator shall pay all costs incurred by ICANN as a result of taking such measures. In addition, in the event that ICANN takes such measures, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

\* \* \* \* \*



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS**

By: \_\_\_\_\_  
[ ]  
President and CEO

Date:

**[Registry Operator]**

By: \_\_\_\_\_  
[ ]  
[ ]

Date:

**EXHIBIT A**

**Approved Services**

# SPECIFICATION 1

## CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

### 1. Consensus Policies.

- 1.1. “*Consensus Policies*” are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this document. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.
- 1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:
  - 1.2.1. issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System (“DNS”);
  - 1.2.2. functional and performance specifications for the provision of Registry Services;
  - 1.2.3. Security and Stability of the registry database for the TLD;
  - 1.2.4. registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;
  - 1.2.5. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
  - 1.2.6. 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.
- 1.3. Such categories of issues referred to in Section 1.2 shall include, without limitation:
  - 1.3.1. principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);
  - 1.3.2. prohibitions on warehousing of or speculation in domain names by registries or registrars;
  - 1.3.3. reservation of registered names in the TLD 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 or the Internet (e.g., establishment of reservations of names from registration); and
  - 1.3.4. 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 affected by such a suspension or termination.
- 1.4. In addition to the other limitations on Consensus Policies, they shall not:



- 1.4.1. prescribe or limit the price of Registry Services;
  - 1.4.2. modify the terms or conditions for the renewal or termination of the Registry Agreement;
  - 1.4.3. modify the limitations on Temporary Policies (defined below) or Consensus Policies;
  - 1.4.4. modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or
  - 1.4.5. modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.
2. **Temporary Policies.** Registry Operator shall comply with and implement all specifications or policies established by the Board on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of Registry Services or the DNS ("*Temporary Policies*").
- 2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws.
    - 2.1.1. ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.
    - 2.1.2. If the period of time for which the Temporary Policy is adopted exceeds 90 days, the Board shall reaffirm its temporary adoption every 90 days for a total period not to exceed one year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one year period expires or, if during such one year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.
3. **Notice and Conflicts.** Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registry Services and Consensus Policies or any Temporary Policy, the Consensus Policies or Temporary Policy shall control, but only with respect to subject matter in conflict.

## SPECIFICATION 2

### DATA ESCROW REQUIREMENTS

Registry Operator will engage an independent entity to act as data escrow agent (“*Escrow Agent*”) for the provision of data escrow services related to the Registry Agreement. The following Technical Specifications set forth in Part A, and Legal Requirements set forth in Part B, will be included in any data escrow agreement between Registry Operator and the Escrow Agent, under which ICANN must be named a third-party beneficiary. In addition to the following requirements, the data escrow agreement may contain other provisions that are not contradictory or intended to subvert the required terms provided below.

#### PART A – TECHNICAL SPECIFICATIONS

1. **Deposits.** There will be two types of Deposits: Full and Differential. For both types, the universe of Registry objects to be considered for data escrow are those objects necessary in order to offer all of the approved Registry Services.
  - 1.1 “**Full Deposit**” will consist of data that reflects the state of the registry as of 00:00:00 UTC on each Sunday.
  - 1.2 “**Differential Deposit**” means data that reflects all transactions that were not reflected in the last previous Full or Differential Deposit, as the case may be. Each Differential Deposit will contain all database transactions since the previous Deposit was completed as of 00:00:00 UTC of each day, but Sunday. Differential Deposits must include complete Escrow Records as specified below that were not included or changed since the most recent full or Differential Deposit (i.e., newly added or modified domain names).
2. **Schedule for Deposits.** Registry Operator will submit a set of escrow files on a daily basis as follows:
  - 2.1 Each Sunday, a Full Deposit must be submitted to the Escrow Agent by 23:59 UTC.
  - 2.2 The other six days of the week, the corresponding Differential Deposit must be submitted to Escrow Agent by 23:59 UTC.
3. **Escrow Format Specification.**
  - 3.1 **Deposit’s Format.** Registry objects, such as domains, contacts, name servers, registrars, etc. will be compiled into a file constructed as described in draft-arias-noguchi-registry-data-escrow, see [1]. The aforementioned document describes some elements as optional; Registry Operator will include those elements in the Deposits if they are available. Registry Operator will use the draft version available at the time of signing the Agreement, if not already an RFC. Once the specification is published as an RFC, Registry Operator will implement that specification, no later than 180 days after. UTF-8 character encoding will be used.
  - 3.2 **Extensions.** If a Registry Operator offers additional Registry Services that require submission of additional data, not included above, additional “extension schemas” shall be defined in a case by case base to represent that data. These “extension schemas” will be specified as described in [1]. Data related to the “extensions schemas” will be included in the deposit file described in section 3.1. ICANN and the respective Registry shall work together to agree on such new objects’ data escrow specifications.

4. **Processing of Deposit files.** The use of compression is recommended in order to reduce electronic data transfer times, and storage capacity requirements. Data encryption will be used to ensure the privacy of registry escrow data. Files processed for compression and encryption will be in the binary OpenPGP format as per OpenPGP Message Format - RFC 4880, see [2]. Acceptable algorithms for Public-key cryptography, Symmetric-key cryptography, Hash and Compression are those enumerated in RFC 4880, not marked as deprecated in OpenPGP IANA Registry, see [3], that are also royalty-free. The process to follow for a data file in original text format is:
- (1) The file should be compressed. The suggested algorithm for compression is ZIP as per RFC 4880.
  - (2) The compressed data will be encrypted using the escrow agent's public key. The suggested algorithms for Public-key encryption are Elgamal and RSA as per RFC 4880. The suggested algorithms for Symmetric-key encryption are TripleDES, AES128 and CAST5 as per RFC 4880.
  - (3) The file may be split as necessary if, once compressed and encrypted is larger than the file size limit agreed with the escrow agent. Every part of a split file, or the whole file if split is not used, will be called a processed file in this section.
  - (4) A digital signature file will be generated for every processed file using the Registry's private key. The digital signature file will be in binary OpenPGP format as per RFC 4880 [2], and will not be compressed or encrypted. The suggested algorithms for Digital signatures are DSA and RSA as per RFC 4880. The suggested algorithm for Hashes in Digital signatures is SHA256.
  - (5) The processed files and digital signature files will then be transferred to the Escrow Agent through secure electronic mechanisms, such as, SFTP, SCP, HTTPS file upload, etc. as agreed between the Escrow Agent and the Registry Operator. Non-electronic delivery through a physical medium such as CD-ROMs, DVD-ROMs, or USB storage devices may be used if authorized by ICANN.
  - (6) The Escrow Agent will then validate every (processed) transferred data file using the procedure described in section 8.
5. **File Naming Conventions.** Files will be named according to the following convention: {gTLD}\_{YYYY-MM-DD}\_{type}\_S{#}\_R{rev}.{ext} where:
- 5.1 {gTLD} is replaced with the gTLD name; in case of an IDN-TLD, the ASCII-compatible form (A-Label) must be used;
  - 5.2 {YYYY-MM-DD} is replaced by the date corresponding to the time used as a timeline watermark for the transactions; i.e. for the Full Deposit corresponding to 2009-08-02T00:00Z, the string to be used would be "2009-08-02";
  - 5.3 {type} is replaced by:
    - (1) "full", if the data represents a Full Deposit;
    - (2) "diff", if the data represents a Differential Deposit;
    - (3) "thin", if the data represents a Bulk Registration Data Access file, as specified in section 3 of Specification 4;
  - 5.4 {#} is replaced by the position of the file in a series of files, beginning with "1"; in case of a lone file, this must be replaced by "1".
  - 5.5 {rev} is replaced by the number of revision (or resend) of the file beginning with "0";
  - 5.6 {ext} is replaced by "sig" if it is a digital signature file of the quasi-homonymous file. Otherwise it is replaced by "ryde".

6. **Distribution of Public Keys.** Each of Registry Operator and Escrow Agent will distribute its public key to the other party (Registry Operator or Escrow Agent, as the case may be) via email to an email address to be specified. Each party will confirm receipt of the other party's public key with a reply email, and the distributing party will subsequently reconfirm the authenticity of the key transmitted via offline methods, like in person meeting, telephone, etc. In this way, public key transmission is authenticated to a user able to send and receive mail via a mail server operated by the distributing party. Escrow Agent, Registry and ICANN will exchange keys by the same procedure.
7. **Notification of Deposits.** Along with the delivery of each Deposit, Registry Operator will deliver to Escrow Agent and to ICANN a written statement (which may be by authenticated e-mail) that includes a copy of the report generated upon creation of the Deposit and states that the Deposit has been inspected by Registry Operator and is complete and accurate. Registry Operator will include the Deposit's "id" and "resend" attributes in its statement. The attributes are explained in [1].
8. **Verification Procedure.**
  - (1) The signature file of each processed file is validated.
  - (2) If processed files are pieces of a bigger file, the latter is put together.
  - (3) Each file obtained in the previous step is then decrypted and uncompressed.
  - (4) Each data file contained in the previous step is then validated against the format defined in [1].
  - (5) If [1] includes a verification process, that will be applied at this step.  
If any discrepancy is found in any of the steps, the Deposit will be considered incomplete.
9. **References.**
  - [1] Domain Name Data Escrow Specification (work in progress), <http://tools.ietf.org/html/draft-arias-noguchi-registry-data-escrow>
  - [2] OpenPGP Message Format, <http://www.rfc-editor.org/rfc/rfc4880.txt>
  - [3] OpenPGP parameters, <http://www.iana.org/assignments/pgp-parameters/pgp-parameters.xhtml>

**PART B – LEGAL REQUIREMENTS**

1. **Escrow Agent.** Prior to entering into an escrow agreement, the Registry Operator must provide notice to ICANN as to the identity of the Escrow Agent, and provide ICANN with contact information and a copy of the relevant escrow agreement, and all amendment thereto. In addition, prior to entering into an escrow agreement, Registry Operator must obtain the consent of ICANN to (a) use the specified Escrow Agent, and (b) enter into the form of escrow agreement provided. ICANN must be expressly designated a third-party beneficiary of the escrow agreement. ICANN reserves the right to withhold its consent to any Escrow Agent, escrow agreement, or any amendment thereto, all in its sole discretion.
2. **Fees.** Registry Operator must pay, or have paid on its behalf, fees to the Escrow Agent directly. If Registry Operator fails to pay any fee by the due date(s), the Escrow Agent will give ICANN written notice of such non-payment and ICANN may pay the past-due fee(s) within ten business days after receipt of the written notice from Escrow Agent. Upon payment of the past-due fees by ICANN, ICANN shall have a claim for such amount against Registry Operator, which Registry Operator shall be required to submit to ICANN together with the next fee payment due under the Registry Agreement.
3. **Ownership.** Ownership of the Deposits during the effective term of the Registry Agreement shall remain with Registry Operator at all times. Thereafter, Registry Operator shall assign any such ownership rights (including intellectual property rights, as the case may be) in such Deposits to ICANN. In the event that during the term of the Registry Agreement any Deposit is released from escrow to ICANN, any intellectual property rights held by Registry Operator in the Deposits will automatically be licensed on a non-exclusive, perpetual, irrevocable, royalty-free, paid-up basis to ICANN or to a party designated in writing by ICANN.
4. **Integrity and Confidentiality.** Escrow Agent will be required to (i) hold and maintain the Deposits in a secure, locked, and environmentally safe facility, which is accessible only to authorized representatives of Escrow Agent, (ii) protect the integrity and confidentiality of the Deposits using commercially reasonable measures and (iii) keep and safeguard each Deposit for one year. ICANN and Registry Operator will be provided the right to inspect Escrow Agent's applicable records upon reasonable prior notice and during normal business hours. Registry Operator and ICANN will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 from time to time.

If Escrow Agent receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposits, Escrow Agent will promptly notify the Registry Operator and ICANN unless prohibited by law. After notifying the Registry Operator and ICANN, Escrow Agent shall allow sufficient time for Registry Operator or ICANN to challenge any such order, which shall be the responsibility of Registry Operator or ICANN; provided, however, that Escrow Agent does not waive its rights to present its position with respect to any such order. Escrow Agent will cooperate with the Registry Operator or ICANN to support efforts to quash or limit any subpoena, at such party's expense. Any party requesting additional assistance shall pay Escrow Agent's standard charges or as quoted upon submission of a detailed request.

5. **Copies.** Escrow Agent may be permitted to duplicate any Deposit, in order to comply with the terms and provisions of the escrow agreement.
6. **Release of Deposits.** Escrow Agent will make available for electronic download (unless otherwise requested) to ICANN or its designee, within twenty-four hours, at the Registry Operator's expense, all Deposits in Escrow Agent's possession in the event that the Escrow Agent receives a request from Registry Operator to effect such delivery to ICANN, or receives one of the following written notices by ICANN stating that:
  - 6.1 the Registry Agreement has expired without renewal, or been terminated; or
  - 6.2 ICANN failed, with respect to (a) any Full Deposit or (b) five Differential Deposits within any calendar month, to receive, within five calendar days after the Deposit's scheduled delivery date, notification of receipt from Escrow Agent; (x) ICANN gave notice to Escrow Agent and Registry Operator of that failure; and (y) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent that the Deposit has been received; or
  - 6.3 ICANN has received notification from Escrow Agent of failed verification of a Full Deposit or of failed verification of five Differential Deposits within any calendar month and (a) ICANN gave notice to Registry Operator of that receipt; and (b) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent of verification of a remediated version of such Full Deposit or Differential Deposit; or
  - 6.4 Registry Operator has: (i) ceased to conduct its business in the ordinary course; or (ii) filed for bankruptcy, become insolvent or anything analogous to any of the foregoing under the laws of any jurisdiction anywhere in the world; or
  - 6.5 Registry Operator has experienced a failure of critical registry functions and ICANN has asserted its rights pursuant to Section 2.13 of the Registry Agreement; or
  - 6.6 a competent court, arbitral, legislative, or government agency mandates the release of the Deposits to ICANN.

Unless Escrow Agent has previously released the Registry Operator's Deposits to ICANN or its designee, Escrow Agent will deliver all Deposits to ICANN upon termination of the Registry Agreement or the Escrow Agreement.

7. **Verification of Deposits.**
  - 7.1 Within twenty-four hours after receiving each Deposit or corrected Deposit, Escrow Agent must verify the format and completeness of each Deposit and deliver to ICANN a copy of the verification report generated for each Deposit. Reports will be delivered electronically, as specified from time to time by ICANN.
  - 7.2 If Escrow Agent discovers that any Deposit fails the verification procedures, Escrow Agent must notify, either by email, fax or phone, Registry Operator and ICANN of such nonconformity within twenty-four hours after receiving the non-conformant Deposit. Upon notification of such verification failure, Registry Operator must begin developing modifications, updates, corrections, and other fixes of the Deposit necessary for the Deposit to pass the verification procedures and deliver such fixes to Escrow Agent as promptly as possible.
8. **Amendments.** Escrow Agent and Registry Operator shall amend the terms of the Escrow Agreement to conform to this Specification 2 within ten (10) calendar days of any amendment or modification to this Specification 2. In the event of a conflict between this Specification 2 and the Escrow Agreement, this Specification 2 shall control.
9. **Indemnity.** Registry Operator shall indemnify and hold harmless Escrow Agent and each of its directors, officers, agents, employees, members, and stockholders ("Escrow Agent Indemnitees")

absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Escrow Agent Indemnitees in connection with the Escrow Agreement or the performance of Escrow Agent or any Escrow Agent Indemnitees thereunder (with the exception of any claims based on the misrepresentation, negligence, or misconduct of Escrow Agent, its directors, officers, agents, employees, contractors, members, and stockholders). Escrow Agent shall indemnify and hold harmless Registry Operator and ICANN, and each of their respective directors, officers, agents, employees, members, and stockholders ("Indemnitees") absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Indemnitee in connection with the misrepresentation, negligence or misconduct of Escrow Agent, its directors, officers, agents, employees and contractors.



## SPECIFICATION 3

### FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

Registry Operator shall provide one set of monthly reports per gTLD to \_\_\_\_\_ with the following content. ICANN may request in the future that the reports be delivered by other means and using other formats. ICANN will use reasonable commercial efforts to preserve the confidentiality of the information reported until three months after the end of the month to which the reports relate.

**1. Per-Registrar Transactions Report.** This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named “gTLD-transactions-yyyymm.csv”, where “gTLD” is the gTLD name; in case of an IDN-TLD, the A-label shall be used; “yyyymm” is the year and month being reported. The file shall contain the following fields per registrar:

Field #	Field Name	Description
01	registrar-name	registrar's full corporate name as registered with IANA
02	iana-id	<a href="http://www.iana.org/assignments/registrar-ids">http://www.iana.org/assignments/registrar-ids</a>
03	total-domains	total domains under sponsorship
04	total-nameservers	total name servers registered for TLD
05	net-adds-1-yr	number of domains successfully registered with an initial term of one year (and not deleted within the add grace period)
06	net-adds-2-yr	number of domains successfully registered with an initial term of two years (and not deleted within the add grace period)
07	net-adds-3-yr	number of domains successfully registered with an initial term of three years (and not deleted within the add grace period)
08	net-adds-4-yr	number of domains successfully registered with an initial term of four years (and not deleted within the add grace period)
09	net-adds-5-yr	number of domains successfully registered with an initial term of five years (and not deleted within the add grace period)
10	net-adds-6-yr	number of domains successfully registered with an initial term of six years (and not deleted within the add grace period)
11	net-adds-7-yr	number of domains successfully registered with an initial term of seven years (and not deleted within the add grace period)



12	net-adds-8-yr	number of domains successfully registered with an initial term of eight years (and not deleted within the add grace period)
13	net-adds-9-yr	number of domains successfully registered with an initial term of nine years (and not deleted within the add grace period)
14	net-adds-10-yr	number of domains successfully registered with an initial term of ten years (and not deleted within the add grace period)
15	net-renews-1-yr	number of domains successfully renewed either automatically or by command with a new renewal period of one year (and not deleted within the renew grace period)
16	net-renews-2-yr	number of domains successfully renewed either automatically or by command with a new renewal period of two years (and not deleted within the renew grace period)
17	net-renews-3-yr	number of domains successfully renewed either automatically or by command with a new renewal period of three years (and not deleted within the renew grace period)
18	net-renews-4-yr	number of domains successfully renewed either automatically or by command with a new renewal period of four years (and not deleted within the renew grace period)
19	net-renews-5-yr	number of domains successfully renewed either automatically or by command with a new renewal period of five years (and not deleted within the renew grace period)
20	net-renews-6-yr	number of domains successfully renewed either automatically or by command with a new renewal period of six years (and not deleted within the renew grace period)
21	net-renews-7-yr	number of domains successfully renewed either automatically or by command with a new renewal period of seven years (and not deleted within the renew grace period)
22	net-renews-8-yr	number of domains successfully renewed either automatically or by command with a new renewal period of eight years (and not deleted within the renew grace period)
23	net-renews-9-yr	number of domains successfully renewed either

		automatically or by command with a new renewal period of nine years (and not deleted within the renew grace period)
24	net-renews-10-yr	number of domains successfully renewed either automatically or by command with a new renewal period of ten years (and not deleted within the renew grace period)
25	transfer-gaining-successful	transfers initiated by this registrar that were ack'd by the other registrar – either by command or automatically
26	transfer-gaining-nacked	transfers initiated by this registrar that were n'acked by the other registrar
27	transfer-losing-successful	transfers initiated by another registrar that this registrar ack'd – either by command or automatically
28	transfer-losing-nacked	transfers initiated by another registrar that this registrar n'acked
29	transfer-disputed-won	number of transfer disputes in which this registrar prevailed
30	transfer-disputed-lost	number of transfer disputes this registrar lost
31	transfer-disputed-nodecision	number of transfer disputes involving this registrar with a split or no decision
32	deleted-domains-grace	domains deleted within the add grace period
33	deleted-domains-nograce	domains deleted outside the add grace period
34	restored-domains	domain names restored from redemption period
35	restored-noreport	total number of restored names for which the registrar failed to submit a restore report
36	agp-exemption-requests	total number of AGP (add grace period) exemption requests
37	agp-exemptions-granted	total number of AGP (add grace period) exemption requests granted
38	agp-exempted-domains	total number of names affected by granted AGP (add grace period) exemption requests
39	attempted-adds	number of attempted (successful and failed) domain name create commands

The first line shall include the field names exactly as described in the table above as a “header line” as described in section 2 of RFC 4180. The last line of each report shall include totals for each column across all registrars; the first field of this line shall read “Totals” while the second field shall be left empty in that line. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

**2. Registry Functions Activity Report.** This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named “gTLD-activity-yyyymm.csv”, where “gTLD” is the gTLD name; in case of an IDN-TLD, the A-label shall be used; “yyyymm” is the year and month being reported. The file shall contain the following fields:

Field #	Field Name	Description
01	operational-registrars	number of operational registrars at the end of the reporting period
02	ramp-up-registrars	number of registrars that have received a password for access to OT&E at the end of the reporting period
03	pre-ramp-up-registrars	number of registrars that have requested access, but have not yet entered the ramp-up period at the end of the reporting period
04	zfa-passwords	number of active zone file access passwords at the end of the reporting period
05	whois-43-queries	number of WHOIS (port-43) queries responded during the reporting period
06	web-whois-queries	number of Web-based Whois queries responded during the reporting period, not including searchable Whois
07	searchable-whois-queries	number of searchable Whois queries responded during the reporting period, if offered
08	dns-udp-queries-received	number of DNS queries received over UDP transport during the reporting period
09	dns-udp-queries-responded	number of DNS queries received over UDP transport that were responded during the reporting period
10	dns-tcp-queries-received	number of DNS queries received over TCP transport during the reporting period
11	dns-tcp-queries-responded	number of DNS queries received over TCP transport that were responded during the reporting period
12	srs-dom-check	number of SRS (EPP and any other interface) domain name “check” requests responded during the reporting period
13	srs-dom-create	number of SRS (EPP and any other interface) domain name “create” requests responded during the reporting period
14	srs-dom-delete	number of SRS (EPP and any other interface) domain name “delete” requests responded during the reporting period
15	srs-dom-info	number of SRS (EPP and any other interface) domain name “info” requests responded during the reporting period
16	srs-dom-renew	number of SRS (EPP and any other interface) domain name

		“renew” requests responded during the reporting period
17	srs-dom-rgp-restore-report	number of SRS (EPP and any other interface) domain name RGP “restore” requests responded during the reporting period
18	srs-dom-rgp-restore-request	number of SRS (EPP and any other interface) domain name RGP “restore” requests delivering a restore report responded during the reporting period
19	srs-dom-transfer-approve	number of SRS (EPP and any other interface) domain name “transfer” requests to approve transfers responded during the reporting period
20	srs-dom-transfer-cancel	number of SRS (EPP and any other interface) domain name “transfer” requests to cancel transfers responded during the reporting period
21	srs-dom-transfer-query	number of SRS (EPP and any other interface) domain name “transfer” requests to query about a transfer responded during the reporting period
22	srs-dom-transfer-reject	number of SRS (EPP and any other interface) domain name “transfer” requests to reject transfers responded during the reporting period
23	srs-dom-transfer-request	number of SRS (EPP and any other interface) domain name “transfer” requests to request transfers responded during the reporting period
24	srs-dom-update	number of SRS (EPP and any other interface) domain name “update” requests (not including RGP restore requests) responded during the reporting period
25	srs-host-check	number of SRS (EPP and any other interface) host “check” requests responded during the reporting period
26	srs-host-create	number of SRS (EPP and any other interface) host “create” requests responded during the reporting period
27	srs-host-delete	number of SRS (EPP and any other interface) host “delete” requests responded during the reporting period
28	srs-host-info	number of SRS (EPP and any other interface) host “info” requests responded during the reporting period
29	srs-host-update	number of SRS (EPP and any other interface) host “update” requests responded during the reporting period
30	srs-cont-check	number of SRS (EPP and any other interface) contact “check” requests responded during the reporting period
31	srs-cont-create	number of SRS (EPP and any other interface) contact “create” requests responded during the reporting period

32	srs-cont-delete	number of SRS (EPP and any other interface) contact “delete” requests responded during the reporting period
33	srs-cont-info	number of SRS (EPP and any other interface) contact “info” requests responded during the reporting period
34	srs-cont-transfer-approve	number of SRS (EPP and any other interface) contact “transfer” requests to approve transfers responded during the reporting period
35	srs-cont-transfer-cancel	number of SRS (EPP and any other interface) contact “transfer” requests to cancel transfers responded during the reporting period
36	srs-cont-transfer-query	number of SRS (EPP and any other interface) contact “transfer” requests to query about a transfer responded during the reporting period
37	srs-cont-transfer-reject	number of SRS (EPP and any other interface) contact “transfer” requests to reject transfers responded during the reporting period
38	srs-cont-transfer-request	number of SRS (EPP and any other interface) contact “transfer” requests to request transfers responded during the reporting period
39	srs-cont-update	number of SRS (EPP and any other interface) contact “update” requests responded during the reporting period

The first line shall include the field names exactly as described in the table above as a “header line” as described in section 2 of RFC 4180. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

## SPECIFICATION 4

### SPECIFICATION FOR REGISTRATION DATA PUBLICATION SERVICES

1. **Registration Data Directory Services.** Until ICANN requires a different protocol, Registry Operator will operate a WHOIS service available via port 43 in accordance with RFC 3912, and a web-based Directory Service at <whois.nic.TLD> providing free public query-based access to at least the following elements in the following format. ICANN reserves the right to specify alternative formats and protocols, and upon such specification, the Registry Operator will implement such alternative specification as soon as reasonably practicable.

1.1. The format of responses shall follow a semi-free text format outline below, followed by a blank line and a legal disclaimer specifying the rights of Registry Operator, and of the user querying the database.

1.2. Each data object shall be represented as a set of key/value pairs, with lines beginning with keys, followed by a colon and a space as delimiters, followed by the value.

1.3. For fields where more than one value exists, multiple key/value pairs with the same key shall be allowed (for example to list multiple name servers). The first key/value pair after a blank line should be considered the start of a new record, and should be considered as identifying that record, and is used to group data, such as hostnames and IP addresses, or a domain name and registrant information, together.

#### 1.4. Domain Name Data:

1.4.1. **Query format:** whois EXAMPLE.TLD

1.4.2. **Response format:**

Domain Name: EXAMPLE.TLD  
Domain ID: D1234567-TLD  
WHOIS Server: whois.example.tld  
Referral URL: http://www.example.tld  
Updated Date: 2009-05-29T20:13:00Z  
Creation Date: 2000-10-08T00:45:00Z  
Registry Expiry Date: 2010-10-08T00:44:59Z  
Sponsoring Registrar: EXAMPLE REGISTRAR LLC  
Sponsoring Registrar IANA ID: 5555555  
Domain Status: clientDeleteProhibited  
Domain Status: clientRenewProhibited  
Domain Status: clientTransferProhibited  
Domain Status: serverUpdateProhibited  
Registrant ID: 5372808-ERL  
Registrant Name: EXAMPLE REGISTRANT  
Registrant Organization: EXAMPLE ORGANIZATION  
Registrant Street: 123 EXAMPLE STREET  
Registrant City: ANYTOWN  
Registrant State/Province: AP  
Registrant Postal Code: A1A1A1  
Registrant Country: EX

Registrant Phone: +1.5555551212  
Registrant Phone Ext: 1234  
Registrant Fax: +1.5555551213  
Registrant Fax Ext: 4321  
Registrant Email: EMAIL@EXAMPLE.TLD  
Admin ID: 5372809-ERL  
Admin Name: EXAMPLE REGISTRANT ADMINISTRATIVE  
Admin Organization: EXAMPLE REGISTRANT ORGANIZATION  
Admin Street: 123 EXAMPLE STREET  
Admin City: ANYTOWN  
Admin State/Province: AP  
Admin Postal Code: A1A1A1  
Admin Country: EX  
Admin Phone: +1.5555551212  
Admin Phone Ext: 1234  
Admin Fax: +1.5555551213  
Admin Fax Ext:  
Admin Email: EMAIL@EXAMPLE.TLD  
Tech ID: 5372811-ERL  
Tech Name: EXAMPLE REGISTRAR TECHNICAL  
Tech Organization: EXAMPLE REGISTRAR LLC  
Tech Street: 123 EXAMPLE STREET  
Tech City: ANYTOWN  
Tech State/Province: AP  
Tech Postal Code: A1A1A1  
Tech Country: EX  
Tech Phone: +1.1235551234  
Tech Phone Ext: 1234  
Tech Fax: +1.5555551213  
Tech Fax Ext: 93  
Tech Email: EMAIL@EXAMPLE.TLD  
Name Server: NS01.EXAMPLEREGISTRAR.TLD  
Name Server: NS02.EXAMPLEREGISTRAR.TLD  
DNSSEC: signedDelegation  
DNSSEC: unsigned  
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

## 1.5. Registrar Data:

1.5.1. **Query format:** whois "registrar Example Registrar, Inc."

1.5.2. **Response format:**

Registrar Name: Example Registrar, Inc.  
Street: 1234 Admiralty Way  
City: Marina del Rey  
State/Province: CA  
Postal Code: 90292  
Country: US  
Phone Number: +1.3105551212  
Fax Number: +1.3105551213

Email: registrar@example.tld  
 WHOIS Server: whois.example-registrar.tld  
 Referral URL: http://www.example-registrar.tld  
 Admin Contact: Joe Registrar  
 Phone Number: +1.3105551213  
 Fax Number: +1.3105551213  
 Email: joeregistrar@example-registrar.tld  
 Admin Contact: Jane Registrar  
 Phone Number: +1.3105551214  
 Fax Number: +1.3105551213  
 Email: janeregistrar@example-registrar.tld  
 Technical Contact: John Geek  
 Phone Number: +1.3105551215  
 Fax Number: +1.3105551216  
 Email: johngeek@example-registrar.tld  
 >>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

## 1.6. Nameserver Data:

1.6.1. **Query format:** whois "NS1.EXAMPLE.TLD" or whois "nameserver (IP Address)"

1.6.2. **Response format:**

Server Name: NS1.EXAMPLE.TLD  
 IP Address: 192.0.2.123  
 IP Address: 2001:0DB8::1  
 Registrar: Example Registrar, Inc.  
 WHOIS Server: whois.example-registrar.tld  
 Referral URL: http://www.example-registrar.tld  
 >>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.7. The format of the following data fields: domain status, individual and organizational names, address, street, city, state/province, postal code, country, telephone and fax numbers, email addresses, date and times should conform to the mappings specified in EPP RFCs 5730-5734 so that the display of this information (or values return in WHOIS responses) can be uniformly processed and understood.

1.8. **Searchability.** Offering searchability capabilities on the Directory Services is optional but if offered by the Registry Operator it shall comply with the specification described in this section.

1.8.1. Registry Operator will offer searchability on the web-based Directory Service.

1.8.2. Registry Operator will offer partial match capabilities, at least, on the following fields: domain name, contacts and registrant's name, and contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.).

1.8.3. Registry Operator will offer exact-match capabilities, at least, on the following fields: registrar id, name server name, and name server's IP address (only applies to IP addresses stored by the registry, i.e., glue records).



1.8.4. Registry Operator will offer Boolean search capabilities supporting, at least, the following logical operators to join a set of search criteria: AND, OR, NOT.

1.8.5. Search results will include domain names matching the search criteria.

1.8.6. Registry Operator will: 1) implement appropriate measures to avoid abuse of this feature (e.g., permitting access only to legitimate authorized users); and 2) ensure the feature is in compliance with any applicable privacy laws or policies.

## 2. Zone File Access

### 2.1. Third-Party Access

2.1.1. **Zone File Access Agreement.** Registry Operator will enter into an agreement with any Internet user that will allow such user to access an Internet host server or servers designated by Registry Operator and download zone file data. The agreement will be standardized, facilitated and administered by a Centralized Zone Data Access Provider (the “CZDA Provider”). Registry Operator will provide access to zone file data per Section 2.1.3 and do so using the file format described in Section 2.1.4. Notwithstanding the foregoing, (a) the CZDA Provider may reject the request for access of any user that does not satisfy the credentialing requirements in Section 2.1.2 below; (b) Registry Operator may reject the request for access of any user that does not provide correct or legitimate credentials under Section 2.1.2 or where Registry Operator reasonably believes will violate the terms of Section 2.1.5. below; and, (c) Registry Operator may revoke access of any user if Registry Operator has evidence to support that the user has violated the terms of Section 2.1.5.

2.1.2. **Credentialing Requirements.** Registry Operator, through the facilitation of the CZDA Provider, will request each user to provide it with information sufficient to correctly identify and locate the user. Such user information will include, without limitation, company name, contact name, address, telephone number, facsimile number, email address, and the Internet host machine name and IP address.

2.1.3. **Grant of Access.** Each Registry Operator will provide the Zone File FTP (or other Registry supported) service for an ICANN-specified and managed URL (specifically, <TLD>.zda.icann.org where <TLD> is the TLD for which the registry is responsible) for the user to access the Registry’s zone data archives. Registry Operator will grant the user a non-exclusive, non-transferable, limited right to access Registry Operator’s Zone File FTP server, and to transfer a copy of the top-level domain zone files, and any associated cryptographic checksum files no more than once per 24 hour period using FTP, or other data transport and access protocols that may be prescribed by ICANN. For every zone file access server, the zone files are in the top-level directory called <zone>.zone.gz, with <zone>.zone.gz.md5 and <zone>.zone.gz.sig to verify downloads. If the Registry Operator also provides historical data, it will use the naming pattern <zone>-yyyymmdd.zone.gz, etc.

2.1.4. **File Format Standard.** Registry Operator will provide zone files using a sub-format of the standard Master File format as originally defined in RFC 1035, Section 5, including all the records present in the actual zone used in the public DNS. Sub-format is as follows:

1. Each record must include all fields in one line as: <domain-name> <TTL> <class> <type> <RDATA>.
2. Class and Type must use the standard mnemonics and must be in lower case.

3. TTL must be present as a decimal integer.
4. Use of /X and /DDD inside domain names is allowed.
5. All domain names must be in lower case.
6. Must use exactly one tab as separator of fields inside a record.
7. All domain names must be fully qualified.
8. No \$ORIGIN directives.
9. No use of "@" to denote current origin.
10. No use of "blank domain names" at the beginning of a record to continue the use of the domain name in the previous record.
11. No \$INCLUDE directives.
12. No \$TTL directives.
13. No use of parentheses, e.g., to continue the list of fields in a record across a line boundary.
14. No use of comments.
15. No blank lines.
16. The SOA record should be present at the top and (duplicated at) the end of the zone file.
17. With the exception of the SOA record, all the records in a file must be in alphabetical order.
18. One zone per file. If a TLD divides its DNS data into multiple zones, each goes into a separate file named as above, with all the files combined using tar into a file called <tld>.zone.tar.

2.1.5. **Use of Data by User.** Registry Operator will permit user to use the zone file for lawful purposes; provided that, (a) user takes all reasonable steps to protect against unauthorized access to and use and disclosure of the data, and (b) under no circumstances will Registry Operator be required or permitted to allow user to use the data to, (i) allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations to entities other than user's own existing customers, or (ii) enable high volume, automated, electronic processes that send queries or data to the systems of Registry Operator or any ICANN-accredited registrar.

2.1.6. **Term of Use.** Registry Operator, through CZDA Provider, will provide each user with access to the zone file for a period of not less than three (3) months. Registry Operator will allow users to renew their Grant of Access.

2.1.7. **No Fee for Access.** Registry Operator will provide, and CZDA Provider will facilitate, access to the zone file to user at no cost.

## 2.2 Co-operation

2.2.1. **Assistance.** Registry Operator will co-operate and provide reasonable assistance to ICANN and the CZDA Provider to facilitate and maintain the efficient access of zone file data by permitted users as contemplated under this Schedule.

**2.3 ICANN Access.** Registry Operator shall provide bulk access to the zone files for the TLD to ICANN or its designee on a continuous basis in the manner ICANN may reasonably specify from time to time.

**2.4 Emergency Operator Access.** Registry Operator shall provide bulk access to the zone files for the TLD to the Emergency Operators designated by ICANN on a continuous basis in the manner ICANN may reasonably specify from time to time.

### 3. Bulk Registration Data Access to ICANN

**3.1. Periodic Access to Thin Registration Data.** In order to verify and ensure the operational stability of Registry Services as well as to facilitate compliance checks on accredited registrars, Registry Operator will provide ICANN on a weekly basis (the day to be designated by ICANN) with up-to-date Registration Data as specified below. Data will include data committed as of 00:00:00 UTC on the day previous to the one designated for retrieval by ICANN.

**3.1.1. Contents.** Registry Operator will provide, at least, the following data for all registered domain names: domain name, domain name repository object id (roid), registrar id (IANA ID), statuses, last updated date, creation date, expiration date, and name server names. For sponsoring registrars, at least, it will provide: registrar name, registrar repository object id (roid), hostname of registrar Whois server, and URL of registrar.

**3.1.2. Format.** The data will be provided in the format specified in Specification 2 for Data Escrow (including encryption, signing, etc.) but including only the fields mentioned in the previous section, i.e., the file will only contain Domain and Registrar objects with the fields mentioned above. Registry Operator has the option to provide a full deposit file instead as specified in Specification 2.

**3.1.3. Access.** Registry Operator will have the file(s) ready for download as of 00:00:00 UTC on the day designated for retrieval by ICANN. The file(s) will be made available for download by SFTP, though ICANN may request other means in the future.

**3.2. Exceptional Access to Thick Registration Data.** In case of a registrar failure, de-accreditation, court order, etc. that prompts the temporary or definitive transfer of its domain names to another registrar, at the request of ICANN, Registry Operator will provide ICANN with up-to-date data for the domain names of the losing registrar. The data will be provided in the format specified in Specification 2 for Data Escrow. The file will only contain data related to the domain names of the losing registrar. Registry Operator will provide the data within 2 business days. Unless otherwise agreed by Registry Operator and ICANN, the file will be made available for download by ICANN in the same manner as the data specified in Section 3.1. of this Specification.

## SPECIFICATION 5

### SCHEDULE OF RESERVED NAMES AT THE SECOND LEVEL IN GTLD REGISTRIES

Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall reserve (i.e., Registry Operator shall not register, delegate, use or otherwise make available such labels to any third party, but may register such labels in its own name in order to withhold them from delegation or use) names formed with the following labels from initial (i.e. other than renewal) registration within the TLD:

1. **Example. The label “EXAMPLE”** shall be reserved at the second level and at all other levels within the TLD at which Registry Operator makes registrations.
2. **Two-character labels.** All two-character labels shall be initially reserved. The reservation of a two-character label string may be released to the extent that Registry Operator reaches agreement with the government and country-code manager. The Registry Operator may also propose release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes.
3. **Tagged Domain Names.** Labels may only include hyphens in the third and fourth position if they represent valid internationalized domain names in their ASCII encoding (for example "xn--ndk061n").
4. **Second-Level Reservations for Registry Operations.** The following names are reserved for use in connection with the operation of the registry for the TLD. Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the TLD they shall be transferred as specified by ICANN: NIC, WWW, IRIS and WHOIS.
5. **Country and Territory Names.** The country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations:
  - 5.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union  
<[http://www.iso.org/iso/support/country\\_codes/iso\\_3166\\_code\\_lists/iso-3166-1\\_decoding\\_table.htm#EU](http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU)>;
  - 5.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
  - 5.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names;

provided, that the reservation of specific country and territory names may be released to the extent that Registry Operator reaches agreement with the applicable government(s), provided, further, that

Registry Operator may also propose release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN.

## SPECIFICATION 6

### REGISTRY INTEROPERABILITY AND CONTINUITY SPECIFICATIONS

#### 1. Standards Compliance

1.1. **DNS.** Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the DNS and name server operations including without limitation RFCs 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 4343, and 5966.

1.2. **EPP.** Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 5910, 5730, 5731, 5732, 5733 and 5734. If Registry Operator implements Registry Grace Period (RGP), it will comply with RFC 3915 and its successors. If Registry Operator requires the use of functionality outside the base EPP RFCs, Registry Operator must document EPP extensions in Internet-Draft format following the guidelines described in RFC 3735. Registry Operator will provide and update the relevant documentation of all the EPP Objects and Extensions supported to ICANN prior to deployment.

1.3. **DNSSEC.** Registry Operator shall sign its TLD zone files implementing Domain Name System Security Extensions (“DNSSEC”). During the Term, Registry Operator shall comply with RFCs 4033, 4034, 4035, 4509 and their successors, and follow the best practices described in RFC 4641 and its successors. If Registry Operator implements Hashed Authenticated Denial of Existence for DNS Security Extensions, it shall comply with RFC 5155 and its successors. Registry Operator shall accept public-key material from child domain names in a secure manner according to industry best practices. Registry shall also publish in its website the DNSSEC Practice Statements (DPS) describing critical security controls and procedures for key material storage, access and usage for its own keys and secure acceptance of registrants’ public-key material. Registry Operator shall publish its DPS following the format described in “DPS-framework” (currently in draft format, see <http://tools.ietf.org/html/draft-ietf-dnsop-dnssec-dps-framework>) within 180 days after the “DPS-framework” becomes an RFC.

1.4. **IDN.** If the Registry Operator offers Internationalized Domain Names (“IDNs”), it shall comply with RFCs 5890, 5891, 5892, 5893 and their successors. Registry Operator shall comply with the ICANN IDN Guidelines at <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>, as they may be amended, modified, or superseded from time to time. Registry Operator shall publish and keep updated its IDN Tables and IDN Registration Rules in the IANA Repository of IDN Practices as specified in the ICANN IDN Guidelines.

1.5. **IPv6.** Registry Operator shall be able to accept IPv6 addresses as glue records in its Registry System and publish them in the DNS. Registry Operator shall offer public IPv6 transport for, at least, two of the Registry’s name servers listed in the root zone with the corresponding IPv6 addresses registered with IANA. Registry Operator should follow “DNS IPv6 Transport Operational Guidelines” as described in BCP 91 and the recommendations and considerations described in RFC 4472. Registry Operator shall offer public IPv6 transport for its Registration Data Publication Services as defined in Specification 4 of this Agreement; e.g. Whois (RFC 3912), Web based Whois. Registry Operator shall offer public IPv6 transport for its Shared Registration System (SRS) to any Registrar, no later than six months after receiving the first request in writing from a gTLD accredited Registrar willing to operate with the SRS over IPv6.

## 2. Registry Services

2.1. **Registry Services.** “Registry Services” are, for purposes of the Registry Agreement, defined as the following: (a) those services that are operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry DNS servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; (b) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy as defined in Specification 1; (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above.

2.2. **Wildcard Prohibition.** For domain names which are either not registered, or the registrant has not supplied valid records such as NS records for listing in the DNS zone file, or their status does not allow them to be published in the DNS, the use of DNS wildcard Resource Records as described in RFCs 1034 and 4592 or any other method or technology for synthesizing DNS Resources Records or using redirection within the DNS by the Registry is prohibited. When queried for such domain names the authoritative name servers must return a “Name Error” response (also known as NXDOMAIN), RCODE 3 as described in RFC 1035 and related RFCs. This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry Operator (or an affiliate engaged in providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.

## 3. Registry Continuity

3.1. **High Availability.** Registry Operator will conduct its operations using network and geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme where applicable) to ensure continued operation in the case of technical failure (widespread or local), or an extraordinary occurrence or circumstance beyond the control of the Registry Operator.

3.2. **Extraordinary Event.** Registry Operator will use commercially reasonable efforts to restore the critical functions of the registry within 24 hours after the termination of an extraordinary event beyond the control of the Registry Operator and restore full system functionality within a maximum of 48 hours following such event, depending on the type of critical function involved. Outages due to such an event will not be considered a lack of service availability.

3.3. **Business Continuity.** Registry Operator shall maintain a business continuity plan, which will provide for the maintenance of Registry Services in the event of an extraordinary event beyond the control of the Registry Operator or business failure of Registry Operator, and may include the designation of a Registry Services continuity provider. If such plan includes the designation of a Registry Services continuity provider, Registry Operator shall provide the name and contact information for such Registry Services continuity provider to ICANN. In the case of an extraordinary event beyond the control of the Registry Operator where the Registry Operator cannot be contacted, Registry Operator consents that ICANN may contact the designated Registry Services continuity provider, if one exists. Registry Operator shall conduct Registry Services Continuity testing at least once per year.

## 4. Abuse Mitigation



4.1. **Abuse Contact.** Registry Operator shall provide to ICANN and publish on its website its accurate contact details including a valid email and mailing address as well as a primary contact for handling inquiries related to malicious conduct in the TLD, and will provide ICANN with prompt notice of any changes to such contact details.

4.2. **Malicious Use of Orphan Glue Records.** Registry Operators shall take action to remove orphan glue records (as defined at <http://www.icann.org/en/committees/security/sac048.pdf>) when provided with evidence in written form that such records are present in connection with malicious conduct.

## **5. Supported Initial and Renewal Registration Periods**

5.1. **Initial Registration Periods.** Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, initial registrations of registered names may not exceed ten (10) years.

5.2. **Renewal Periods.** Renewal of registered names may be made in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, renewal of registered names may not extend their registration period beyond ten (10) years from the time of the renewal.



## SPECIFICATION 7

### MINIMUM REQUIREMENTS FOR RIGHTS PROTECTION MECHANISMS

1. **Rights Protection Mechanisms.** Registry Operator shall implement and adhere to any rights protection mechanisms (“RPMs”) that may be mandated from time to time by ICANN. In addition to such RPMs, Registry Operator may develop and implement additional RPMs that discourage or prevent registration of domain names that violate or abuse another party’s legal rights. Registry Operator will include all ICANN mandated and independently developed RPMs in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to register names in the TLD. Registry Operator shall implement in accordance with requirements established by ICANN each of the mandatory RPMs set forth in the Trademark Clearinghouse (posted at [url to be inserted when final Trademark Clearinghouse is adopted]), which may be revised by ICANN from time to time. Registry Operator shall not mandate that any owner of applicable intellectual property rights use any other trademark information aggregation, notification, or validation service in addition to or instead of the ICANN-designated Trademark Clearinghouse.

2. **Dispute Resolution Mechanisms.** Registry Operator will comply with the following dispute resolution mechanisms as they may be revised from time to time:

- a. the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Registration Restriction Dispute Resolution Procedure (RRDRP) adopted by ICANN (posted at [urls to be inserted when final procedure is adopted]). 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 PDDRP or RRDRP panel and to be bound by any such determination; and
- b. the Uniform Rapid Suspension system (“URS”) adopted by ICANN (posted at [url to be inserted]), including the implementation of determinations issued by URS examiners.

## SPECIFICATION 8

### CONTINUED OPERATIONS INSTRUMENT

1. The Continued Operations Instrument shall (a) provide for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section [ ] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8) for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6<sup>th</sup>) anniversary of the Effective Date, and (b) be in the form of either (i) an irrevocable standby letter of credit, or (ii) an irrevocable cash escrow deposit, each meeting the requirements set forth in Section [ ] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8). Registry Operator shall use its best efforts to take all actions necessary or advisable to maintain in effect the Continued Operations Instrument for a period of six (6) years from the Effective Date, and to maintain ICANN as a third party beneficiary thereof. Registry Operator shall provide to ICANN copies of all final documents relating to the Continued Operations Instrument and shall keep ICANN reasonably informed of material developments relating to the Continued Operations Instrument. Registry Operator shall not agree to, or permit, any amendment of, or waiver under, the Continued Operations Instrument or other documentation relating thereto without the prior written consent of ICANN (such consent not to be unreasonably withheld). The Continued Operations Instrument shall expressly state that ICANN may access the financial resources of the Continued Operations Instrument pursuant to Section 2.13 or Section 4.5 [*insert for government entity*: or Section 7.14] of the Registry Agreement.
2. If, notwithstanding the use of best efforts by Registry Operator to satisfy its obligations under the preceding paragraph, the Continued Operations Instrument expires or is terminated by another party thereto, in whole or in part, for any reason, prior to the sixth anniversary of the Effective Date, Registry Operator shall promptly (i) notify ICANN of such expiration or termination and the reasons therefor and (ii) arrange for an alternative instrument that provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date (an “Alternative Instrument”). Any such Alternative Instrument shall be on terms no less favorable to ICANN than the Continued Operations Instrument and shall otherwise be in form and substance reasonably acceptable to ICANN.
3. Notwithstanding anything to the contrary contained in this Specification 8, at any time, Registry Operator may replace the Continued Operations Instrument with an alternative

instrument that (i) provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date, and (ii) contains terms no less favorable to ICANN than the Continued Operations Instrument and is otherwise in form and substance reasonably acceptable to ICANN. In the event Registry Operation replaces the Continued Operations Instrument either pursuant to paragraph 2 or this paragraph 3, the terms of this Specification 8 shall no longer apply with respect to the original Continuing Operations Instrument, but shall thereafter apply with respect to such replacement instrument(s).

## SPECIFICATION 9

### Registry Operator Code of Conduct

1. In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a "Registry Related Party"), to:
  - a. directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions;
  - b. register domain names in its own right, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD, provided, that Registry Operator may reserve names from registration pursuant to Section 2.6 of the Registry Agreement;
  - c. register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running");
  - d. allow any Affiliated registrar to disclose user data to Registry Operator or any Registry Related Party, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such user data on substantially similar terms and subject to substantially similar conditions; or
  - e. disclose confidential registry data or confidential information about its Registry Services or operations to any employee of any DNS services provider, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such confidential registry data or confidential information on substantially similar terms and subject to substantially similar conditions.
2. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will, or will cause such Registry Related Party to, ensure that such services are offered through a legal entity separate from Registry Operator, and maintain separate books of accounts with respect to its registrar or registrar-reseller operations.
3. Registry Operator will conduct internal reviews at least once per calendar year to

- ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future the form and contents of such reports or that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification.
4. Nothing set forth herein shall: (i) limit ICANN from conducting investigations of claims of Registry Operator's non-compliance with this Code of Conduct; or (ii) provide grounds for Registry Operator to refuse to cooperate with ICANN investigations of claims of Registry Operator's non-compliance with this Code of Conduct.
  5. Nothing set forth herein shall limit the ability of Registry Operator or any Registry Related Party, to enter into arms-length transactions in the ordinary course of business with a registrar or reseller with respect to products and services unrelated in all respects to the TLD.
  6. Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

## SPECIFICATION 10

### REGISTRY PERFORMANCE SPECIFICATIONS

#### 1. Definitions

- 1.1. **DNS.** Refers to the Domain Name System as specified in RFCs 1034, 1035, and related RFCs.
- 1.2. **DNSSEC proper resolution.** There is a valid DNSSEC chain of trust from the root trust anchor to a particular domain name, e.g., a TLD, a domain name registered under a TLD, etc.
- 1.3. **EPP.** Refers to the Extensible Provisioning Protocol as specified in RFC 5730 and related RFCs.
- 1.4. **IP address.** Refers to IPv4 or IPv6 addresses without making any distinction between the two. When there is need to make a distinction, IPv4 or IPv6 is used.
- 1.5. **Probes.** Network hosts used to perform (DNS, EPP, etc.) tests (see below) that are located at various global locations.
- 1.6. **RDDS.** Registration Data Directory Services refers to the collective of WHOIS and Web-based WHOIS services as defined in Specification 4 of this Agreement.
- 1.7. **RTT.** Round-Trip Time or **RTT** refers to the time measured from the sending of the first bit of the first packet of the sequence of packets needed to make a request until the reception of the last bit of the last packet of the sequence needed to receive the response. If the client does not receive the whole sequence of packets needed to consider the response as received, the request will be considered unanswered.
- 1.8. **SLR.** Service Level Requirement is the level of service expected for a certain parameter being measured in a Service Level Agreement (SLA).

#### 2. Service Level Agreement Matrix

	Parameter	SLR (monthly basis)
<b>DNS</b>	DNS service availability	0 min downtime = 100% availability
	DNS name server availability	≤ 432 min of downtime (≈ 99%)
	TCP DNS resolution RTT	≤ 1500 ms, for at least 95% of the queries
	UDP DNS resolution RTT	≤ 500 ms, for at least 95% of the queries
	DNS update time	≤ 60 min, for at least 95% of the probes
<b>RDDS</b>	RDDS availability	≤ 864 min of downtime (≈ 98%)
	RDDS query RTT	≤ 2000 ms, for at least 95% of the queries
	RDDS update time	≤ 60 min, for at least 95% of the probes
<b>EPP</b>	EPP service availability	≤ 864 min of downtime (≈ 98%)
	EPP session-command RTT	≤ 4000 ms, for at least 90% of the commands
	EPP query-command RTT	≤ 2000 ms, for at least 90% of the commands
	EPP transform-command RTT	≤ 4000 ms, for at least 90% of the commands

Registry Operator is encouraged to do maintenance for the different services at the times and dates of statistically lower traffic for each service. However, note that there is no provision for planned outages or similar; any downtime, be it for maintenance or due to system failures, will be noted simply as downtime and counted for SLA purposes.

### 3. DNS

- 3.1. **DNS service availability.** Refers to the ability of the group of listed-as-authoritative name servers of a particular domain name (e.g., a TLD), to answer DNS queries from DNS probes. For the service to be considered available at a particular moment, at least, two of the delegated name servers registered in the DNS must have successful results from “**DNS tests**” to each of their public-DNS registered “**IP addresses**” to which the name server resolves. If 51% or more of the DNS testing probes see the service as unavailable during a given time, the DNS service will be considered unavailable.
- 3.2. **DNS name server availability.** Refers to the ability of a public-DNS registered “**IP address**” of a particular name server listed as authoritative for a domain name, to answer DNS queries from an Internet user. All the public DNS-registered “**IP address**” of all name servers of the domain name being monitored shall be tested individually. If 51% or more of the DNS testing probes get undefined/unanswered results from “**DNS tests**” to a name server “**IP address**” during a given time, the name server “**IP address**” will be considered unavailable.
- 3.3. **UDP DNS resolution RTT.** Refers to the **RTT** of the sequence of two packets, the UDP DNS query and the corresponding UDP DNS response. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.
- 3.4. **TCP DNS resolution RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the DNS response for only one DNS query. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.
- 3.5. **DNS resolution RTT.** Refers to either “**UDP DNS resolution RTT**” or “**TCP DNS resolution RTT**”.
- 3.6. **DNS update time.** Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, until the name servers of the parent domain name answer “**DNS queries**” with data consistent with the change made. This only applies for changes to DNS information.
- 3.7. **DNS test.** Means one non-recursive DNS query sent to a particular “**IP address**” (via UDP or TCP). If DNSSEC is offered in the queried DNS zone, for a query to be considered answered, the signatures must be positively verified against a corresponding DS record published in the parent zone or, if the parent is not signed, against a statically configured Trust Anchor. The answer to the query must contain the corresponding information from the Registry System, otherwise the query will be considered unanswered. A query with a “**DNS resolution RTT**” 5 times higher than the corresponding **SLR**, will be considered unanswered. The possible results to a DNS test are: a number in milliseconds corresponding to the “**DNS resolution RTT**” or, undefined/unanswered.
- 3.8. **Measuring DNS parameters.** Every minute, every DNS probe will make an UDP or TCP “**DNS test**” to each of the public-DNS registered “**IP addresses**” of the name servers of the domain



name being monitored. If a “**DNS test**” result is undefined/unanswered, the tested IP will be considered unavailable from that probe until it is time to make a new test.

- 3.9. **Collating the results from DNS probes.** The minimum number of active testing probes to consider a measurement valid is 20 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.
- 3.10. **Distribution of UDP and TCP queries.** DNS probes will send UDP or TCP “**DNS test**” approximating the distribution of these queries.
- 3.11. **Placement of DNS probes.** Probes for measuring DNS parameters shall be placed as near as possible to the DNS resolvers on the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

#### 4. **RDDS**

- 4.1. **RDDS availability.** Refers to the ability of all the RDDS services for the TLD, to respond to queries from an Internet user with appropriate data from the relevant Registry System. If 51% or more of the RDDS testing probes see any of the RDDS services as unavailable during a given time, the RDDS will be considered unavailable.
- 4.2. **WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the WHOIS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.
- 4.3. **Web-based-WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the HTTP response for only one HTTP request. If Registry Operator implements a multiple-step process to get to the information, only the last step shall be measured. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.
- 4.4. **RDDS query RTT.** Refers to the collective of “**WHOIS query RTT**” and “**Web-based-WHOIS query RTT**”.
- 4.5. **RDDS update time.** Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, host or contact, up until the servers of the RDDS services reflect the changes made.
- 4.6. **RDDS test.** Means one query sent to a particular “**IP address**” of one of the servers of one of the RDDS services. Queries shall be about existing objects in the Registry System and the responses must contain the corresponding information otherwise the query will be considered unanswered. Queries with an **RTT** 5 times higher than the corresponding SLR will be considered as unanswered. The possible results to an RDDS test are: a number in milliseconds corresponding to the **RTT** or undefined/unanswered.
- 4.7. **Measuring RDDS parameters.** Every 5 minutes, RDDS probes will select one IP address from all the public-DNS registered “**IP addresses**” of the servers for each RDDS service of the TLD being monitored and make an “**RDDS test**” to each one. If an “**RDDS test**” result is



undefined/unanswered, the corresponding RDDS service will be considered as unavailable from that probe until it is time to make a new test.

4.8. **Collating the results from RDDS probes.** The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

4.9. **Placement of RDDS probes.** Probes for measuring RDDS parameters shall be placed inside the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

## 5. EPP

5.1. **EPP service availability.** Refers to the ability of the TLD EPP servers as a group, to respond to commands from the Registry accredited Registrars, who already have credentials to the servers. The response shall include appropriate data from the Registry System. An EPP command with “**EPP command RTT**” 5 times higher than the corresponding SLR will be considered as unanswered. If 51% or more of the EPP testing probes see the EPP service as unavailable during a given time, the EPP service will be considered unavailable.

5.2. **EPP session-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a session command plus the reception of the EPP response for only one EPP session command. For the login command it will include packets needed for starting the TCP session. For the logout command it will include packets needed for closing the TCP session. EPP session commands are those described in section 2.9.1 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.3. **EPP query-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a query command plus the reception of the EPP response for only one EPP query command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP query commands are those described in section 2.9.2 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

5.4. **EPP transform-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a transform command plus the reception of the EPP response for only one EPP transform command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP transform commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.5. **EPP command RTT.** Refers to “**EPP session-command RTT**”, “**EPP query-command RTT**” or “**EPP transform-command RTT**”.

5.6. **EPP test.** Means one EPP command sent to a particular “**IP address**” for one of the EPP servers. Query and transform commands, with the exception of “create”, shall be about existing objects in the Registry System. The response shall include appropriate data from the Registry System. The possible results to an EPP test are: a number in milliseconds corresponding to the “**EPP command RTT**” or undefined/unanswered.

- 5.7. **Measuring EPP parameters.** Every 5 minutes, EPP probes will select one “IP address“ of the EPP servers of the TLD being monitored and make an “EPP test”; every time they should alternate between the 3 different types of commands and between the commands inside each category. If an “EPP test” result is undefined/unanswered, the EPP service will be considered as unavailable from that probe until it is time to make a new test.
- 5.8. **Collating the results from EPP probes.** The minimum number of active testing probes to consider a measurement valid is 5 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.
- 5.9. **Placement of EPP probes.** Probes for measuring EPP parameters shall be placed inside or close to Registrars points of access to the Internet across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

## 6. Emergency Thresholds

The following matrix presents the Emergency Thresholds that, if reached by any of the services mentioned above for a TLD, would cause the Emergency Transition of the Critical Functions as specified in Section 2.13. of this Agreement.

<b>Critical Function</b>	<b>Emergency Threshold</b>
DNS service (all servers)	4-hour downtime / week
DNSSEC proper resolution	4-hour downtime / week
EPP	24-hour downtime / week
RDDS (WHOIS/Web-based WHOIS)	24-hour downtime / week
Data Escrow	Breach of the Registry Agreement caused by missing escrow deposits as described in Specification 2, Part B, Section 6.

## 7. Emergency Escalation

Escalation is strictly for purposes of notifying and investigating possible or potential issues in relation to monitored services. The initiation of any escalation and the subsequent cooperative investigations do not in themselves imply that a monitored service has failed its performance requirements.

Escalations shall be carried out between ICANN and Registry Operators, Registrars and Registry Operator, and Registrars and ICANN. Registry Operators and ICANN must provide said emergency operations departments. Current contacts must be maintained between ICANN and Registry Operators and published to Registrars, where relevant to their role in escalations, prior to any processing of an Emergency Escalation by all related parties, and kept current at all times.

### 7.1. **Emergency Escalation initiated by ICANN**

Upon reaching 10% of the Emergency thresholds as described in Section 6, ICANN’s emergency operations will initiate an Emergency Escalation with the relevant Registry Operator. An Emergency Escalation consists of the following minimum elements: electronic (i.e., email or SMS) and/or voice contact notification to the Registry Operator’s emergency operations department with detailed information concerning the issue being escalated, including evidence of monitoring failures, cooperative trouble-shooting of the monitoring failure between ICANN staff and the Registry Operator, and the

commitment to begin the process of rectifying issues with either the monitoring service or the service being monitoring.

### 7.2. Emergency Escalation initiated by Registrars

Registry Operator will maintain an emergency operations departments prepared to handle emergency requests from registrars. In the event that a registrar is unable to conduct EPP transactions with the Registry because of a fault with the Registry Service and is unable to either contact (through ICANN mandated methods of communication) the Registry Operator, or the Registry Operator is unable or unwilling to address the fault, the registrar may initiate an Emergency Escalation to the emergency operations department of ICANN. ICANN then may initiate an Emergency Escalation with the Registry Operator as explained above.

### 7.3. Notifications of Outages and Maintenance

In the event that a Registry Operator plans maintenance, they will provide related notice to the ICANN emergency operations department, at least, 24 hours ahead of that maintenance. ICANN's emergency operations department will note planned maintenance times, and suspend Emergency Escalation services for the monitored services during the expected maintenance outage period.

If Registry Operator declares an outage, as per their contractual obligations with ICANN, on services under SLA and performance requirements, it will notify the ICANN emergency operations department. During that declared outage, ICANN's emergency operations department will note and suspend Emergency Escalation services for the monitored services involved.

## 8. Covenants of Performance Measurement

- 8.1. **No interference.** Registry Operator shall not interfere with measurement **Probes**, including any form of preferential treatment of the requests for the monitored services. Registry Operator shall respond to the measurement tests described in this Specification as it would do with any other request from Internet users (for DNS and RDDS) or registrars (for EPP).
- 8.2. **ICANN testing registrar.** Registry Operator agrees that ICANN will have a testing registrar used for purposes of measuring the **SLRs** described above. Registry Operator agrees to not provide any differentiated treatment for the testing registrar other than no billing of the transactions. ICANN shall not use the registrar for registering domain names (or other registry objects) for itself or others, except for the purposes of verifying contractual compliance with the conditions described in this Agreement.

**TRADEMARK CLEARINGHOUSE**  
**4 JUNE 2012**

**1. PURPOSE OF CLEARINGHOUSE**

- 1.1 The Trademark Clearinghouse is a central repository for information to be authenticated, stored, and disseminated, pertaining to the rights of trademark holders. ICANN will enter into an arms-length contract with service provider or providers, awarding the right to serve as a Trademark Clearinghouse Service Provider, i.e., to accept, authenticate, validate and facilitate the transmission of information related to certain trademarks.
- 1.2 The Clearinghouse will be required to separate its two primary functions: (i) authentication and validation of the trademarks in the Clearinghouse; and (ii) serving as a database to provide information to the new gTLD registries to support pre-launch Sunrise or Trademark Claims Services. Whether the same provider could serve both functions or whether two providers will be determined in the tender process.
- 1.3 The Registry shall only need to connect with one centralized database to obtain the information it needs to conduct its Sunrise or Trademark Claims Services regardless of the details of the Trademark Clearinghouse Service Provider's contract(s) with ICANN.
- 1.4 Trademark Clearinghouse Service Provider may provide ancillary services, as long as those services and any data used for those services are kept separate from the Clearinghouse database.
- 1.5 The Clearinghouse database will be a repository of authenticated information and disseminator of the information to a limited number of recipients. Its functions will be performed in accordance with a limited charter, and will not have any discretionary powers other than what will be set out in the charter with respect to authentication and validation. The Clearinghouse administrator(s) cannot create policy. Before material changes are made to the Clearinghouse functions, they will be reviewed through the ICANN public participation model.
- 1.6 Inclusion in the Clearinghouse is not proof of any right, nor does it create any legal rights. Failure to submit trademarks into the Clearinghouse should not be perceived to be lack of vigilance by trademark holders or a waiver of any rights, nor can any negative influence be drawn from such failure.

**2. SERVICE PROVIDERS**

- 2.1 The selection of Trademark Clearinghouse Service Provider(s) will be subject to predetermined criteria, but the foremost considerations will be the ability to store, authenticate, validate and disseminate the data at the highest level of technical stability

and security without interference with the integrity or timeliness of the registration process or registry operations.

- 2.2 Functions – Authentication/Validation; Database Administration. Public commentary has suggested that the best way to protect the integrity of the data and to avoid concerns that arise through sole-source providers would be to separate the functions of database administration and data authentication/validation.
  - 2.2.1 One entity will authenticate registrations ensuring the word marks qualify as registered or are court-validated word marks or word marks that are protected by statute or treaty. This entity would also be asked to ensure that proof of use of marks is provided, which can be demonstrated by furnishing a signed declaration and one specimen of current use.
  - 2.2.2 The second entity will maintain the database and provide Sunrise and Trademark Claims Services (described below).
- 2.3 Discretion will be used, balancing effectiveness, security and other important factors, to determine whether ICANN will contract with one or two entities - one to authenticate and validate, and the other to, administer in order to preserve integrity of the data.
- 2.4 Contractual Relationship.
  - 2.4.1 The Clearinghouse shall be separate and independent from ICANN. It will operate based on market needs and collect fees from those who use its services. ICANN may coordinate or specify interfaces used by registries and registrars, and provide some oversight or quality assurance function to ensure rights protection goals are appropriately met.
  - 2.4.2 The Trademark Clearinghouse Service Provider(s) (authenticator/validator and administrator) will be selected through an open and transparent process to ensure low costs and reliable, consistent service for all those utilizing the Clearinghouse services.
  - 2.4.3 The Service Provider(s) providing the authentication of the trademarks submitted into the Clearinghouse shall adhere to rigorous standards and requirements that would be specified in an ICANN contractual agreement.
  - 2.4.4 The contract shall include service level requirements, customer service availability (with the goal of seven days per week, 24 hours per day, 365 days per year), data escrow requirements, and equal access requirements for all persons and entities required to access the Trademark Clearinghouse database.

- 2.4.5 To the extent practicable, the contract should also include indemnification by Service Provider for errors such as false positives for participants such as Registries, ICANN, Registrants and Registrars.
- 2.5. Service Provider Requirements. The Clearinghouse Service Provider(s) should utilize regional marks authentication service providers (whether directly or through sub-contractors) to take advantage of local experts who understand the nuances of the trademark in question. Examples of specific performance criteria details in the contract award criteria and service-level-agreements are:
  - 2.5.1 provide 24 hour accessibility seven days a week (database administrator);
  - 2.5.2 employ systems that are technically reliable and secure (database administrator);
  - 2.5.3 use globally accessible and scalable systems so that multiple marks from multiple sources in multiple languages can be accommodated and sufficiently cataloged (database administrator and validator);
  - 2.5.4 accept submissions from all over the world - the entry point for trademark holders to submit their data into the Clearinghouse database could be regional entities or one entity;
  - 2.5.5 allow for multiple languages, with exact implementation details to be determined;
  - 2.5.6 provide access to the Registrants to verify and research Trademark Claims Notices;
  - 2.5.7 have the relevant experience in database administration, validation or authentication, as well as accessibility to and knowledge of the various relevant trademark laws (database administrator and authenticator); and
  - 2.5.8 ensure through performance requirements, including those involving interface with registries and registrars, that neither domain name registration timeliness, nor registry or registrar operations will be hindered (database administrator).

### **3. CRITERIA FOR TRADEMARK INCLUSION IN CLEARINGHOUSE**

- 3.1 The trademark holder will submit to one entity – a single entity for entry will facilitate access to the entire Clearinghouse database. If regional entry points are used, ICANN will publish an information page describing how to locate regional submission points. Regardless of the entry point into the Clearinghouse, the authentication procedures established will be uniform.
- 3.2 The standards for inclusion in the Clearinghouse are:
  - 3.2.1 Nationally or regionally registered word marks from all jurisdictions.
  - 3.2.2 Any word mark that has been validated through a court of law or other judicial proceeding.

- 3.2.3 Any word mark protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion.
  - 3.2.4 Other marks that constitute intellectual property.
  - 3.2.5 Protections afforded to trademark registrations do not extend to applications for registrations, marks within any opposition period or registered marks that were the subject of successful invalidation, cancellation or rectification proceedings.
- 3.3 The type of data supporting entry of a registered word mark into the Clearinghouse must include a copy of the registration or the relevant ownership information, including the requisite registration number(s), the jurisdictions where the registrations have issued, and the name of the owner of record.
- 3.4 Data supporting entry of a judicially validated word mark into the Clearinghouse must include the court documents, properly entered by the court, evidencing the validation of a given word mark.
- 3.5 Data supporting entry into the Clearinghouse of word marks protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion, must include a copy of the relevant portion of the statute or treaty and evidence of its effective date.
- 3.6 Data supporting entry into the Clearinghouse of marks that constitute intellectual property of types other than those set forth in sections 3.2.1-3.2.3 above shall be determined by the registry operator and the Clearinghouse based on the services any given registry operator chooses to provide.
- 3.7 Registrations that include top level extensions such as “icann.org” or “.icann” as the word mark will not be permitted in the Clearinghouse regardless of whether that mark has been registered or it has been otherwise validated or protected (e.g., if a mark existed for icann.org or .icann, neither will not be permitted in the Clearinghouse).
- 3.8 All mark holders seeking to have their marks included in the Clearinghouse will be required to submit a declaration, affidavit, or other sworn statement that the information provided is true and current and has not been supplied for an improper purpose. The mark holder will also be required to attest that it will keep the information supplied to the Clearinghouse current so that if, during the time the mark is included in the Clearinghouse, a registration gets cancelled or is transferred to another entity, or in the case of a court- or Clearinghouse-validated mark the holder abandons use of the mark, the mark holder has an affirmative obligation to notify the Clearinghouse. There will be penalties for failing to keep information current. Moreover, it is anticipated that there will be a process whereby registrations can be



removed from the Clearinghouse if it is discovered that the marks are procured by fraud or if the data is inaccurate.

- 3.9 As an additional safeguard, the data will have to be renewed periodically by any mark holder wishing to remain in the Clearinghouse. Electronic submission should facilitate this process and minimize the cost associated with it. The reason for periodic authentication is to streamline the efficiencies of the Clearinghouse and the information the registry operators will need to process and limit the marks at issue to the ones that are in use.

#### **4. USE OF CLEARINGHOUSE DATA**

- 4.1 All mark holders seeking to have their marks included in the Clearinghouse will have to consent to the use of their information by the Clearinghouse. However, such consent would extend only to use in connection with the stated purpose of the Trademark Clearinghouse Database for Sunrise or Trademark Claims services. The reason for such a provision would be to presently prevent the Clearinghouse from using the data in other ways without permission. There shall be no bar on the Trademark Clearinghouse Service Provider or other third party service providers providing ancillary services on a non-exclusive basis.
- 4.2 In order not to create a competitive advantage, the data in the Trademark Clearinghouse should be licensed to competitors interested in providing ancillary services on equal and non-discriminatory terms and on commercially reasonable terms if the mark holders agree. Accordingly, two licensing options will be offered to the mark holder: (a) a license to use its data for all required features of the Trademark Clearinghouse, with no permitted use of such data for ancillary services either by the Trademark Clearinghouse Service Provider or any other entity; or (b) license to use its data for the mandatory features of the Trademark Clearinghouse and for any ancillary uses reasonably related to the protection of marks in new gTLDs, which would include a license to allow the Clearinghouse to license the use and data in the Trademark Clearinghouse to competitors that also provide those ancillary services. The specific implementation details will be determined, and all terms and conditions related to the provision of such services shall be included in the Trademark Clearinghouse Service Provider's contract with ICANN and subject to ICANN review.
- 4.3 Access by a prospective registrant to verify and research Trademark Claims Notices shall not be considered an ancillary service, and shall be provided at no cost to the Registrant. Misuse of the data by the service providers would be grounds for immediate termination.



## 5. DATA AUTHENTICATION AND VALIDATION GUIDELINES

- 5.1 One core function for inclusion in the Clearinghouse would be to authenticate that the data meets certain minimum criteria. As such, the following minimum criteria are suggested:
- 5.1.1 An acceptable list of data authentication sources, i.e. the web sites of patent and trademark offices throughout the world, third party providers who can obtain information from various trademark offices;
  - 5.1.2 Name, address and contact information of the applicant is accurate, current and matches that of the registered owner of the trademarks listed;
  - 5.1.3 Electronic contact information is provided and accurate;
  - 5.1.4 The registration numbers and countries match the information in the respective trademark office database for that registration number.
- 5.2 For validation of marks by the Clearinghouse that were not protected via a court, statute or treaty, the mark holder shall be required to provide evidence of use of the mark in connection with the bona fide offering for sale of goods or services prior to application for inclusion in the Clearinghouse. Acceptable evidence of use will be a signed declaration and a single specimen of current use, which might consist of labels, tags, containers, advertising, brochures, screen shots, or something else that evidences current use.

## 6. MANDATORY RIGHTS PROTECTION MECHANISMS

All new gTLD registries will be required to use the Trademark Clearinghouse to support its pre-launch or initial launch period rights protection mechanisms (RPMs). These RPMs, at a minimum, must consist of a Trademark Claims service and a Sunrise process.

- 6.1 Trademark Claims service
- 6.1.1 New gTLD Registry Operators must provide Trademark Claims services during an initial launch period for marks in the Trademark Clearinghouse. This launch period must occur for at least the first 60 days that registration is open for general registration.
  - 6.1.2 A Trademark Claims service is intended to provide clear notice to the prospective registrant of the scope of the mark holder's rights in order to minimize the chilling effect on registrants (Trademark Claims Notice). A form that describes the required elements is attached. The specific statement by

prospective registrant warrants that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant's knowledge, the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice.

- 6.1.3 The Trademark Claims Notice should provide the prospective registrant access to the Trademark Clearinghouse Database information referenced in the Trademark Claims Notice to enhance understanding of the Trademark rights being claimed by the trademark holder. These links (or other sources) shall be provided in real time without cost to the prospective registrant. Preferably, the Trademark Claims Notice should be provided in the language used for the rest of the interaction with the registrar or registry, but it is anticipated that at the very least in the most appropriate UN-sponsored language (as specified by the prospective registrant or registrar/registry).
- 6.1.4 If the domain name is registered in the Clearinghouse, the registrar (again through an interface with the Clearinghouse) will promptly notify the mark holders(s) of the registration after it is effectuated.
- 6.1.5 The Trademark Clearinghouse Database will be structured to report to registries when registrants are attempting to register a domain name that is considered an "Identical Match" with the mark in the Clearinghouse. "Identical Match" means that the domain name consists of the complete and identical textual elements of the mark. In this regard: (a) spaces contained within a mark that are either replaced by hyphens (and vice versa) or omitted; (b) only certain special characters contained within a trademark are spelled out with appropriate words describing it (@ and &); (c) punctuation or special characters contained within a mark that are unable to be used in a second-level domain name may either be (i) omitted or (ii) replaced by spaces, hyphens or underscores and still be considered identical matches; and (d) no plural and no "marks contained" would qualify for inclusion.

## 6.2 Sunrise service

- 6.2.1 Sunrise registration services must be offered for a minimum of 30 days during the pre-launch phase and notice must be provided to all trademark holders in the Clearinghouse if someone is seeking a sunrise registration. This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match to the name to be registered during Sunrise.
- 6.2.2 Sunrise Registration Process. For a Sunrise service, sunrise eligibility requirements (SERs) will be met as a minimum requirement, verified by Clearinghouse data, and

incorporate a Sunrise Dispute Resolution Policy (SDRP).

- 6.2.3 The proposed SERs include: (i) ownership of a mark (that satisfies the criteria in section 7.2 below), (ii) optional registry elected requirements re: international class of goods or services covered by registration; (iii) representation that all provided information is true and correct; and (iv) provision of data sufficient to document rights in the trademark.
- 6.2.4 The proposed SDRP must allow challenges based on at least the following four grounds: (i) at time the challenged domain name was registered, the registrant did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.
- 6.2.5 The Clearinghouse will maintain the SERs, validate and authenticate marks, as applicable, and hear challenges.

## **7. PROTECTION FOR MARKS IN CLEARINGHOUSE**

The scope of registered marks that must be honored by registries in providing Trademarks Claims services is broader than those that must be honored by registries in Sunrise services.

- 7.1 For Trademark Claims services - Registries must recognize and honor all word marks that have been or are: (i) nationally or regionally registered; (ii) court-validated; or (iii) specifically protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion. No demonstration of use is required.
- 7.2 For Sunrise services - Registries must recognize and honor all word marks: (i) nationally or regionally registered and for which proof of use – which can be a declaration and a single specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse; or (ii) that have been court-validated; or (iii) that are specifically protected by a statute or treaty currently in effect and that was in effect on or before 26 June 2008.

## **8. COSTS OF CLEARINGHOUSE**

Costs should be completely borne by the parties utilizing the services. Trademark holders will pay to register the Clearinghouse, and registries will pay for Trademark Claims and Sunrise services. Registrars and others who avail themselves of Clearinghouse services will pay the Clearinghouse directly.

**TRADEMARK NOTICE**

[In English and the language of the registration agreement]

You have received this Trademark Notice because you have applied for a domain name which matches at least one trademark record submitted to the Trademark Clearinghouse.

You may or may not be entitled to register the domain name depending on your intended use and whether it is the same or significantly overlaps with the trademarks listed below.

***Your rights to register this domain name may or may not be protected as noncommercial use or "fair use" by the laws of your country. [in bold italics or all caps]***

Please read the trademark information below carefully, including the trademarks, jurisdictions, and goods and service for which the trademarks are registered. Please be aware that not all jurisdictions review trademark applications closely, so some of the trademark information below may exist in a national or regional registry which does not conduct a thorough or substantive review of trademark rights prior to registration.

***If you have questions, you may want to consult an attorney or legal expert on trademarks and intellectual property for guidance.***

If you continue with this registration, you represent that, you have received and you understand this notice and to the best of your knowledge, your registration and use of the requested domain name will not infringe on the trademark rights listed below.

The following [number] Trademarks are listed in the Trademark Clearinghouse:

1. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant: Trademark Registrant Contact:

[with links to the TM registrations as listed in the TM Clearinghouse]

2. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant:

Trademark Registrant Contact:

\*\*\*\*\* [with links to the TM registrations as listed in the TM Clearinghouse]

X. 1. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant: Trademark Registrant Contact:

**UNIFORM RAPID SUSPENSION SYSTEM (“URS”)  
4 JUNE 2012**

**DRAFT PROCEDURE**

**1. Complaint**

1.1 Filing the Complaint

- a) Proceedings are initiated by electronically filing with a URS Provider a Complaint outlining the trademark rights and the actions complained of entitling the trademark holder to relief.
- b) Each Complaint must be accompanied by the appropriate fee, which is under consideration. The fees will be non-refundable.
- c) One Complaint is acceptable for multiple related companies against one Registrant, but only if the companies complaining are related. Multiple Registrants can be named in one Complaint only if it can be shown that they are in some way related. There will not be a minimum number of domain names imposed as a prerequisite to filing.

1.2 Contents of the Complaint

The form of the Complaint will be simple and as formulaic as possible. There will be a Form Complaint. The Form Complaint shall include space for the following:

- 1.2.1 Name, email address and other contact information for the Complaining Party (Parties).
- 1.2.2 Name, email address and contact information for any person authorized to act on behalf of Complaining Parties.
- 1.2.3 Name of Registrant (i.e. relevant information available from Whois) and Whois listed available contact information for the relevant domain name(s).
- 1.2.4 The specific domain name(s) that are the subject of the Complaint. For each domain name, the Complainant shall include a copy of the currently available Whois information and a description and copy, if available, of the offending portion of the website content associated with each domain name that is the subject of the Complaint.
- 1.2.5 The specific trademark/service marks upon which the Complaint is based and pursuant to which the Complaining Parties are asserting their rights to them, for which goods and in connection with what services.
- 1.2.6 A statement of the grounds upon which the Complaint is based setting forth facts showing that the Complaining Party is entitled to relief, namely:

1.2.6.1. that the registered domain name is identical or confusingly similar to a word mark: (i) for which the Complainant holds a valid national or regional registration and that is in current use; or (ii) that has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty in effect at the time the URS complaint is filed.

- a. Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use in commerce - was submitted to, and validated by, the Trademark Clearinghouse)
- b. Proof of use may also be submitted directly with the URS Complaint.

and

1.2.6.2. that the Registrant has no legitimate right or interest to the domain name; and

1.2.6.3. that the domain was registered and is being used in bad faith.

A non-exclusive list of circumstances that demonstrate bad faith registration and use by the Registrant include:

- a. Registrant has registered or acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of documented out-of pocket costs directly related to the domain name; or
- b. Registrant has registered the domain name in order to prevent the trademark holder or service mark from reflecting the mark in a corresponding domain name, provided that Registrant has engaged in a pattern of such conduct; or
- c. Registrant registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- d. By using the domain name Registrant has intentionally attempted to attract for commercial gain, Internet users to Registrant's web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of Registrant's web site or location or of a product or service on that web site or location.

1.2.7 A box in which the Complainant may submit up to 500 words of explanatory free form text.

1.2.8. An attestation that the Complaint is not being filed for any improper basis and that there is a sufficient good faith basis for filing the Complaint.

## **2. Fees**

2.1 URS Provider will charge fees to the Complainant. Fees are thought to be in the range of USD 300 per proceeding, but will ultimately be set by the Provider.

2.2 Complaints listing fifteen (15) or more disputed domain names registered by the same registrant will be subject to a Response Fee which will be refundable to the prevailing party. Under no circumstances shall the Response Fee exceed the fee charged to the Complainant.

## **3. Administrative Review**

3.1 Complaints will be subjected to an initial administrative review by the URS Provider for compliance with the filing requirements. This is a review to determine that the Complaint contains all of the necessary information, and is not a determination as to whether a *prima facie* case has been established.

3.2 The Administrative Review shall be conducted within two (2) business days of submission of the Complaint to the URS Provider.

3.3 Given the rapid nature of this Procedure, and the intended low level of required fees, there will be no opportunity to correct inadequacies in the filing requirements.

3.4 If a Complaint is deemed non-compliant with filing requirements, the Complaint will be dismissed without prejudice to the Complainant filing a new complaint. The initial filing fee shall not be refunded in these circumstances.

## **4. Notice and Locking of Domain**

4.1 Upon completion of the Administrative Review, the URS Provider must immediately notify the registry operator (via email) ("Notice of Complaint") after the Complaint has been deemed compliant with the filing requirements. Within 24 hours of receipt of the Notice of Complaint from the URS Provider, the registry operator shall "lock" the domain, meaning the registry shall restrict all changes to the registration data, including transfer and deletion of the domain names, but the name will continue to resolve. The registry operator will notify the URS Provider immediately upon locking the domain name ("Notice of Lock").

4.2 Within 24 hours after receiving Notice of Lock from the registry operator, the URS Provider shall notify the Registrant of the Complaint, sending a hard copy of the Notice of Complaint to the addresses listed in the Whois contact information, and providing an electronic copy of the Complaint, advising of the locked status, as well as the potential

effects if the Registrant fails to respond and defend against the Complaint. Notices must be clear and understandable to Registrants located globally. The Notice of Complaint shall be in English and translated by the Provider into the predominant language used in the registrant's country or territory.

- 4.3 All Notices to the Registrant shall be sent through email, fax (where available) and postal mail. The Complaint and accompanying exhibits, if any, shall be served electronically.
- 4.4 The URS Provider shall also electronically notify the registrar of record for the domain name at issue via the addresses the registrar has on file with ICANN.

## **5. The Response**

- 5.1 A Registrant will have 14 calendar days from the date the URS Provider sent its Notice of Complaint to the Registrant to electronically file a Response with the URS Provider. Upon receipt, the Provider will electronically send a copy of the Response, and accompanying exhibits, if any, to the Complainant.
- 5.2 No filing fee will be charged if the Registrant files its Response prior to being declared in default or not more than thirty (30) days following a Determination. For Responses filed more than thirty (30) days after a Determination, the Registrant should pay a reasonable non-refundable fee for re-examination, plus a Response Fee as set forth in section 2.2 above if the Complaint lists twenty-six (26) or more disputed domain names against the same registrant. The Response Fee will be refundable to the prevailing party.
- 5.3 Upon request by the Registrant, a limited extension of time to respond may be granted by the URS Provider if there is a good faith basis for doing so. In no event shall the extension be for more than seven (7) calendar days.
- 5.4 The Response shall be no longer than 2,500 words, excluding attachments, and the content of the Response should include the following:
  - 5.4.1 Confirmation of Registrant data.
  - 5.4.2 Specific admission or denial of each of the grounds upon which the Complaint is based.
  - 5.4.3 Any defense which contradicts the Complainant's claims.
  - 5.4.4 A statement that the contents are true and accurate.
- 5.5 In keeping with the intended expedited nature of the URS and the remedy afforded to a successful Complainant, affirmative claims for relief by the Registrant will not be permitted except for an allegation that the Complainant has filed an abusive Complaint.
- 5.6 Once the Response is filed, and the URS Provider determines that the Response is compliant with the filing requirements of a Response (which shall be on the same day),



the Complaint, Response and supporting materials will immediately be sent to a qualified Examiner, selected by the URS Provider, for review and Determination. All materials submitted are considered by the Examiner.

- 5.7 The Response can contain any facts refuting the claim of bad faith registration by setting out any of the following circumstances:
- 5.7.1 Before any notice to Registrant of the dispute, Registrant's use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
  - 5.7.2 Registrant (as an individual, business or other organization) has been commonly known by the domain name, even if Registrant has acquired no trademark or service mark rights; or
  - 5.7.3 Registrant is making a legitimate or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Such claims, if found by the Examiner to be proved based on its evaluation of all evidence, shall result in a finding in favor of the Registrant.

- 5.8 The Registrant may also assert Defenses to the Complaint to demonstrate that the Registrant's use of the domain name is not in bad faith by showing, for example, one of the following:
- 5.8.1 The domain name is generic or descriptive and the Registrant is making fair use of it.
  - 5.8.2 The domain name sites are operated solely in tribute to or in criticism of a person or business that is found by the Examiner to be fair use.
  - 5.8.3 Registrant's holding of the domain name is consistent with an express term of a written agreement entered into by the disputing Parties and that is still in effect.
  - 5.8.4 The domain name is not part of a wider pattern or series of abusive registrations because the Domain Name is of a significantly different type or character to other domain names registered by the Registrant.
- 5.9 Other factors for the Examiner to consider:
- 5.9.1 Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves not indicia of bad faith under the URS. Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner must review each case on its merits.
  - 5.9.2 Sale of traffic (i.e. connecting domain names to parking pages and earning click-per-view revenue) does not in and of itself constitute bad faith under the URS.

Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner will take into account:

5.9.2.1. the nature of the domain name;

5.9.2.2. the nature of the advertising links on any parking page associated with the domain name; and

5.9.2.3. that the use of the domain name is ultimately the Registrant's responsibility.

## **6. Default**

- 6.1 If at the expiration of the 14-day answer period (or extended period if granted), the Registrant does not submit an answer, the Complaint proceeds to Default.
- 6.2 In either case, the Provider shall provide Notice of Default via email to the Complainant and Registrant, and via mail and fax to Registrant. During the Default period, the Registrant will be prohibited from changing content found on the site to argue that it is now a legitimate use and will also be prohibited from changing the Whois information.
- 6.3 All Default cases proceed to Examination for review on the merits of the claim.
- 6.4 If after Examination in Default cases, the Examiner rules in favor of Complainant, Registrant shall have the right to seek relief from Default via de novo review by filing a Response at any time up to six months after the date of the Notice of Default. The Registrant will also be entitled to request an extension of an additional six months if the extension is requested before the expiration of the initial six-month period.
- 6.5 If a Response is filed after: (i) the Respondent was in Default (so long as the Response is filed in accordance with 6.4 above); and (ii) proper notice is provided in accordance with the notice requirements set forth above, the domain name shall again resolve to the original IP address as soon as practical, but shall remain locked as if the Response had been filed in a timely manner before Default. The filing of a Response after Default is not an appeal; the case is considered as if responded to in a timely manner.
- 6.5 If after Examination in Default case, the Examiner rules in favor of Registrant, the Provider shall notify the Registry Operator to unlock the name and return full control of the domain name registration to the Registrant.

## **7. Examiners**

- 7.1 One Examiner selected by the Provider will preside over a URS proceeding.
- 7.2 Examiners should have demonstrable relevant legal background, such as in trademark law, and shall be trained and certified in URS proceedings. Specifically, Examiners shall be provided with instructions on the URS elements and defenses and how to conduct the examination of a URS proceeding.

- 7.3 Examiners used by any given URS Provider shall be rotated to the extent feasible to avoid “forum or examiner shopping.” URS Providers are strongly encouraged to work equally with all certified Examiners, with reasonable exceptions (such as language needs, non-performance, or malfeasance) to be determined on a case by case analysis.

## **8. Examination Standards and Burden of Proof**

- 8.1 The standards that the qualified Examiner shall apply when rendering its Determination are whether:
- 8.1.2 The registered domain name is identical or confusingly similar to a word mark: (i) for which the Complainant holds a valid national or regional registration and that is in current use; or (ii) that has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty currently in effect and that was in effect at the time the URS Complaint is filed; and
- 8.1.2.1 Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse.
- 8.1.2.2 Proof of use may also be submitted directly with the URS Complaint.
- 8.1.2 The Registrant has no legitimate right or interest to the domain name; and
- 8.1.3 The domain was registered and is being used in a bad faith.
- 8.2 The burden of proof shall be clear and convincing evidence.
- 8.3 For a URS matter to conclude in favor of the Complainant, the Examiner shall render a Determination that there is no genuine issue of material fact. Such Determination may include that: (i) the Complainant has rights to the name; and (ii) the Registrant has no rights or legitimate interest in the name. This means that the Complainant must present adequate evidence to substantiate its trademark rights in the domain name (e.g., evidence of a trademark registration and evidence that the domain name was registered and is being used in bad faith in violation of the URS).
- 8.4 If the Examiner finds that the Complainant has not met its burden, or that genuine issues of material fact remain in regards to any of the elements, the Examiner will reject the Complaint under the relief available under the URS. That is, the Complaint shall be dismissed if the Examiner finds that evidence was presented or is available to the Examiner to indicate that the use of the domain name in question is a non-infringing use or fair use of the trademark.
- 8.5 Where there is any genuine contestable issue as to whether a domain name registration and use of a trademark are in bad faith, the Complaint will be denied, the URS proceeding will be terminated without prejudice, e.g., a UDRP, court proceeding or

another URS may be filed. The URS is not intended for use in any proceedings with open questions of fact, but only clear cases of trademark abuse.

- 8.6 To restate in another way, if the Examiner finds that all three standards are satisfied by clear and convincing evidence and that there is no genuine contestable issue, then the Examiner shall issue a Determination in favor of the Complainant. If the Examiner finds that any of the standards have not been satisfied, then the Examiner shall deny the relief requested, thereby terminating the URS proceeding without prejudice to the Complainant to proceed with an action in court of competent jurisdiction or under the UDRP.

## **9. Determination**

- 9.1 There will be no discovery or hearing; the evidence will be the materials submitted with the Complaint and the Response, and those materials will serve as the entire record used by the Examiner to make a Determination.
- 9.2 If the Complainant satisfies the burden of proof, the Examiner will issue a Determination in favor of the Complainant. The Determination will be published on the URS Provider's website. However, there should be no other preclusive effect of the Determination other than the URS proceeding to which it is rendered.
- 9.3 If the Complainant does not satisfy the burden of proof, the URS proceeding is terminated and full control of the domain name registration shall be returned to the Registrant.
- 9.4 Determinations resulting from URS proceedings will be published by the service provider in a format specified by ICANN.
- 9.5 Determinations shall also be emailed by the URS Provider to the Registrant, the Complainant, the Registrar, and the Registry Operator, and shall specify the remedy and required actions of the registry operator to comply with the Determination.
- 9.6 To conduct URS proceedings on an expedited basis, examination should begin immediately upon the earlier of the expiration of a fourteen (14) day Response period (or extended period if granted), or upon the submission of the Response. A Determination shall be rendered on an expedited basis, with the stated goal that it be rendered within three (3) business days from when Examination began. Absent extraordinary circumstances, however, Determinations must be issued no later than five (5) days after the Response is filed. Implementation details will be developed to accommodate the needs of service providers once they are selected. (The tender offer for potential service providers will indicate that timeliness will be a factor in the award decision.)

## **10. Remedy**

- 10.1 If the Determination is in favor of the Complainant, the decision shall be immediately transmitted to the registry operator.

- 10.2 Immediately upon receipt of the Determination, the registry operator shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS Provider about the URS. The URS Provider shall not be allowed to offer any other services on such page, nor shall it directly or indirectly use the web page for advertising purposes (either for itself or any other third party). The Whois for the domain name shall continue to display all of the information of the original Registrant except for the redirection of the nameservers. In addition, the Whois shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration.
- 10.3 There shall be an option for a successful Complainant to extend the registration period for one additional year at commercial rates.
- 10.4 No other remedies should be available in the event of a Determination in favor of the Complainant.

## **11. Abusive Complaints**

- 11.1 The URS shall incorporate penalties for abuse of the process by trademark holders.
- 11.2 In the event a party is deemed to have filed two (2) abusive Complaints, or one (1) “deliberate material falsehood,” that party shall be barred from utilizing the URS for one-year following the date of issuance of a Determination finding a complainant to have: (i) filed its second abusive complaint; or (ii) filed a deliberate material falsehood.
- 11.3 A Complaint may be deemed abusive if the Examiner determines:
- 11.3.1 it was presented solely for improper purpose such as to harass, cause unnecessary delay, or needlessly increase the cost of doing business; and
- 11.3.2 (i) the claims or other assertions were not warranted by any existing law or the URS standards; or (ii) the factual contentions lacked any evidentiary support
- 11.4 An Examiner may find that Complaint contained a deliberate material falsehood if it contained an assertion of fact, which at the time it was made, was made with the knowledge that it was false and which, if true, would have an impact on the outcome on the URS proceeding.
- 11.5 Two findings of “deliberate material falsehood” shall permanently bar the party from utilizing the URS.
- 11.6 URS Providers shall be required to develop a process for identifying and tracking barred parties, and parties whom Examiners have determined submitted abusive complaints or deliberate material falsehoods.

- 11.7 The dismissal of a complaint for administrative reasons or a ruling on the merits, in itself, shall not be evidence of filing an abusive complaint.
- 11.8 A finding that filing of a complaint was abusive or contained a deliberate materially falsehood can be appealed solely on the grounds that an Examiner abused his/her discretion, or acted in an arbitrary or capricious manner.

## **12. Appeal**

- 12.1 Either party shall have a right to seek a de novo appeal of the Determination based on the existing record within the URS proceeding for a reasonable fee to cover the costs of the appeal. An appellant must identify the specific grounds on which the party is appealing, including why the appellant claims the Examiner's Determination was incorrect.
- 12.2 The fees for an appeal shall be borne by the appellant. A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint. The Appeal Panel, to be selected by the Provider, may request, in its sole discretion, further statements or documents from either of the Parties.
- 12.3 Filing an appeal shall not change the domain name's resolution. For example, if the domain name no longer resolves to the original nameservers because of a Determination in favor of the Complainant, the domain name shall continue to point to the informational page provided by the URS Provider. If the domain name resolves to the original nameservers because of a Determination in favor of the registrant, it shall continue to resolve during the appeal process.
- 12.4 An appeal must be filed within 14 days after a Determination is issued and any Response must be filed 14 days after an appeal is filed.
- 12.5 If a respondent has sought relief from Default by filing a Response within six months (or the extended period if applicable) of issuance of initial Determination, an appeal must be filed within 14 days from date the second Determination is issued and any Response must be filed 14 days after the appeal is filed.
- 12.6 Notice of appeal and findings by the appeal panel shall be sent by the URS Provider via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator.
- 12.7 The Providers' rules and procedures for appeals, other than those stated above, shall apply.

## **13. Other Available Remedies**

The URS Determination shall not preclude any other remedies available to the appellant, such as UDRP (if appellant is the Complainant), or other remedies as may be available in a court of competition jurisdiction. A URS Determination for or against a party shall not prejudice the

party in UDRP or any other proceedings.

**14. Review of URS**

A review of the URS procedure will be initiated one year after the first Examiner Determination is issued. Upon completion of the review, a report shall be published regarding the usage of the procedure, including statistical information, and posted for public comment on the usefulness and effectiveness of the procedure.

**TRADEMARK POST-DELEGATION DISPUTE RESOLUTION PROCEDURE (TRADEMARK PDDRP)**  
**4 JUNE 2012**

**1. Parties to the Dispute**

The parties to the dispute will be the trademark holder and the gTLD registry operator. ICANN shall not be a party.

**2. Applicable Rules**

2.1 This procedure is intended to cover Trademark post-delegation dispute resolution proceedings generally. To the extent more than one Trademark PDDRP provider ("Provider") is selected to implement the Trademark PDDRP, each Provider may have additional rules that must be followed when filing a Complaint. The following are general procedures to be followed by all Providers.

2.2 In the Registry Agreement, the registry operator agrees to participate in all post-delegation procedures and be bound by the resulting Determinations.

**3. Language**

3.1 The language of all submissions and proceedings under the procedure will be English.

3.2 Parties may submit supporting evidence in their original language, provided and subject to the authority of the Expert Panel to determine otherwise, that such evidence is accompanied by an English translation of all relevant text.

**4. Communications and Time Limits**

4.1 All communications with the Provider must be submitted electronically.

4.2 For the purpose of determining the date of commencement of a time limit, a notice or other communication will be deemed to have been received on the day that it is transmitted to the appropriate contact person designated by the parties.

4.3 For the purpose of determining compliance with a time limit, a notice or other communication will be deemed to have been sent, made or transmitted on the day that it is dispatched.

4.4 For the purpose of calculating a period of time under this procedure, such period will begin to run on the day following the date of receipt of a notice or other communication.

4.5 All references to day limits shall be considered as calendar days unless otherwise specified.



## 5. Standing

- 5.1 The mandatory administrative proceeding will commence when a third-party complainant (“Complainant”) has filed a Complaint with a Provider asserting that the Complainant is a trademark holder (which may include either registered or unregistered marks as defined below) claiming that one or more of its marks have been infringed, and thereby the Complainant has been harmed, by the registry operator’s manner of operation or use of the gTLD.
- 5.2 Before proceeding to the merits of a dispute, and before the Respondent is required to submit a substantive Response, or pay any fees, the Provider shall appoint a special one-person Panel to perform an initial “threshold” review (“Threshold Review Panel”).

## 6. Standards

For purposes of these standards, “registry operator” shall include entities directly or indirectly controlling, controlled by or under common control with a registry operator, whether by ownership or control of voting securities, by contract or otherwise where ‘control’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership or control of voting securities, by contract or otherwise.

### 6.1 Top Level:

A complainant must assert and prove, by clear and convincing evidence, that the registry operator’s affirmative conduct in its operation or use of its gTLD string that is identical or confusingly similar to the complainant’s mark, causes or materially contributes to the gTLD doing one of the following:

*(a) taking unfair advantage of the distinctive character or the reputation of the complainant’s mark; or*

*(b) impairing the distinctive character or the reputation of the complainant’s mark; or*

*(c) creating a likelihood of confusion with the complainant’s mark.*

An example of infringement at the top-level is where a TLD string is identical to a trademark and then the registry operator holds itself out as the beneficiary of the mark.

### 6.2 Second Level

Complainants are required to prove, by clear and convincing evidence that, through the registry operator’s affirmative conduct:

*(a) there is a substantial pattern or practice of specific bad faith intent by the registry operator to profit from the sale of trademark infringing domain names; and*

*(b) the registry operator's bad faith intent to profit from the systematic registration of domain names within the gTLD that are identical or confusingly similar to the complainant's mark, which:*

*(i) takes unfair advantage of the distinctive character or the reputation of the complainant's mark; or*

*(ii) impairs the distinctive character or the reputation of the complainant's mark, or*

*(iii) creates a likelihood of confusion with the complainant's mark.*

In other words, it is not sufficient to show that the registry operator is on notice of possible trademark infringement through registrations in the gTLD. The registry operator is not liable under the PDDRP solely because: (i) infringing names are in its registry; or (ii) the registry operator knows that infringing names are in its registry; or (iii) the registry operator did not monitor the registrations within its registry.

A registry operator is not liable under the PDDRP for any domain name registration that: (i) is registered by a person or entity that is unaffiliated with the registry operator; (ii) is registered without the direct or indirect encouragement, inducement, initiation or direction of any person or entity affiliated with the registry operator; and (iii) provides no direct or indirect benefit to the registry operator other than the typical registration fee (which may include other fees collected incidental to the registration process for value added services such as enhanced registration security).

An example of infringement at the second level is where a registry operator has a pattern or practice of actively and systematically encouraging registrants to register second level domain names and to take unfair advantage of the trademark to the extent and degree that bad faith is apparent. Another example of infringement at the second level is where a registry operator has a pattern or practice of acting as the registrant or beneficial user of infringing registrations, to monetize and profit in bad faith.

## **7. Complaint**

### **7.1 Filing:**

The Complaint will be filed electronically. Once the Administrative Review has been completed and the Provider deems the Complaint to be in compliance, the Provider will electronically serve the Complaint and serve a paper notice on the registry operator that is the subject of the Complaint ("Notice of Complaint") consistent with the contact information listed in the Registry Agreement.

### **7.2 Content:**

**7.2.1** The name and contact information, including address, phone, and email address, of the Complainant, and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.

- 7.2.2 The name and contact information, including address, phone, and email address of any person authorized to act on behalf of Complainant.
- 7.2.3 A statement of the nature of the dispute, and any relevant evidence, which shall include:
- (a) The particular legal rights claim being asserted, the marks that form the basis for the dispute and a short and plain statement of the basis upon which the Complaint is being filed.
  - (b) A detailed explanation of how the Complainant's claim meets the requirements for filing a claim pursuant to that particular ground or standard.
  - (c) A detailed explanation of the validity of the Complaint and why the Complainant is entitled to relief.
  - (d) A statement that the Complainant has at least 30 days prior to filing the Complaint notified the registry operator in writing of: (i) its specific concerns and specific conduct it believes is resulting in infringement of Complainant's trademarks and (ii) its willingness to meet to resolve the issue.
  - (e) An explanation of how the mark is used by the Complainant (including the type of goods/services, period and territory of use – including all on-line usage) or otherwise protected by statute, treaty or has been validated by a court or the Clearinghouse.
  - (f) Copies of any documents that the Complainant considers to evidence its basis for relief, including evidence of current use of the Trademark at issue in the Complaint and domain name registrations.
  - (g) A statement that the proceedings are not being brought for any improper purpose.
  - (h) A statement describing how the registration at issue has harmed the trademark owner.
- 7.3 Complaints will be limited 5,000 words and 20 pages, excluding attachments, unless the Provider determines that additional material is necessary.
- 7.4 At the same time the Complaint is filed, the Complainant will pay a non-refundable filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within 10 days of the receipt of the Complaint by the Provider, the Complaint will be dismissed without prejudice.

## 8. Administrative Review of the Complaint

- 8.1 All Complaints will be reviewed by the Provider within five (5) business days of submission to the Provider to determine whether the Complaint contains all necessary information and complies with the procedural rules.
- 8.2 If the Provider finds that the Complaint complies with procedural rules, the Complaint will be deemed filed, and the proceedings will continue to the Threshold Review. If the Provider finds that the Complaint does not comply with procedural rules, it will electronically notify the Complainant of such non-compliance and provide the Complainant five (5) business days to submit an amended Complaint. If the Provider does not receive an amended Complaint within the five (5) business days provided, it will dismiss the Complaint and close the proceedings without prejudice to the Complainant's submission of a new Complaint that complies with procedural rules. Filing fees will not be refunded.
- 8.3 If deemed compliant, the Provider will electronically serve the Complaint on the registry operator and serve the Notice of Complaint consistent with the contact information listed in the Registry Agreement.

## 9. Threshold Review

- 9.1 Provider shall establish a Threshold Review Panel, consisting of one panelist selected by the Provider, for each proceeding within five (5) business days after completion of Administrative Review and the Complaint has been deemed compliant with procedural rules.
- 9.2 The Threshold Review Panel shall be tasked with determining whether the Complainant satisfies the following criteria:
  - 9.2.1 The Complainant is a holder of a word mark that: (i) is nationally or regionally registered and that is in current use; or (ii) has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty at the time the PDDRP complaint is filed;
    - 9.2.1.1 Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse
    - 9.2.1.2 Proof of use may also be submitted directly with the Complaint.
  - 9.2.2 The Complainant has asserted that it has been materially harmed as a result of trademark infringement;
  - 9.2.3 The Complainant has asserted facts with sufficient specificity that, if everything the Complainant asserted is true, states a claim under the Top Level Standards herein  
OR

The Complainant has asserted facts with sufficient specificity that, if everything the Complainant asserted is true, states a claim under the Second Level Standards herein;

- 9.2.4 The Complainant has asserted that: (i) at least 30 days prior to filing the Complaint the Complainant notified the registry operator in writing of its specific concerns and specific conduct it believes is resulting in infringement of Complainant's trademarks, and its willingness to meet to resolve the issue; (ii) whether the registry operator responded to the Complainant's notice of specific concerns; and (iii) if the registry operator did respond, that the Complainant attempted to engage in good faith discussions to resolve the issue prior to initiating the PDDRP.
- 9.3 Within ten (10) business days of date Provider served Notice of Complaint, the registry operator shall have the opportunity, but is not required, to submit papers to support its position as to the Complainant's standing at the Threshold Review stage. If the registry operator chooses to file such papers, it must pay a filing fee.
- 9.4 If the registry operator submits papers, the Complainant shall have ten (10) business days to submit an opposition.
- 9.5 The Threshold Review Panel shall have ten (10) business days from due date of Complainant's opposition or the due date of the registry operator's papers if none were filed, to issue Threshold Determination.
- 9.6 Provider shall electronically serve the Threshold Determination on all parties.
- 9.7 If the Complainant has not satisfied the Threshold Review criteria, the Provider will dismiss the proceedings on the grounds that the Complainant lacks standing and declare that the registry operator is the prevailing party.
- 9.8 If the Threshold Review Panel determines that the Complainant has standing and satisfied the criteria then the Provider will commence the proceedings on the merits.

## **10. Response to the Complaint**

- 10.1 The registry operator must file a Response to each Complaint within forty-five (45) days after the date of the Threshold Review Panel Declaration.
- 10.2 The Response will comply with the rules for filing of a Complaint and will contain the name and contact information for the registry operator, as well as a point-by-point response to the statements made in the Complaint.
- 10.3 The Response must be filed with the Provider and the Provider must serve it upon the Complainant in electronic form with a hard-copy notice that it has been served.

- 10.4 Service of the Response will be deemed effective, and the time will start to run for a Reply, upon confirmation that the electronic Response and hard-copy notice of the Response was sent by the Provider to the addresses provided by the Complainant.
- 10.5 If the registry operator believes the Complaint is without merit, it will affirmatively plead in its Response the specific grounds for the claim.

## **11. Reply**

- 11.1 The Complainant is permitted ten (10) days from Service of the Response to submit a Reply addressing the statements made in the Response showing why the Complaint is not “without merit.” A Reply may not introduce new facts or evidence into the record, but shall only be used to address statements made in the Response. Any new facts or evidence introduced in a Response shall be disregarded by the Expert Panel.
- 11.2 Once the Complaint, Response and Reply (as necessary) are filed and served, a Panel will be appointed and provided with all submissions.

## **12. Default**

- 12.1 If the registry operator fails to respond to the Complaint, it will be deemed to be in default.
- 12.2 Limited rights to set aside the finding of default will be established by the Provider, but in no event will they be permitted absent a showing of good cause to set aside the finding of default.
- 12.3 The Provider shall provide notice of Default via email to the Complainant and registry operator.
- 12.4 All Default cases shall proceed to Expert Determination on the merits.

## **13. Expert Panel**

- 13.1 The Provider shall establish an Expert Panel within 21 days after receiving the Reply, or if no Reply is filed, within 21 days after the Reply was due to be filed.
- 13.2 The Provider shall appoint a one-person Expert Panel, unless any party requests a three- member Expert Panel. No Threshold Panel member shall serve as an Expert Panel member in the same Trademark PDDRP proceeding.
- 13.3 In the case where either party requests a three-member Expert Panel, each party (or each side of the dispute if a matter has been consolidated) shall select an Expert and the two selected Experts shall select the third Expert Panel member. Such selection shall be made pursuant to the Providers rules or procedures. Trademark PDDRP panelists within a Provider shall be rotated to the extent feasible.

- 13.4 Expert Panel member must be independent of the parties to the post-delegation challenge. Each Provider will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing a panelist for lack of independence.

**14. Costs**

- 14.1 The Provider will estimate the costs for the proceedings that it administers under this procedure in accordance with the applicable Provider rules. Such costs will be estimated to cover the administrative fees of the Provider, the Threshold Review Panel and the Expert Panel, and are intended to be reasonable.
- 14.2 The Complainant shall be required to pay the filing fee as set forth above in the "Complaint" section, and shall be required to submit the full amount of the Provider estimated administrative fees, the Threshold Review Panel fees and the Expert Panel fees at the outset of the proceedings. Fifty percent of that full amount shall be in cash (or cash equivalent) to cover the Complainant's share of the proceedings and the other 50% shall be in either cash (or cash equivalent), or in bond, to cover the registry operator's share if the registry operator prevails.
- 14.3 If the Panel declares the Complainant to be the prevailing party, the registry operator is required to reimburse Complainant for all Panel and Provider fees incurred. Failure to do shall be deemed a violation of the Trademark PDDRP and a breach of the Registry Agreement, subject to remedies available under the Agreement up to and including termination.

**15. Discovery**

- 15.1 Whether and to what extent discovery is allowed is at the discretion of the Panel, whether made on the Panel's own accord, or upon request from the Parties.
- 15.2 If permitted, discovery will be limited to that for which each Party has a substantial need.
- 15.3 In extraordinary circumstances, the Provider may appoint experts to be paid for by the Parties, request live or written witness testimony, or request limited exchange of documents.
- 15.4 At the close of discovery, if permitted by the Expert Panel, the Parties will make a final evidentiary submission, the timing and sequence to be determined by the Provider in consultation with the Expert Panel.

**16. Hearings**

- 16.1 Disputes under this Procedure will be resolved without a hearing unless either party requests a hearing or the Expert Panel determines on its own initiative that one is necessary.

- 16.2 If a hearing is held, videoconferences or teleconferences should be used if at all possible. If not possible, then the Expert Panel will select a place for hearing if the Parties cannot agree.
- 16.3 Hearings should last no more than one day, except in the most extraordinary circumstances.
- 16.4 All dispute resolution proceedings will be conducted in English.

**17. Burden of Proof**

The Complainant bears the burden of proving the allegations in the Complaint; the burden must be by clear and convincing evidence.

**18. Remedies**

- 18.1 Since registrants are not a party to the action, a recommended remedy cannot take the form of deleting, transferring or suspending registrations (except to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator).
  - 18.2 Recommended remedies will not include monetary damages or sanctions to be paid to any party other than fees awarded pursuant to section 14.
  - 18.3 The Expert Panel may recommend a variety of graduated enforcement tools against the registry operator if it the Expert Panel determines that the registry operator is liable under this Trademark PDDRP, including:
    - 18.3.1 Remedial measures for the registry to employ to ensure against allowing future infringing registrations, which may be in addition to what is required under the registry agreement, except that the remedial measures shall not:
      - (a) Require the Registry Operator to monitor registrations not related to the names at issue in the PDDRP proceeding; or
      - (b) Direct actions by the registry operator that are contrary to those required under the Registry Agreement;
    - 18.3.2 Suspension of accepting new domain name registrations in the gTLD until such time as the violation(s) identified in the Determination is(are) cured or a set period of time;
- OR,
- 18.3.3 In extraordinary circumstances where the registry operator acted with malice, providing for the termination of a Registry Agreement.



- 18.4 In making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for other, unrelated, good faith domain name registrants operating within the gTLD.
- 18.5 The Expert Panel may also determine whether the Complaint was filed “without merit,” and, if so, award the appropriate sanctions on a graduated scale, including:
  - 18.5.1 Temporary bans from filing Complaints;
  - 18.5.2 Imposition of costs of registry operator, including reasonable attorney fees; and
  - 18.5.3 Permanent bans from filing Complaints after being banned temporarily.
- 18.6 Imposition of remedies shall be at the discretion of ICANN, but absent extraordinary circumstances, those remedies will be in line with the remedies recommended by the Expert Panel.

## **19. The Expert Panel Determination**

- 19.1 The Provider and the Expert Panel will make reasonable efforts to ensure that the Expert Determination is issued within 45 days of the appointment of the Expert Panel and absent good cause, in no event later than 60 days after the appointment of the Expert Panel.
- 19.2 The Expert Panel will render a written Determination. The Expert Determination will state whether or not the Complaint is factually founded and provide the reasons for that Determination. The Expert Determination should be publicly available and searchable on the Provider’s web site.
- 19.3 The Expert Determination may further include a recommendation of specific remedies. Costs and fees to the Provider, to the extent not already paid, will be paid within thirty (30) days of the Expert Panel’s Determination.
- 19.4 The Expert Determination shall state which party is the prevailing party.
- 19.5 While the Expert Determination that a registry operator is liable under the standards of the Trademark PDDRP shall be taken into consideration, ICANN will have the authority to impose the remedies, if any, that ICANN deems appropriate given the circumstances of each matter.

## **20. Appeal of Expert Determination**

- 20.1 Either party shall have a right to seek a de novo appeal of the Expert Determination of liability or recommended remedy based on the existing record within the Trademark PDDRP proceeding for a reasonable fee to cover the costs of the appeal.
- 20.2 An appeal must be filed with the Provider and served on all parties within 20 days after an Expert Determination is issued and a response to the appeal must be filed within 20

days after the appeal. Manner and calculation of service deadlines shall in consistent with those set forth in Section 4 above, "Communication and Time Limits."

- 20.3 A three-member Appeal Panel is to be selected by the Provider, but no member of the Appeal Panel shall also have been an Expert Panel member.
- 20.4 The fees for an appeal in the first instance shall be borne by the appellant.
- 20.5 A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint.
- 20.6 The Appeal Panel may request at its sole discretion, further statements or evidence from any party regardless of whether the evidence pre-dates the filing of the Complaint if the Appeal Panel determines such evidence is relevant.
- 20.7 The prevailing party shall be entitled to an award of costs of appeal.
- 20.8 The Providers rules and procedures for appeals, other than those stated above, shall apply.

## **21. Challenge of a Remedy**

- 21.1 ICANN shall not implement a remedy for violation of the Trademark PDDRP for at least 20 days after the issuance of an Expert Determination, providing time for an appeal to be filed.
- 21.2 If an appeal is filed, ICANN shall stay its implementation of a remedy pending resolution of the appeal.
- 21.3 If ICANN decides to implement a remedy for violation of the Trademark PDDRP, ICANN will wait ten (10) business days (as observed in the location of its principal office) after notifying the registry operator of its decision. ICANN will then implement the decision unless it has received from the registry operator during that ten (10) business-day period official documentation that the registry operator has either: (a) commenced a lawsuit against the Complainant in a court of competent jurisdiction challenging the Expert Determination of liability against the registry operator, or (b) challenged the intended remedy by initiating dispute resolution under the provisions of its Registry Agreement. If ICANN receives such documentation within the ten (10) business day period, it will not seek to implement the remedy in furtherance of the Trademark PDDRP until it receives: (i) evidence of a resolution between the Complainant and the registry operator; (ii) evidence that registry operator's lawsuit against Complainant has been dismissed or withdrawn; or (iii) a copy of an order from the dispute resolution provider selected pursuant to the Registry Agreement dismissing the dispute against ICANN whether by reason of agreement of the parties or upon determination of the merits.

- 21.4 The registry operator may challenge ICANN's imposition of a remedy imposed in furtherance of an Expert Determination that the registry operator is liable under the PDDRP, to the extent a challenge is warranted, by initiating dispute resolution under the provisions of its Registry Agreement. Any arbitration shall be determined in accordance with the parties' respective rights and duties under the Registry Agreement. Neither the Expert Determination nor the decision of ICANN to implement a remedy is intended to prejudice the registry operator in any way in the determination of the arbitration dispute. Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement.
- 21.5 Nothing herein shall be deemed to prohibit ICANN from imposing remedies at any time and of any nature it is otherwise entitled to impose for a registry operator's non-compliance with its Registry Agreement.

## **22. Availability of Court or Other Administrative Proceedings**

- 22.1 The Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability.
- 22.2 In those cases where a Party submits documented proof to the Provider that a Court action involving the same Parties, facts and circumstances as the Trademark PDDRP was instituted prior to the filing date of the Complaint in the Trademark PDDRP, the Provider shall suspend or terminate the Trademark PDDRP.

**REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)<sup>1</sup>**  
**4 JUNE 2012**

**1. Parties to the Dispute**

The parties to the dispute will be the harmed established institution and the gTLD registry operator. ICANN shall not be a party.

**2. Applicable Rules**

2.1 This procedure is intended to cover these dispute resolution proceedings generally. To the extent more than one RRDRP provider (“Provider”) is selected to implement the RRDRP, each Provider may have additional rules and procedures that must be followed when filing a Complaint. The following are the general procedure to be followed by all Providers.

2.2 In any new community-based gTLD registry agreement, the registry operator shall be required to agree to participate in the RRDRP and be bound by the resulting Determinations.

**3. Language**

3.1 The language of all submissions and proceedings under the procedure will be English.

3.2 Parties may submit supporting evidence in their original language, provided and subject to the authority of the RRDRP Expert Panel to determine otherwise, that such evidence is accompanied by an English translation of all relevant text.

**4. Communications and Time Limits**

4.1 All communications with the Provider must be filed electronically.

4.2 For the purpose of determining the date of commencement of a time limit, a notice or other communication will be deemed to have been received on the day that it is transmitted to the appropriate contact person designated by the parties.

4.3 For the purpose of determining compliance with a time limit, a notice or other communication will be deemed to have been sent, made or transmitted on the day that it is dispatched.

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<sup>1</sup> Initial complaints that a Registry has failed to comply with registration restrictions shall be processed through a Registry Restriction Problem Report System (RRPRS) using an online form similar to the Whois Data Problem Report System (WDPRS) at InterNIC.net. A nominal processing fee could serve to decrease frivolous complaints. The registry operator shall receive a copy of the complaint and will be required to take reasonable steps to investigate (and remedy if warranted) the reported non-compliance. The Complainant will have the option to escalate the complaint in accordance with this RRDRP, if the alleged non-compliance continues. Failure by the Registry to address the complaint to complainant’s satisfaction does not itself give the complainant standing to file an RRDRP complaint.

- 4.4 For the purpose of calculating a period of time under this procedure, such period will begin to run on the day following the date of receipt of a notice or other communication.
- 4.5 All references to day limits shall be considered as calendar days unless otherwise specified.

## 5. Standing

- 5.1 The mandatory administrative proceeding will commence when a third-party complainant (“Complainant”) has filed a Complaint with a Provider asserting that the Complainant is a harmed established institution as a result of the community-based gTLD registry operator not complying with the registration restrictions set out in the Registry Agreement.
- 5.2 Established institutions associated with defined communities are eligible to file a community objection. The “defined community” must be a community related to the gTLD string in the application that is the subject of the dispute. To qualify for standing for a community claim, the Complainant must prove both: it is an established institution, and has an ongoing relationship with a defined community that consists of a restricted population that the gTLD supports.
- 5.3 Complainants must have filed a claim through the Registry Restriction Problem Report System (RRPRS) to have standing to file an RRDRP.
- 5.4 The Panel will determine standing and the Expert Determination will include a statement of the Complainant’s standing.

## 6. Standards

- 6.1 For a claim to be successful, the claims must prove that:
  - 6.1.1 The community invoked by the objector is a defined community;
  - 6.1.2 There is a strong association between the community invoked and the gTLD label or string;
  - 6.1.3 The TLD operator violated the terms of the community-based restrictions in its agreement;
  - 6.1.4 There is a measureable harm to the Complainant and the community named by the objector.

## 7. Complaint

- 7.1 Filing:

The Complaint will be filed electronically. Once the Administrative Review has been completed and the Provider deems the Complaint to be in compliance, the Provider will electronically serve the Complaint and serve a hard copy and fax notice on the registry operator consistent with the contact information listed in the Registry Agreement.

7.2 Content:

- 7.2.1 The name and contact information, including address, phone, and email address, of the Complainant, the registry operator and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.
- 7.2.2 The name and contact information, including address, phone, and email address of any person authorized to act on behalf of Complainant.
- 7.2.3 A statement of the nature of the dispute, which must include:
  - 7.2.3.1 The particular registration restrictions in the Registry Agreement with which the registry operator is failing to comply; and
  - 7.2.3.2 A detailed explanation of how the registry operator's failure to comply with the identified registration restrictions has caused harm to the complainant.
- 7.2.4 A statement that the proceedings are not being brought for any improper purpose.
- 7.2.5 A statement that the Complainant has filed a claim through the RRPRS and that the RRPRS process has concluded.
- 7.2.6 A statement that Complainant has not filed a Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) complaint relating to the same or similar facts or circumstances.

7.3 Complaints will be limited to 5,000 words and 20 pages, excluding attachments, unless the Provider determines that additional material is necessary.

7.4 Any supporting documents should be filed with the Complaint.

7.5 At the same time the Complaint is filed, the Complainant will pay a filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within 10 days of the receipt of the Complaint by the Provider, the Complaint will be dismissed without prejudice to the Complainant to file another complaint.

## **8. Administrative Review of the Complaint**

8.1 All Complaints will be reviewed within five (5) business days of submission by panelists designated by the applicable Provider to determine whether the Complainant has complied with the procedural rules.

- 8.2 If the Provider finds that the Complaint complies with procedural rules, the Complaint will be deemed filed, and the proceedings will continue. If the Provider finds that the Complaint does not comply with procedural rules, it will electronically notify the Complainant of such non-compliance and provide the Complainant five (5) business days to submit an amended Complaint. If the Provider does not receive an amended Complaint within the five (5) business days provided, it will dismiss the Complaint and close the proceedings without prejudice to the Complainant's submission of a new Complaint that complies with procedural rules. Filing fees will not be refunded if the Complaint is deemed not in compliance.
- 8.3 If deemed compliant, the Provider will electronically serve the Complaint on the registry operator and serve a paper notice on the registry operator that is the subject of the Complaint consistent with the contact information listed in the Registry Agreement.

## **9. Response to the Complaint**

- 9.1 The registry operator must file a response to each Complaint within thirty (30) days of service the Complaint.
- 9.2 The Response will comply with the rules for filing of a Complaint and will contain the names and contact information for the registry operator, as well as a point by point response to the statements made in the Complaint.
- 9.3 The Response must be electronically filed with the Provider and the Provider must serve it upon the Complainant in electronic form with a hard-copy notice that it has been served.
- 9.4 Service of the Response will be deemed effective, and the time will start to run for a Reply, upon electronic transmission of the Response.
- 9.5 If the registry operator believes the Complaint is without merit, it will affirmatively plead in its Response the specific grounds for the claim.
- 9.6 At the same time the Response is filed, the registry operator will pay a filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the Provider, the Response will be deemed improper and not considered in the proceedings, but the matter will proceed to Determination.

## **10 Reply**

- 10.1 The Complainant is permitted ten (10) days from Service of the Response to submit a Reply addressing the statements made in the Response showing why the Complaint is not "without merit." A Reply may not introduce new facts or evidence into the record, but shall only be used to address statements made in the Response. Any new facts or evidence introduced in a Response shall be disregarded by the Expert Panel.
- 10.2 Once the Complaint, Response and Reply (as necessary) are filed and served, a Panel will be appointed and provided with all submissions.

**11. Default**

- 11.1 If the registry operator fails to respond to the Complaint, it will be deemed to be in default.
- 11.2 Limited rights to set aside the finding of default will be established by the Provider, but in no event will it be permitted absent a showing of good cause to set aside the finding of Default.
- 11.3 The Provider shall provide Notice of Default via email to the Complainant and registry operator.
- 11.4 All Default cases shall proceed to Expert Determination on the merits.

**12. Expert Panel**

- 12.1 The Provider shall select and appoint a single-member Expert Panel within (21) days after receiving the Reply, or if no Reply is filed, within 21 days after the Reply was due to be filed.
- 12.2 The Provider will appoint a one-person Expert Panel unless any party requests a three-member Expert Panel.
- 12.3 In the case where either party requests a three-member Expert Panel, each party (or each side of the dispute if a matter has been consolidated) shall select an Expert and the two selected Experts shall select the third Expert Panel member. Such selection shall be made pursuant to the Provider's rules or procedures. RRDRP panelists within a Provider shall be rotated to the extent feasible.
- 12.4 Expert Panel members must be independent of the parties to the post-delegation challenge. Each Provider will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an Expert for lack of independence.

**13. Costs**

- 13.1 The Provider will estimate the costs for the proceedings that it administers under this procedure in accordance with the applicable Provider Rules. Such costs will cover the administrative fees, including the Filing and Response Fee, of the Provider, and the Expert Panel fees, and are intended to be reasonable.
- 13.2 The Complainant shall be required to pay the Filing fee as set forth above in the "Complaint" section, and shall be required to submit the full amount of the other Provider-estimated administrative fees, including the Response Fee, and the Expert Panel fees at the outset of the proceedings. Fifty percent of that full amount shall be in cash (or cash equivalent) to cover the Complainant's share of the proceedings and the other 50% shall be in either cash (or cash equivalent), or in bond, to cover the registry operator's share if the registry operator prevails.



- 13.3 If the Panel declares the Complainant to be the prevailing party, the registry operator is required to reimburse Complainant for all Panel and Provider fees incurred, including the Filing Fee. Failure to do so shall be deemed a violation of the RRDRP and a breach of the Registry Agreement, subject to remedies available under the Agreement up to and including termination.
- 13.4 If the Panel declares the registry operator to be the prevailing party, the Provider shall reimburse the registry operator for its Response Fee.

#### **14. Discovery/Evidence**

- 14.1 In order to achieve the goal of resolving disputes rapidly and at a reasonable cost, discovery will generally not be permitted. In exceptional cases, the Expert Panel may require a party to provide additional evidence.
- 14.2 If permitted, discovery will be limited to that for which each Party has a substantial need.
- 14.3 Without a specific request from the Parties, but only in extraordinary circumstances, the Expert Panel may request that the Provider appoint experts to be paid for by the Parties, request live or written witness testimony, or request limited exchange of documents.

#### **15. Hearings**

- 15.1 Disputes under this RRDRP will usually be resolved without a hearing.
- 15.2 The Expert Panel may decide on its own initiative, or at the request of a party, to hold a hearing. However, the presumption is that the Expert Panel will render Determinations based on written submissions and without a hearing.
- 15.3 If a request for a hearing is granted, videoconferences or teleconferences should be used if at all possible. If not possible, then the Expert Panel will select a place for hearing if the parties cannot agree.
- 15.4 Hearings should last no more than one day, except in the most exceptional circumstances.
- 15.5 If the Expert Panel grants one party's request for a hearing, notwithstanding the other party's opposition, the Expert Panel is encouraged to apportion the hearing costs to the requesting party as the Expert Panel deems appropriate.
- 15.6 All dispute resolution proceedings will be conducted in English.

#### **16. Burden of Proof**

The Complainant bears the burden of proving its claim; the burden should be by a preponderance of the evidence.

**17. Recommended Remedies**

- 17.1 Since registrants of domain names registered in violation of the agreement restriction are not a party to the action, a recommended remedy cannot take the form of deleting, transferring or suspending registrations that were made in violation of the agreement restrictions (except to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator).
- 17.2 Recommended remedies will not include monetary damages or sanctions to be paid to any party other than fees awarded pursuant to section 13.
- 17.3 The Expert Panel may recommend a variety of graduated enforcement tools against the registry operator if the Expert Panel determines that the registry operator allowed registrations outside the scope of its promised limitations, including:
- 17.3.1 Remedial measures, which may be in addition to requirements under the registry agreement, for the registry to employ to ensure against allowing future registrations that do not comply with community-based limitations; except that the remedial measures shall not:
- (a) Require the registry operator to monitor registrations not related to the names at issue in the RRDRP proceeding, or
  - (b) direct actions by the registry operator that are contrary to those required under the registry agreement
- 17.3.2 Suspension of accepting new domain name registrations in the gTLD until such time as the violation(s) identified in the Determination is(are) cured or a set period of time;
- OR,
- 17.3.3 In extraordinary circumstances where the registry operator acted with malice providing for the termination of a registry agreement.
- 17.3 In making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for other, unrelated, good faith domain name registrants operating within the gTLD.

**18. The Expert Determination**

- 18.1 The Provider and the Expert Panel will make reasonable efforts to ensure that the Expert Determination is rendered within 45 days of the appointment of the Expert Panel and absent good cause, in no event later than 60 days after the appointment of the Expert Panel.
- 18.2 The Expert Panel will render a written Determination. The Expert Determination will state whether or not the Complaint is factually founded and provide the reasons for its

Determination. The Expert Determination should be publicly available and searchable on the Provider's web site.

- 18.3 The Expert Determination may further include a recommendation of specific remedies. Costs and fees to the Provider, to the extent not already paid, will be paid within thirty (30) days of the Expert Determination.
- 18.4 The Expert Determination shall state which party is the prevailing party.
- 18.5 While the Expert Determination that a community-based restricted gTLD registry operator was not meeting its obligations to police the registration and use of domains within the applicable restrictions shall be considered, ICANN shall have the authority to impose the remedies ICANN deems appropriate, given the circumstances of each matter.

## **19. Appeal of Expert Determination**

- 19.1 Either party shall have a right to seek a de novo appeal of the Expert Determination based on the existing record within the RDRP proceeding for a reasonable fee to cover the costs of the appeal.
- 19.2 An appeal must be filed with the Provider and served on all parties within 20 days after an Expert Determination is issued and a response to the appeal must be filed within 20 days after the appeal. Manner and calculation of service deadlines shall in consistent with those set forth in Section 4 above, "Communication and Time Limits."
- 19.3 A three-member Appeal Panel is to be selected by the Provider, but no member of the Appeal Panel shall also have been an Expert Panel member.
- 19.4 The fees for an appeal in the first instance shall be borne by the appellant.
- 19.5 A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint.
- 19.6 The Appeal Panel may request at its sole discretion, further statements or evidence from any party regardless of whether the evidence pre-dates the filing of the Complaint if the Appeal Panel determines such evidence is relevant.
- 19.7 The prevailing party shall be entitled to an award of costs of appeal.
- 19.8 The Providers rules and procedures for appeals, other than those stated above, shall apply.

## **20. Breach**

- 20.1 If the Expert determines that the registry operator is in breach, ICANN will then proceed to notify the registry operator that it is in breach. The registry operator will be given the opportunity to cure the breach as called for in the Registry Agreement.

- 20.2 If registry operator fails to cure the breach then both parties are entitled to utilize the options available to them under the registry agreement, and ICANN may consider the recommended remedies set forth in the Expert Determination when taking action.
- 20.3 Nothing herein shall be deemed to prohibit ICANN from imposing remedies at any time and of any nature it is otherwise entitled to impose for a registry operator's non-compliance with its Registry Agreement.

**21. Availability of Court or Other Administrative Proceedings**

- 21.1 The RRDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability.
- 21.2 The parties are encouraged, but not required to participate in informal negotiations and/or mediation at any time throughout the dispute resolution process but the conduct of any such settlement negotiation is not, standing alone, a reason to suspend any deadline under the proceedings.



# gTLD Applicant Guidebook

(v. 2012-06-04)

## Module 6

4 June 2012

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# Module 6

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## *Top-Level Domain Application - Terms and Conditions*

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.
2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.
3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.
5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR 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 FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. 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. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.
7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other



materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement <http://newgtlds.icann.org/en/applicants/agb/program-privacy>, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:
  - a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;
  - b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;
  - c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

- d. Applicant may be requested to supply certain information in the original language as well as in English.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
  - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
  - b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.
13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.
14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

**Ex. R-ER-4**

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[ICANN Resolutions](#) » 2012-04-10 - Establishment of New gTLD Program Committee

**Important note:** The Board Resolutions are as reported in the Board Meeting Transcripts, Minutes & Resolutions portion of ICANN's website. Only the words contained in the Resolutions themselves represent the official acts of the Board. The explanatory text provided through this database (including the summary, implementation actions, identification of related resolutions, and additional information) is an interpretation or an explanation that has no official authority and does not represent the purpose behind the Board actions, nor does any explanations or interpretations modify or override the Resolutions themselves. Resolutions can only be modified through further act of the ICANN Board.

## 2012-04-10 - Establishment of New gTLD Program Committee

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Resolution of the ICANN Board

**Topic:**

Establishment of Committee

**Summary:**

Establishment of New gTLD Program Committee

**Category:**

Board

**Meeting Date:**

Tue, 10 Apr 2012

**Resolution Number:**

2012.04.10.01 - 2012.04.10.04

**URL for Resolution:**

<http://www.icann.org/en/groups/board/documents/resolutions-10apr12-en.htm>

**Status:**

Ongoing

**Implementation Actions:**

- Set forth a process for the creation of Board Committees to address future conflict of interest situations
  - Responsible entity: CEO
  - Due date: None provided
  - Completion date: Ongoing

**Resolution Text:**

Resolved (2012.04.10.01), the Board hereby establishes the Board New gTLD Program Committee as follows: (i) the voting members of the Committee will consist of: Rod Beckstrom, Cherine Chalaby, Chris Disspain, Bill Graham, Erika Mann, Gonzalo Navarro, Ray Plzak, R. Ramaraj, George Sadowsky, Mike Silber, and Kuo-Wei Wu; (ii) the liaisons to the Committee will be Thomas Roessler; and (iii) the Chair of the Committee will be Cherine Chalaby.

Resolved (2012.04.10.02), the Board hereby delegates to the Board New gTLD Program Committee all legal and decision making authority of the Board relating to the New gTLD Program (for the round of the Program, which commenced in January 2012 and for the related Applicant Guidebook that applies to this current round) as set forth in its Charter, which excludes those things that the Board is prohibited from delegating by law, or pursuant to Article XII, Section 2 of the ICANN Bylaws.

Resolved (2012.04.10.03), all members of the New gTLD Program Committee reinforce their commitment to the 8 December 2011 Resolution of the Board (Resolution 2011.12.08.19) regarding Board member conflicts, and specifying in part: "Any and all Board members who approve any new gTLD application shall not take a contracted or employment position with any company sponsoring or in any way involved with that new gTLD for 12 months after the Board made the decision on the application."

Resolved (2012.04.10.04), the Board directs the CEO to prepare a document setting forth a process for the creation of Board Committees to address future situations where there may be multiple Board members with perceived, potential or actual conflicts of interest on an issue.

**Rationale for Resolution:**

*In order to have efficient meetings and take appropriate actions with respect to the New gTLD Program for the current round of the Program and as related to the Applicant Guidebook, the Board decided to create the "New gTLD Program Committee" in accordance with Article XII of the Bylaws and has delegated decision making authority to the Committee as it relates to the New gTLD Program for the current round of the Program which commenced in January 2012 and for the related Applicant Guidebook that applies to this current round.*

*Establishing this new Committee without conflicted members, and delegating to it decision making authority, will provide some distinct advantages. First, it will eliminate any uncertainty for conflict Board members with respect to attendance at Board meetings and workshops since the New gTLD Program topics can be dealt with at the Committee level. Second, it will allow for actions to be taken without a meeting by the committee. As the Board is aware, actions without a meeting cannot be taken unless done via electronic submission by unanimous consent; such unanimous consent cannot be achieved if just one Board member is conflicted. Third, it will provide the community with a transparent view into the Board's commitment to*

*dealing with actual, potential or perceived conflicts.*

*This resolution should have a positive impact on the community and ICANN as a whole as the New gTLD Program Committee will be able to take actions relating to the New gTLD Program for the current round of the Program and as related to the Applicant Guidebook without any question of conflict arising. No fiscal impact is anticipated as a result of this action and there will be no impact on the security, stability or resiliency of the domain name system.*

### **Other Related Resolutions:**

- Resolutions 2011.06.20.01, 2011.06.20.02, 2011.06.20.03, approving the New gTLD Program, available at <https://community.icann.org/display/tap/2011-0B>
- Other resolutions TBD

### **Additional Information:**

- The current composition and work of the New gTLD Program Committee can be located at <http://www.icann.org/en/groups/board/new-gtld>
- The resolution does not address funding for the items identified therein.



Ex. R-ER-5

HOME



Independent Objector

Home

Introducing the Independent Objector

Final Activity Report

Limited Public Interests Objections

Community Objections

ICANN Applicant Guidebook for the New gTLD Program

The Dispute Resolution Process

The Independent Objector's Objections

The Independent Objector's Comments on Controversial Applications

".ADULT" - General Comment

".AFRICA" - General Comment

".ARMY" - General Comment

".CATHOLIC" - General Comment

".CHURCH" - General Comment

".GAY" - General Comment

".GCC" - General Comment

".HOT" - General Comment

".ISLAM" - General Comment

".LGBT" - General Comment

".PERSIANGULF" - General Comment

".PORN" - General Comment

".SEX" - General Comment

".SEXY" - General Comment

".VODKA" - General Comment

".WTF" - General Comment

The Issue of "Closed Generic" gTLDs

News

**During his review of the application for the new gTLD ".PERSIANGULF", the Independent Objector has noted that numerous comments have been posted on the public comments webpage of ICANN. To ensure transparency and address public concerns on this controversial application, the hereunder comment aims at informing the public of the reasons why the IO does not consider filing an objection.**

**It is important to note that this comment is still preliminary and does not prejudice the IO's final decision to file an objection against the application or not.**

### Controversial Application

.Persiangulf - Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.

### Overview of the comments against the controversial application

The application for the new gTLD string ".Persiangulf" has given rise to numerous comments on the public comments webpage of ICANN. Most of the comments against the application raise identical issues. The IO also notes that there are several comments supportive of the application.

Opponents to the launch of the gTLD underline that the name "Persian Gulf" refers to the body of water which separates the Arabian Peninsula and the Islamic Republic of Iran. The name itself is contested and therefore constitutes a highly sensitive issue. Indeed, many surroundings Arab States maintain that it should bear the name "Arabian Gulf", whereas Iranians stand for the denomination "Persian Gulf". Opponents argue that ICANN should not authorize the launch of this gTLD and therefore interfere in a sensitive case.

### The Independent Objector's position

It should be noted that, acting in the interests of global Internet users, the IO has the possibility to file objections against applications on the community and limited public interest grounds.

### Limited Public Interest Objection

## Contact

## Contact

**Pr. Alain Pellet**  
*Independent Objector*

**Julien Boissise**  
*Legal Assistant to the Independent Objector*

**Email:**  
Contact@Independent-Objector-newgtlds.org

You can also use our  
Contact Form.

When assessing whether an objection against an application would be warranted on the limited public interest ground, the IO examines if the applied-for gTLD string is contrary to generally accepted “legal norms of morality” and public order that are recognized under fundamental principles of international law.

1. The IO acknowledges that there has been a longstanding naming dispute over the body of water which separates the Arabian Peninsula and the Islamic Republic of Iran. There are eight littoral States in the region, namely Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. Those States cannot reach a consensus on a unique name for the designated body of water and use alternatively the name of “Arabian Gulf” or “Persian Gulf”.
2. When reviewing the application, the IO pays a particular attention to the representative nature of entities or persons expressing opposition as well as to the level of recognized stature or weight among sources expressing opposition. In this regard, the IO notes that early warnings have been issued by the governments of Bahrain, Oman, Qatar and the United Arab Emirates. In particular, they underline that “the naming of the Arabian Gulf has been controversial and debatable subject in various national and international venues and levels” and that there is a “lack of community involvement and support”. Therefore, ICANN should not authorize the launch of this gTLD.
3. This type of issue is not unique in international relations. Thus, the same problem occurred between Greece and the Former Yugoslav Republic of Macedonia, the latter claiming the name of Macedonia for the country. Similarly, Argentina names “Malvinas” the group of islands named “Falkland Islands” by the UK and a similar problem arises between Japan and South Korea regarding the name of the body of water they have in common and for which Japan supports the name “sea of Japan”, while South Korea supports the name “East Sea”.
4. He also observes that The United Nations Group of Experts on Geographical Names was established by ECOSOC Resolution 715A (XXVII) in 1959 for the purpose of encouraging nations to become involved in geographic names standardization. However, this group is not a geographic names decision-making body, nor an arbiter of disputes.
5. The IO notes the existence of a UN Editorial directive regarding the Persian Gulf which states that “the term “Persian Gulf” is used in documents, publications and statements emanating from the Secretariat as the standard geographical designation for the sea area between the Arabian Peninsula and the Islamic Republic of Iran. The full term “Persian Gulf” is always used to designate that sea area when it is first referred to in a text and is repeated thereafter whenever necessary for the sake of clarity”.
6. It is interesting to note that the International Hydrographic Organization has an interest in maritime geographical names, in particular as regards the uniformity in maritime publications. Notably, article 2 of the Convention on the International Hydrographic Organization states that “it shall be the object of the Organization to bring about the greatest possible uniformity in nautical charts



and documents". The IO observes that the International Hydrographic Organization uses the term "Persian Gulf" in its nautical charts and publications.

7. The IO notes the Resolution III/20 of the United Nations Conference on the Standardization of Geographical Names which states that "countries sharing a given geographical feature under different names should endeavor, as far as possible, to reach agreement on fixing a single name for the feature concerned" and which "further recommends that when countries sharing a given geographical feature do not succeed in agreeing on a common name, it should be a general rule of international cartography that the name used by each of the countries concerned will be accepted".
8. However, for the purpose of this evaluation, the IO notes that there are no relevant binding international legal norms which could help settle the issue, as underlined in Resolution II/24 of the United Nations Conference on the Standardization of Geographical Names which recognizes "the absence of an international convention or any other international document determining the rules and procedures of naming and designating features beyond a single sovereignty".

**Therefore and for all these reasons, the IO is of the opinion that an objection against the gTLD ".persiangulf" on the limited public interest ground is not warranted.**

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#### Community Objection

For the IO to consider filing a community objection, there must be a substantial opposition to the gTLD application from a representative portion of the community to which the gTLD string may be explicitly or implicitly targeted. Therefore, the community named by the IO must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection.

When assessing whether a community objection is warranted, the IO bases his review on four preliminary tests.

1. As for the first test, (*the IO determines if the community invoked is a clearly delineated community*), the IO notes that the notion of "community" is wide and broad, and is not precisely defined by ICANN's guidebook for the new gTLD program. It can include a community of interests, as well as a particular ethnical, religious, linguistic or similar community. Moreover, communities can also be classified in sub-communities (i.e. the Jewish community in New York or the Italian community on Facebook). However, beyond the diversity of communities, there are common definitional elements.

For the IO, a community is a group of individuals who have something in common (which can include their place of residence – i.e. the French, South-East Asian or Brazilian community – or a common characteristic – i.e. the disability community), or share common values, interests or goals (i.e. the health, legal, internet or ICANN community). For the purpose of the IO evaluation, it is clear that what matters is that the community invoked can be

clearly delineated, enjoys a certain level of public recognition and encompasses a certain number of people and/or entities.

In the present case, the IO first notes that public comments made on the community ground try to prove the existence of such a community, being the Arabian Peninsula Community. It can be sustained that, beyond their disagreement on the name of the Gulf, the Arabic States and Peoples of the south-western part of the Gulf form a community in other respects.

2. As for the second and third tests, (*The IO verifies if there is a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*), the IO notes that the application for the new gTLD string “.Persiangulf” has been the subject of widespread comments and discussion and shows a substantial opposition to the gTLD application from the community in question. In particular, the IO notes with interest that governments of Bahrain, Oman, Qatar and the United Arab Emirates issued an early warning “to express its serious concerns toward “.Persiangulf””. They argue that the gTLD is “problematic and refers to a geographical place with disputed name” and that there is a “lack of community involvement and support”. Therefore, they stress that “.Persiangulf” should not be allowed to be registered as a gTLD unless there is consensus on a single name recognized by all countries bordering the “Arabian Gulf””. The IO also takes into account the public comment posted by the Communication and Information Technology Commission of the Kingdom of Saudi Arabia, which underlines that “the naming issue has stirred controversy in recent years between the two sides, who each say that their respective name is the only one that should be used”. They “disagree that ICANN should bring this dispute into the cyber world and by doing so give credence to one side over the other”. Therefore, noting that five of the eight governments involved in the dispute over the name of the Arabian or Persian Gulf expressed their disagreement with the application, it can be easily considered that there is an obvious and substantial opposition from a significant portion of the community.

Also, as recalled in the early warning, the application for new gTLD string “.PersianGulf” refers to the body of water separating the Arabian Peninsula from the Iranian plateau (The Arabian Gulf). Throughout the history, this body of water has been known by different names including among others Arabian Gulf, Basreh Gulf, Ghatif Gulf, Bahrain Gulf. The most dominant names that are currently used for this body of water are Arabian Gulf and Persian Gulf”. The IO is thus of the opinion that, if the applied for gTLD string does not intend to explicitly target opponents to the “Persian Gulf” denomination, an implicit link can easily be identified.

3. However, it is most debatable that the fourth test (*the IO conduct when assessing whether an objection is warranted or not, the application for the Top-Level Domain name must create 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*) is fulfilled: it is a matter of fact that there is a long-term dispute over the name of the Gulf and that both designation are in use. It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute; but they probably should adapt to the *status quo* and

the IO deems it unsuitable to take any position on the question. He notes that it is open to the Arabian Gulf community to file an objection as well as the same community could have applied for a “.Arabiangulf” gTLD.

**Therefore, as for his possibility to object on the community ground, the IO is of the opinion that it would be unadvisable for him to file an objection against applications for the new gTLD “.Persiangulf”.**

**Ex. R-ER-6**

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## Consideration of Non-Safeguard Advice in the GAC's Beijing Communiqué

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Resolution of the ICANN Board

### **Topic:**

GAC Beijing Communiqué

### **Summary:**

NGPC adopts the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué" (4 June 2013) in response to the items of GAC advice in the Beijing Communiqué as presented in the scorecard.

### **Category:**

Board

### **Meeting Date:**

Mar, 4 Juin 2013

### **Resolution Number:**



**URL for Resolution:**

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.h...>

**Resolution Text:**

Whereas, the GAC met during the ICANN 46 meeting in Beijing and issued a Communiqué on 11 April 2013 (“Beijing Communiqué”); Whereas, on 18 April 2013, ICANN posted the Beijing Communiqué and officially notified applicants of the advice, <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr1...> triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1; Whereas, the NGPC met on 8 May 2013 to consider a plan for responding to the GAC’s advice on the New gTLD Program, transmitted to the Board through its Beijing Communiqué; Whereas, the NGPC met on 18 May 2013 to further discuss and consider its plan for responding the GAC’s advice in the Beijing Communiqué on the New gTLD Program; Whereas, the NGPC has considered the applicant responses submitted during the 21- day applicant response period, and the NGPC has identified nine (9) items of advice in the attached scorecard where its position is consistent with the GAC’s advice in the Beijing Communiqué. Whereas, the NGPC developed a scorecard to respond to the GAC’s advice in the Beijing Communiqué similar to the one used during the GAC and Board meetings in Brussels on 28 February and 1 March 2011, and has identified where the NGPC’s position is consistent with GAC advice, noting those as “1A” items. Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board’s authority for any and all issues that may arise relating to the New gTLD Program. Resolved (2013.06.04.NG01), the NGPC adopts the “NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué” (4 June 2013), attached as Annex 1 to this Resolution, in response to the items of GAC advice in the Beijing Communiqué as presented in the scorecard.

**Rationale for Resolution:**

Why the NGPC is addressing the issue? Article XI, Section 2.1 of the ICANN Bylaws <http://www.icann.org/en/about/governance/bylaws#XI> permit the GAC to “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013. The ICANN Bylaws require the Board to take into account the GAC’s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed. What is the proposal being considered? The NGPC is being asked to consider accepting a discrete grouping of the GAC advice as described in the attached NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué (4 June 2013), which includes nine (9) items of non- safeguard advice from the Beijing Communiqué as listed in the GAC Register of Advice. These items are those for which the NGPC has a position that is consistent with the GAC’s advice. Which stakeholders or others were consulted? On 18 April 2013, ICANN posted the GAC advice and officially notified applicants of the advice, <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr1...> triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1 <http://newgtlds.icann.org/en/applicants/gac-advice-> responses. The NGPC has considered the applicant responses in formulating its response to the GAC advice as applicable. To note, on 23 April 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address GAC advice regarding safeguards applicable to broad categories of new gTLD strings <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-> en.htm. The public comment forum on how the NGPC should address GAC advice regarding safeguards is open through 4 June 2013. These comments will serve as important inputs to the NGPC’s future consideration of the other elements of GAC advice not being considered at this time in the attached scorecard. What concerns or issues were raised by the community? As part of the 21-day applicant response period, ICANN received 383 applicant response documents representing 745 unique applications. Twenty-three responses were withdrawn and eleven were submitted

after the deadline. Applicants appear to generally support the spirit of the GAC advice. The responses expressed concerns that the advice was too broad in its reach and did not take into account individual applications. Some applicant responses expressed concern that some elements of the advice seem to circumvent the bottom-up, multi-stakeholder model, while others proposed that the NGPC reject specific elements of the advice. A review of the comments has been provided to the NGPC under separate cover. The complete set of applicant responses can be reviewed at: <http://newgtlds.icann.org/en/applicants/gac-advice-responses>. What significant materials did the Board review? As part of its deliberations, the NGPC reviewed the following materials and documents: GAC Beijing Communiqué: <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf> Applicant responses to GAC advice: <http://newgtlds.icann.org/en/applicants/gac-advice-responses> Applicant Guidebook, Module 3: <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> What factors did the Board find to be significant? The Beijing Communiqué generated significant interest from applicants and resulted in many comments. The NGPC considered the applicant comments, the GAC's advice transmitted in the Beijing Communiqué, and the procedures established in the AGB. Are there positive or negative community impacts? The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible. Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public? There are no foreseen fiscal impacts associated with the adoption of this resolution. Are there any security, stability or resiliency issues relating to the DNS? Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS. Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment? ICANN posted the GAC advice and officially notified applicants of the advice on 18 April 2013 <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en.pdf>. This triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

**Ex. R-ER-7**

## **ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01**

### **NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué**

**4 June 2013**

This document contains the NGPC's response to the GAC Beijing Communiqué issued 11 April 2013 <<http://www.icann.org/en/news/correspondence/gac-to-board-11apr13-en>> for the non-safeguard advice items in the GAC Register of Advice where the NGPC has adopted a score of "1A" to indicate that its position is consistent with the GAC advice as described in the Scorecard. Refer to the GAC Register of Advice for the full text of each item of advice in the GAC Beijing Communiqué <<https://gacweb.icann.org/display/GACADV/GAC+Register+of+Advice>>.

GAC Register #	Summary of GAC Advice		NGPC Response
1. 2013-04-11-Obj-Africa (Communiqué §1.a.i.1)	The GAC Advises the ICANN Board that the GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following application: .africa (Application number 1-1165-42560)	1A	The NGPC accepts this advice. The AGB provides that if "GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved." (AGB § 3.1) The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1165-42560 for .africa will not be approved. In accordance with the AGB the applicant may withdraw (pursuant to AGB § 1.5.1) or seek relief according to ICANN's accountability mechanisms (see ICANN Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.
2. 2013-04-11-Obj-GCC (Communiqué §1.a.i.2)	The GAC Advises the ICANN Board that the GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following application: .gcc (application number: 1-1936-2101)	1A	The NGPC accepts this advice. The AGB provides that if "GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved." (AGB § 3.1) The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1936-2101 for .gcc will not be approved. In accordance with the AGB the applicant may withdraw (pursuant to AGB § 1.5.1) or seek relief according to ICANN's accountability mechanisms (see ICANN Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.

GAC Register #	Summary of GAC Advice		NGPC Response
3. 2103-04-11- Religious Terms (Communiqué §1.a.ii)	The GAC Advises the Board that with regard to Module 3.1 part II of the Applicant Guidebook, the GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.	1A	<p>The NGPC accepts this advice. The AGB provides that if "GAC advises ICANN that there are concerns about a particular application 'dot-example,' the ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns."</p> <p>Pursuant to Section 3.1.ii of the AGB, the NGPC stands ready to enter into dialogue with the GAC on this matter. We look forward to liaising with the GAC as to how such dialogue should be conducted.</p> <p>(Note a community objection has been filed with the International Centre for Expertise of the ICC against .ISLAM and .HALAL. Because formal objections have been filed, these applications cannot move to the contracting phase until the objections are resolved.)</p>

GAC Register #	Summary of GAC Advice		NGPC Response
4. 2013-04-11-gTLDStrings (Communiqué §1.c)	In addition to this safeguard advice, the GAC has identified certain gTLD strings where further GAC consideration may be warranted, including at the GAC meetings to be held in Durban. Consequently, the GAC advises the ICANN Board to not proceed beyond Initial Evaluation with the following strings : .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .date, .spa, .yun, .thai, .zulu, .wine, .vin	1A	<p>The NGPC accepts this advice. The AGB provides that "GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process)" (AGB § 3.1). At this time, ICANN will not proceed beyond initial evaluation of these identified strings. In other words, ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings for now.</p> <p>(Note: community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF, .AMAZON, and .PATAGONIA. The application for .ZULU was withdrawn.)</p>
5. 2013-04-11-CommunitySupport (Communiqué §1.e)	The GAC advises the Board that in those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information.	1A	The NGPC accepts this advice. Criterion 4 for the Community Priority Evaluation process takes into account "community support and/or opposition to the application" in determining whether to award priority to a community application in a contention set. (Note however that if a contention set is not resolved by the applicants or through a community priority evaluation then ICANN will utilize an auction as the objective method for resolving the contention.)

GAC Register #	Summary of GAC Advice		NGPC Response
6. 2013-04-11-PluralStrings (Communiqué §1.f)	The GAC believes that singular and plural versions of the string as a TLD could lead to potential consumer confusion. Therefore the GAC advises the Board to reconsider its decision to allow singular and plural versions of the same strings.	1A	The NGPC accepts this advice and will consider whether to allow singular and plural versions of the same string.
7. 2013-04-11-RAA (Communiqué §2)	The GAC advises the ICANN Board that the 2013 Registrar Accreditation Agreement should be finalized before any new gTLD contracts are approved.	1A	The NGPC accepts this advice. The final draft of the RAA was posted for public comment on 22 April 2013. The new gTLD Registry Agreement was posted for public comment on 29 April 2013, and it requires all new gTLD registries to only use 2013 RAA registrars. The public comment reply period for the 2013 RAA closes on 4 June 2013. The NGPC intends to consider the 2013 RAA shortly thereafter.
8. 2013-04-11-WHOIS (Communiqué §3)	The GAC urges the ICANN Board to ensure that the GAC Principles Regarding gTLD WHOIS Services, approved in 2007, are duly taken into account by the recently established Directory Services Expert Working Group.	1A	The NGPC accepts this advice. The NGPC notes that staff has confirmed that the GAC Principles have been shared with the Expert Working Group.



GAC Register #	Summary of GAC Advice		NGPC Response
9. 2013-04-11-IOCRC (Communiqué §4)	The GAC advises the ICANN Board to amend the provisions in the new gTLD Registry Agreement pertaining to the IOC/RCRC names to confirm that the protections will be made permanent prior to the delegation of any new gTLDs.	1A	<p>The NGPC accepts the GAC advice. The proposed final version of the Registry Agreement posted for public comment on 29 April 2013 includes protection for an indefinite duration for IOC/RCRC names. Specification 5 of this version of the Registry Agreement includes a list of names (provided by the IOC and RCRC Movement) that "shall be withheld from registration or allocated to Registry Operator at the second level within the TLD."</p> <p>This protection was added pursuant to a NGPC resolution to maintain these protections "until such time as a policy is adopted that may require further action" (204.11.26.NG03). The resolution recognized the GNSO's initiation of an expedited PDP. Until such time as the GNSO approves recommendations in the PDP and the Board adopts them, the NGPC's resolutions protecting IOC/RCRC names will remain in place. Should the GNSO submit any recommendations on this topic, the NGPC will confer with the GAC prior to taking action on any such recommendations.</p>

Ex. R-ER-8

July 2013

**U.S. STATEMENT ON GEOGRAPHIC NAMES  
IN ADVANCE OF ICANN DURBAN MEETING**

The United States has listened carefully to the concerns expressed by colleagues on certain geographic strings. It is our sincere hope that individual governments can resolve their concerns on specific geographic strings through agreements on specific safeguards negotiated with the relevant applicants. We encourage all parties to continue to do so leading to Durban. However, in the event the parties cannot reach agreement by the time this matter comes up for decision in the GAC, the United States is willing in Durban to abstain and remain neutral on .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .yun, and .thai, thereby allowing the GAC to present consensus objections on these strings to the Board, if no other government objects.

The United States affirms our support for the free flow of information and freedom of expression and does not view sovereignty as a valid basis for objecting to the use of terms, and we have concerns about the effect of such claims on the integrity of the process. We considered that the GAC was of the same mind when it accepted ICANN's definition of geographic names in February 2011 and agreed that any potential confusion with a geographic name could be mitigated through agreement between the applicant and the concerned government. In addition, the United States is not aware of an international consensus that recognizes inherent governmental rights in geographic terms. Therefore, the choice made in this discrete case does not prejudice future United States positions within the ICANN model or beyond.

Recognizing that the current rules for the new gTLD program do not specifically prohibit or condition these strings, we expect the specific issue of how to better address individual government concerns as well as other relevant considerations, including the free flow of information and freedom of expression, in the context of geographic terms, to be considered in the review of the new gTLD program as mandated by the *Affirmation of Commitments*. This review hopefully will provide guidance as to how better to address this issue in future rounds of new gTLDs.

Ex. R-ER-9

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## GAC Communiqué Durban - Scorecard

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Resolution of the New gTLD Program Committee

**Topic:**

GAC Communique Durban Scorecard

**Summary:**

NGPC adopts the "ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué" (10 September 2013).

**Category:**

Board

**Meeting Date:**

Mar, 10 Septiembre 2013

**Resolution Number:**

2013.09.10.NG03

**URL for Resolution:**

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10sep13-en.h...>

**Resolution Text:**

Whereas, the GAC met during the ICANN 47 meeting in Durban and issued a Communiqué on 18 July 2013 (“Durban Communiqué”).

Whereas, on 1 August 2013, ICANN posted the Durban Communiqué and officially notified applicants of the advice <<http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>>, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

Whereas, the NGPC met on 12 August 2013 to consider a plan for responding to the GAC’s advice on the New gTLD Program, transmitted to the Board through its Durban Communiqué.

Whereas, the NGPC has considered the applicant responses submitted during the 21- day applicant response period, and the NGPC has identified items of advice in the attached scorecard where its position is consistent with the GAC’s advice in the Durban Communiqué.

Whereas, the NGPC developed a scorecard to respond to the GAC’s advice in the Durban Communiqué similar to the one used to address the Beijing Advice as well as during the GAC and the Board meetings in Brussels on 28 February and 1 March 2011, and has identified where the NGPC’s position is consistent with GAC advice, noting those as “1A” items.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board’s authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2013.09.10.NG03), the NGPC adopts the “ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué” (10 September 2013), attached as Annex 1 to this Resolution, in response to the items of GAC advice in the Durban Communiqué as presented in the scorecard.

**Rationale for Resolution:****Why the NGPC is addressing the issue?**

Article XI, Section 2.1 of the ICANN Bylaws <<http://www.icann.org/en/about/governance/bylaws - XI>> permit the GAC to “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” The GAC issued advice to the Board on the New gTLD Program through its Durban Communiqué dated 18 July 2013. The ICANN Bylaws require the Board to take into account the GAC’s advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

**What is the proposal being considered?**

The NGPC is being asked to consider accepting the GAC’s Durban advice as described in the attached ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué” (10 September 2013). As noted in the scorecard, most items of advice are scored as “1A,” which indicates that the NGPC’s position is consistent with GAC advice as described in the scorecard.

## Which stakeholders or others were consulted?

On 1 August 2013, ICANN posted the GAC advice and officially notified applicants of the advice <<http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>>, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant responses are provided at: <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>. The NGPC has considered the applicant responses in formulating its response to the GAC advice as applicable.

## What concerns or issues were raised by the community?

As part of the 21-day applicant response period, several of the applicants indicated that they have entered into dialogue with the affected parties, and they anticipated reaching agreement on the areas of concern. Some of the applicants noted that they have proposed additional safeguards to address the concerns of the relevant governments are unsure as to whether a settlement can be reached. These applicants asked that the ICANN Board allow their applications to proceed even if an agreement among the relevant parties cannot be reached. Additionally, inquiries have been made as to whether applicants and the relevant governments will have the opportunity to comment on conversations among the GAC, ICANN Board, and ICANN staff. There have been requests that that the GAC, NGPC, and ICANN staff consult with applicants before decisions regarding any additional safeguards are made.

Other applicants noted the important role of governments in the multi-stakeholder model, but advised the NGPC that it should not allow governments to exercise veto power over ICANN policies adopted through the multi-stakeholder process.

## What significant materials did the Board review?

As part of its deliberations, the NGPC reviewed the following materials and documents:

{C}<!--[if !supportLists]--> <!--[endif]-->GAC Durban Communiqué:

[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2)

{C}<!--[if !supportLists]--> <!--[endif]-->Applicant responses to GAC advice:  
<http://newgtlds.icann.org/en/applicants/gac-advice/durban47>

{C}<!--[if !supportLists]--> <!--[endif]-->Applicant Guidebook, Module 3:

<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

{C}<!--[if !supportLists]-->· <!--[endif]--> Summary of Applicant Responses to GAC Advice in the Durban Communiqué (see reference materials).

### **What factors did the Board find to be significant?**

In adopting its response to the GAC's advice in the Durban Communiqué, the NGPC considered the applicant comments submitted, the GAC's advice transmitted in the Durban Communiqué, and the procedures established in the AGB.

### **Are there positive or negative community impacts?**

The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible.

### **Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There are no foreseen fiscal impacts associated with the adoption of this resolution.

### **Are there any security, stability or resiliency issues relating to the DNS?**

Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS.

### **Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?**

ICANN posted the GAC advice and officially notified applicants of the advice on 1 August 2013. This triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.



**Ex. R-ER-10**

## Annex 1 to NGPC Resolution No. 2013.09.10.NG03

### ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué

10 September 2013

This document contains the NGPC's notes on the GAC Durban Communiqué issued 17 July 2013

<[https://gacweb.icann.org/download/attachments/27132037/Final GAC Communique Durban 20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2)>. Refer to the GAC Register of Advice for the full text of each item of advice in the GAC Durban Communiqué <<https://gacweb.icann.org/display/GACADV/GAC+Register+of+Advice>>.

Each GAC scorecard item is noted with a "1A", "1B", or "2":

- "1A" indicates that the NGPC's proposed position is consistent with GAC advice as described in the Scorecard.
- "1B" indicates that the NGPC's proposed position is consistent with GAC advice as described in the Scorecard in principle, with some revisions to be made.
- "2" indicates that the NGPC's current position is not consistent with GAC advice as described in the Scorecard, and further discussion with the GAC is required following relevant procedures in the ICANN Bylaws.

This is a preliminary draft, unapproved by the NGPC. ICANN reserves the right to make additional changes after further discussions and review of public comments.

GAC Register #	Summary of GAC Advice		NGPC Response/Notes
1. 2013-07-18 – Obj- Amazon (Communiqué §1.1.a.i.1)	The GAC Advise the ICANN Board that the GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following application: .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591)		Per § 3.1 of the AGB, the applicant submitted a response to the ICANN Board. Given the volume of information presented, the NGPC continues to consider the information presented by the applicant and proposes to take action at a future NGPC meeting.
2. 2013-07-18 – Obj- Thai (Communiqué §1.1.a.i.2)	The GAC Advise the ICANN Board that the GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following application: .thai (application number 1-2112-4478)	1A	The NGPC accepts this advice. The AGB provides that if "GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved." (AGB § 3.1) The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-2112-4478 for .thai will not be approved. In accordance with the AGB the applicant may withdraw (pursuant to AGB § 1.5.1) or seek relief according to ICANN's accountability mechanisms (see ICANN Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.
3. 2013-07-18 – gTLDStrings (Communiqué §1.1.b.i.i.1)	The GAC Advises the Board to leave the following applications for further consideration and advises the ICANN Board not to proceed beyond initial evaluation until the agreements between the relevant parties are reached: .spa (application number 1-1309-12524 and 1-1619-92115)	1A	The NGPC accepts this advice. The AGB provides that "GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process)" (AGB § 3.1). At this time, ICANN will not proceed beyond initial evaluation of these identified strings. ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings, subject to the parties having reached agreement or the GAC issuing final advice prior to the close of the ICANN Public meeting in Buenos Aires.

GAC Register #	Summary of GAC Advice		NGPC Response/Notes
4. 2013-07-18 – gTLDStrings (Communiqué §1.1.b.i.i.2)	The GAC Advises the Board to leave the following application for further consideration and advises the ICANN Board not to proceed beyond initial evaluation until the agreements between the relevant parties are reached: .yun (application number 1-1318-12524)	1A	The NGPC accepts this advice. The AGB provides that "GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process)" (AGB § 3.1). At this time, ICANN will not proceed beyond initial evaluation of these identified strings. ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings, subject to the parties having reached agreement or the GAC issuing final advice prior to the close of the ICANN Public meeting in Buenos Aires.
5. 2013-07-18 – gTLDStrings (Communiqué §1.1.b.i.i.3)	The GAC Advises the Board to leave the following application for further consideration and advises the ICANN Board not to proceed beyond initial evaluation until the agreements between the relevant parties are reached: .guangzhou (IDN in Chinese - application number 1-1121-22691)	1A	The NGPC accepts this advice. The AGB provides that "GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process)" (AGB § 3.1). At this time, ICANN will not proceed beyond initial evaluation of these identified strings. ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings, subject to the parties having reached agreement or the GAC issuing final advice prior to the close of the ICANN Public meeting in Buenos Aires.
6. 2013-07-18 – gTLDStrings (Communiqué §1.1.b.i.i.4)	The GAC Advises the Board to leave the following application for further consideration and advises the ICANN Board not to proceed beyond initial evaluation until the agreements between the relevant parties are reached: .shenzhen (IDN in Chinese - application number 1-1121-82863)	1A	The NGPC accepts this advice. The AGB provides that "GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process)" (AGB § 3.1). At this time, ICANN will not proceed beyond initial evaluation of these identified strings. ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings, subject to the parties having reached agreement or the GAC issuing final advice prior to the close of the ICANN Public meeting in Buenos Aires..

GAC Register #	Summary of GAC Advice		NGPC Response/Notes
7. 2013-07-18 – wine and vin (Communiqué §2.a.i)	The GAC advises the ICANN Board that the GAC considered the two strings .vin and .wine and due to the complexity of the matter was unable to conclude at this meeting. As a result the GAC agreed to take thirty days additional time with a view to conclude on the matter.	1A	The NGPC accepts this advice. The NGPC stands ready to hear from the GAC on 29 August 2013 regarding its conclusion on applications for .vin and .wine. <sup>1</sup>
8. 2013-07-18 – date and persiangulf (Communiqué §3.a.i)	The GAC has finalized its consideration of the following string, and does not object to it proceeding: .date (application number 1-1247-30301)	1A	ICANN will continue to process the application in accordance with the established procedures in the AGB.
9. 2013-07-18 – date and persiangulf (Communiqué §3.a.ii)	The GAC has finalized its consideration of the following string, and does not object to it proceeding: .persiangulf (application number 1-2128-55439)	1A	ICANN will continue to process the application in accordance with the established procedures in the AGB. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.
10. 2013-07-18 –Indians and ram (Communiqué §4.a.i)	The GAC Advises the ICANN Board that the GAC has noted the concerns expressed by the Government of India not to proceed with the applications for .indians and .ram.	1A	The NGPC notes the concerns expressed in this advice.

<sup>1</sup> Note: The NGPC received a subsequent email from the GAC Chair on 10 September and a letter on 11 September advising that the GAC had finalized its consideration of the strings .wine and .vin, and that the applications should proceed through the normal application process. <<http://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en>> The NGPC acknowledges receipt of the correspondence and will discuss it at its next meeting.

GAC Register #	Summary of GAC Advice		NGPC Response/Notes
11. 2013-07-18 –IGO Acronyms (Communiqué §5.c.i.a)	The GAC advises the ICANN Board that the GAC is interested to work with the IGOs and the NGPC on a complementary cost-neutral mechanism that would: (a) provide notification to an IGO if a potential registrant seeks to register a domain name matching the acronym of an IGO at the second level, giving the IGO a reasonable opportunity to express concerns, if any.	1A	The NGPC accepts the GAC advice to continue ongoing discussions with the GAC and the IGOs regarding protections of IGO acronyms.
12. 2013-07-18 –IGO Acronyms (Communiqué §5.c.i.b)	The GAC advises the ICANN Board that the GAC is interested to work with the IGOs and the NGPC on a complementary cost-neutral mechanism that would: (b) allow for an independent third party to review any such registration request, in the event of a disagreement between an IGO and potential registrant.	1A	The NGPC accepts the GAC advice to continue discussions with the GAC and the IGOs regarding protections of IGO acronyms.
13. 2013-07-18 –IGO Acronyms (Communiqué §5.c.ii)	The initial protections for IGO acronyms confirmed by the NGPC at its meeting of 2 July 2013 should remain in place until the dialogue between the GAC, NGPC, and IGO representatives ensuring the implementation of preventative protection for IGO acronyms at the second level is completed.	1A	The NGPC accepts this advice. On 17 July 2013, the NGPC adopted a resolution requiring registry operators to continue to implement temporary protections for the precise IGO names and acronyms on the “IGO List” posted as <a href="#">Annex 1</a> to Resolution 2013.07.02NG03 – 2013.07.02.NG06 until the first meeting of the NGPC following the ICANN 48 Meeting in Buenos Aires or until the NGPC makes a further determination on the GAC Advice re IGO protections, whichever is earlier. If the NGPC and GAC do not reach an agreement on outstanding implementation issues in that timeframe, and subject to any matters that arise during the discussions, registry operators will be required to protect only the IGO names identified on the “IGO List”.  <a href="http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-17jul13-en.htm#1.a">http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-17jul13-en.htm#1.a</a>

GAC Register #	Summary of GAC Advice		NGPC Response/Notes
14. 2013-07-18 –IOCRC (Communiqué §5.a.i(sic))	The GAC advises the ICANN Board that the same complementary cost neutral mechanisms to be worked out (as above in 4.c.i. (sic)) for the protection of acronyms of IGOs be used to also protect the acronyms of the International Committee of the Red Cross (ICRC/CICR) and the International Federation of Red Cross and Red Crescent Societies (IFRC/FICR).	1A	<p>As noted above, the NGPC accepts the GAC advice to continue discussions with the GAC and the IGOs regarding protections of IGO acronyms. The NGPC accepts this advice to adopt any mechanism(s) that may be agreed to by the GAC and the NGPC for the protection of IGO acronyms in order to protect the acronyms of the ICRC/CICR and IFRC/FICR.</p> <p>Additionally, the NGPC directs staff to require registry operators to implement temporary protections for acronyms of the International Committee of the Red Cross (ICRC/CICR) and the International Federation of Red Cross and Red Crescent Societies (IFRC/FICR) until the first meeting of the NGPC following the ICANN 48 Meeting in Buenos Aires.</p>
15. 2013-07-18 –Category 1 (Communiqué §6.i.1)	The GAC has met with the NGPC to discuss the Committee’s response to GAC advice contained in the Beijing Communiqué on safeguards that should apply to Category 1 new gTLDs. The GAC Advises the ICANN Board that the GAC will continue the dialogue with the NGPC on this issue.	1A	The NGPC accepts this advice. The NGPC looks forward to continuing the dialogue with the GAC on this issue.
16. 2013-07-18 – GeoNames (Communiqué §7.a.i)	The GAC recommends that ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with regard to the protection of terms with national, cultural, geographic and religious significance, in accordance with the 2007 GAC Principles on New gTLDs.	1A	The NGPC accepts this recommendation. The NGPC stands ready to hear from the GAC regarding possible refinements, for future rounds, of the Applicant Guidebook with respect to the protection of terms with national, cultural, geographic and religious significance, in accordance with the 2007 GAC Principles on New gTLDs.

GAC Register #	Summary of GAC Advice		NGPC Response/Notes
17. 2013-07-18 – Community Applications (Communiqué §7.b.i)	The GAC reiterates its advice from the Beijing Communiqué regarding preferential treatment for all applications which have demonstrable community support, while noting community concerns over the high costs for pursuing a Community Objection process as well as over the high threshold for passing Community Priority Evaluation.	1A	The NGPC accepts the reiteration of the GAC’s earlier advice from the Beijing Communiqué. The NGPC accepted this advice< <a href="http://www.icann.org/en/groups/board/document/s/resolutions-new-gtld-04jun13-en.htm#1.a">http://www.icann.org/en/groups/board/document/s/resolutions-new-gtld-04jun13-en.htm#1.a</a> > and stated as follows: Criterion 4 for the Community Priority Evaluation process takes into account "community support and/or opposition to the application" in determining whether to award priority to a community application in a contention set. (Note however that if a contention set is not resolved by the applicants or through a community priority evaluation then ICANN will utilize an auction as the objective method for resolving the contention.)
18. 2013-07-18 – Community Applications (Communiqué §7.b.ii.a)	Therefore the GAC advises the ICANN Board to consider to take better account of community views, and improve outcomes for communities, within the existing framework, independent of whether those communities have utilized ICANN’s formal community processes to date.	1A	The NGPC accepts this advice. The NGPC will consider taking better account of community views and improving outcomes for communities, within the existing framework, independent of whether those communities have utilized ICANN’s formal community processes to date. The NGPC notes that in general it may not be possible to improve any outcomes for communities beyond what may result from the utilization of the AGB’s community processes while at the same time remaining within the existing framework.
19. 2013-07-18 –Security and Stability (Communiqué §8.a.i.)	The GAC shares the security and stability concerns expressed by the SSAC regarding Internal Name Certificates and Dotless Domains. The GAC requests the ICANN Board to provide a written briefing about how ICANN considers this SSAC advice with a view to implementation as soon as possible. The GAC believes that all such stability and security analysis should be made publicly available prior to the delegation of new gTLDs.	1A	The NGPC will provide a written briefing regarding how ICANN considers this SSAC advice with a view to implementation as soon as possible. The NGPC agrees with the GAC that all such stability and security analysis should be made publicly available prior to the delegation of new gTLDs. The NGPC notes the publication of the “ <a href="#">Name Collision in The DNS” Study</a> ” and the “ <a href="#">Dotless Domain Name Security and Stability Study Report</a> .”



GAC Register #	Summary of GAC Advice		NGPC Response/Notes
20. 2013-07-18 –Security and Stability(Com muniqué §8.a.ii.a)	The GAC Advises the ICANN Board to: as a matter of urgency consider the recommendations contained in the SSAC Report on Dotless Domains (SAC053) and Internal Name Certificates (SAC057).	1A	The NGPC accepts this advice. On 5 August, ICANN opened a <a href="#">public comment forum</a> on staff proposed efforts to mitigate potential impact resulting from name collisions as New gTLDs are delegated into the root zone. At its 13 August 2013 meeting, the NGPC <a href="#">affirmed</a> that dotless domains are prohibited < <a href="http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1">http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1</a> >.
21. 2013-07-18 –Registry/ Registrar Agreements (Communiqué §9.a)	It was noted that there are provisions in the Registry Agreement and Registrar Accreditation Agreement that may conflict with applicable law in certain countries, in particular privacy and data retention, collection and processing law. The importance of having adequate procedures to avoid these conflicts was highlighted.	1A	The NGPC acknowledges the GAC’s highlighting of the importance of having adequate procedures to avoid conflicts between provisions in the Registry Agreement and the Registrar Accreditation Agreement and applicable law in certain countries, in particular privacy and data retention, collection and processing law. First, ICANN’s Registry Agreements and Registrar Accreditation Agreements already require contracted parties to abide by applicable law; ICANN cannot and will not require any of its contracted parties to violate laws. Through its contract development, ICANN has already demonstrated its understanding of the import of allowing contracted parties to obtain waivers of provisions that would conflict with laws, such as through the inclusion of a provision in the Registrar Accreditation Agreement to address conflicts of laws related to data retention. ICANN will also be working to achieve modifications of the existing ICANN Procedure for Handling Whois Conflicts with Privacy Law, including seeking input from the GAC on modifications.

Ex. R-ER-15

## Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008

By Ali Yesilirmak\*

This article is based on a review of a selection of twenty-five ICC arbitral awards rendered between 1999 and 2008 in which ICC arbitral tribunals ordered interim or conservatory measures (ten cases) or refused to do so (fifteen cases). It provides an overview of the issues dealt with in these awards and comments on such matters as jurisdiction to order interim relief, the nature of interim and conservatory measures, and the circumstances in which such measures may or may not be granted. The article also identifies the principal categories of interim and conservatory measures ordered by ICC arbitral tribunals— injunctions (including anti-suit injunctions); security for claims, costs and interim measures; and attachments.

*Este artículo se basa en el análisis de una selección de 25 laudos de la CCI dictados entre 1999 y 2008 en los que los tribunales arbitrales de la CCI ordenaron medidas provisionales o cautelares (10 casos) o se abstuvieron a hacerlo (15 casos). El artículo ofrece una visión general de los asuntos tratados en estos laudos y aborda cuestiones como, por ejemplo, la competencia para dictar medidas provisionales, la naturaleza de las medidas provisionales y cautelares y las circunstancias en las pueden concederse o no dichas medidas. Finalmente, el artículo también menciona las principales categorías de medidas provisionales y cautelares ordenadas por los tribunales arbitrales de la CCI: los requerimientos, incluyendo los anti-suit injunctions (mandamientos de no entablar acciones o actuaciones judiciales); las garantías para demandas, costas o medidas provisionales y, por último, los embargos.*

*Cet article est issu d'un examen d'une sélection de vingt-cinq sentences arbitrales de la CCI rendues entre les années 1999 et 2008, dans lesquelles le tribunal arbitral a soit ordonné une ou plusieurs mesures provisoires ou conservatoires (dix affaires) soit s'en est abstenu (quinze affaires). L'article donne un aperçu des questions traitées dans ces sentences et aborde, entre autres sujets, la compétence pour ordonner des mesures provisoires, la nature des mesures provisoires et conservatoires et les conditions dans lesquelles de telles mesures peuvent ou non être ordonnées. Cet article recense également les principales catégories de mesures provisoires et conservatoires ordonnées par des tribunaux arbitraux de la CCI, dont l'injonction (y compris l'anti-suit injunction interdisant de poursuivre une action en justice); les sûretés en garantie de demandes, de frais ou de mesures provisoires; et la saisie-arrêt.*

### Introduction

Interim and conservatory measures<sup>1</sup> are generally designed to protect the status quo, evidence and the rights and interests of the parties involved in a case.<sup>2</sup> They are considered temporary in nature and are granted without prejudice to the decision on the substance of the dispute.<sup>3</sup>

Today, interim measures of protection are considered an important tool or strategic weapon in international arbitration practice.<sup>4</sup> Indeed, the fact<sup>5</sup> that nearly all versions of the ICC Rules of Arbitration ('ICC Rules') since their creation in 1922 have dealt with the issue of conservatory and interim measures is in itself a demonstration of their importance. The 2012 ICC Rules deal with conservatory and interim measures in Article 28,<sup>6</sup> which reads as follows:

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1 Commonly referred to as interim measures of protection, interim or provisional relief/ remedies, or provisional and/or protective measures. See A. Yesilirmak, 'Interim and Conservatory Measures in ICC Arbitral Practice' (2000) 11:1 ICC IC Arb. Bull. 31, note 1.

2 See J.D.M. Lew, 'Commentary on Interim and Conservatory Measures in ICC Arbitral Practice' (2000) 11:1 ICC IC Arb. Bull. 23.

3 E.g. final award (2003) in ICC case 11905 [unpublished], which refers to the agreement of parties on interim measures as an agreement entered into only for interim purposes 'which shall not prejudice, in any way, the position the parties have taken in this arbitration and any possible claims for damages'.

4 J.D.M. Lew, *supra* note 2 at 23.

5 The exception was the 1927 version of the ICC Rules, which were silent on the issue of interim measures of protection. On the evolution of the concept of interim measures in various versions of the ICC Rules, see, e.g., A. Yesilirmak, *Provisional Measures in International Commercial Arbitration* (2005) 26-29.

6 Article 29 has introduced into the ICC Rules the concept of an emergency arbitrator, empowered to order urgent interim and conservatory measures prior to the transmission of the case file to arbitral tribunal.



#### Conservatory and Interim Measures

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2. Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

The above provision is almost identical to its predecessor, Article 23 of the 1998 ICC Rules. However, Article 23 differed substantially from its predecessor, Article 8(5) of the 1988 ICC Rules, which read:

Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat of the International Court of Arbitration. The Secretariat shall inform the arbitrator thereof.

The Bulletin has in the past published three articles<sup>7</sup> on interim measures of protection in ICC arbitral practice. In 2000 it published, alongside two of these articles, a collection of extracts from ICC awards referring to interim and conservatory measures.<sup>8</sup> Since then, further awards have been rendered on the subject. The present contribution is based on a study of twenty-five<sup>9</sup> of these awards, considered to be amongst the most pertinent. Extracts from sixteen of those awards are published in the present Supplement.

The question immediately arises as to what influence such awards have on other ICC arbitral tribunals. Although there is no such thing as precedent in international arbitration, previous awards are generally considered persuasive<sup>10</sup> or at least a source of guidance for arbitral tribunals in subsequent cases. The extracts from awards on interim measures reproduced as part of the present survey will therefore serve as useful material for arbitral tribunals to consult. In case 12361, the tribunal noted that 'the standards elaborated by other ICC arbitral tribunals are in no way binding upon it', yet it had regard to such standards when ruling on the request for interim measures of protection filed in the case.<sup>11</sup> Studies and awards on interim measures are also extremely useful for academic purposes given that it is generally difficult to access such primary material.

Six important issues concerning interim measures are raised in the awards: (i) arbitral jurisdiction to grant interim measures, (ii) types of measures, (iii) requirements for granting such measures, (iv) compliance with interim measures ordered by arbitral tribunals, (v) costs of proceedings relating to interim measures, and (vi) the relationship between arbitral tribunals and courts with respect to the granting of interim measures.

7 Namely, the articles by A. Yesilirmak and J.D.M. Lew, cited *supra* in notes 1 and 2, and E.A. Schwartz, 'The Practices and Experience of the ICC Court' in *Conservatory and Provisional Measures in International Arbitration*, ICC Publication No. 519 (1993) 45.

8 (2000) 11:3 ICC ICArb. Bull. 37-116.

9 The awards were rendered between 1999 and 2008. In ten of these awards one or more of the requests for interim measures were granted, whereas in the other fifteen cases the requests for interim measure were denied. The actual number of decisions on interim and conservatory measures made during the period was of course higher, not only because only the most pertinent awards have been selected for this study, but also because decisions on interim and conservatory measures are sometimes made in a form other than an award (e.g. order, recommendation).

10 J.D.M. Lew, *supra* note 2 at 23. See also, e.g., J.D.M. Lew, 'The Case for the Publication of Arbitration Awards' in J.C. Schultz & A.J. van den Berg, eds., *The Art of Arbitration* (1982) 223; H.A. Grigera Naón, Editorial (1988) 5:2 *International Arbitration* 5; K.P. Berger, *International Economic Arbitration* (1993) at 509-525; and R.A. Schutze, 'The Precedential Effect of Arbitration Decisions' (1994) 11:3 *Journal of International Arbitration* 69.

11 Interim award (2003) in ICC case 12361, ¶ 46.



## I. Jurisdiction of arbitrators to grant interim measures

Arbitrators first look to the agreements of the parties as the source of their powers to grant interim measures.<sup>12</sup> However, it is rare for party agreements to contain express provisions on powers to order interim measures.<sup>13</sup> If the agreements of the parties are silent on this matter, arbitrators will look to the ICC Rules of Arbitration.<sup>14</sup> Lastly, they will check the law at the place of the arbitration.<sup>15</sup> Since the ICC Rules of Arbitration (both the 1998 and the 2012 Rules) expressly give the arbitral tribunal such powers, it is particularly important to ascertain whether the law at the place of arbitration contains any provisions prohibiting or limiting the exercise of those powers.<sup>16</sup>

The power to grant interim measures of protection naturally includes also the power to amend any measure granted.<sup>17</sup> An interim measure may be amended when the circumstances that caused the interim measure to be granted have changed. This is explained by the fact that an interim measure of protection is of a temporary nature and is always subject to a subsequent or final decision on the rights and interests of the parties involved in arbitration.

Arbitral powers to order interim measures do not, on the other hand, extend to issues that fall outside the scope of the arbitration agreement or to third parties not bound by that agreement.<sup>18</sup>

Another important issue in respect of arbitrators' powers to grant interim measures is whether or not an interim measure of protection already granted by a court would have *res judicata* effect with respect to an interim measure requested from an arbitral tribunal. In response to this question, the arbitral tribunal in case 10021 rightly indicated in its 1999 interim award:

The main characteristics of provisional measures is that they 'are temporary in nature, their effects being limited by the purpose of assuring a specified protection until the time of the award (hence, their being "provisional")', thus conservatory measures, granted in either arbitral or court proceedings, can be changed throughout the proceedings due to the change of determining facts.<sup>19</sup>

## II. Types of measures

The ICC Rules empower the arbitral tribunal to grant any interim and conservatory measure it 'deems appropriate'.<sup>20</sup> The Rules do not specify what kinds of measures may be granted, leaving the arbitral tribunal with wide discretion. In the partial award (2001) in case 10681, the sole arbitrator listed as possible interim and conservatory measures orders intended to:

- preserve the status quo of the subject matter of the arbitration;
- preserve evidence;
- provide security for costs;
- instruct a party to refrain from a given activity or conduct.<sup>21</sup>

Without going as far as issuing a formal order, an arbitral tribunal may send a warning to similar effect, as in the partial award (2002) in case 12122:

The arbitral tribunal wishes to call the parties' attention to the fact that they should refrain from any action likely to widen or aggravate their dispute, or to complicate the task of the tribunal or even to make more difficult, one way or another, the observance of the final award...<sup>22</sup>

To avoid the future aggravation of the dispute, the arbitral tribunal warned the parties that it would take into consideration 'the consequences of the parties' respective conduct'.<sup>23</sup>

Types of interim and conservatory measures typically requested are injunctions, anti-suit injunctions, security, and attachments.

### A. Injunctions

Injunctions, ordering parties to do or refrain from doing something, are the most common form of interim measures of protection.<sup>24</sup> An example of a restraining injunction is found in the interim award (2003) in case 12361, where the tribunal stated:

The tribunal therefore accepts, by this interim award, to order and direct the Respondent not to dispose of, sell or create encumbrances over the equipment supplied to it by the Claimant...<sup>25</sup>

<sup>12</sup> E.g. final award (1999) in ICC case 10062, § 13.3; interim award (2003) in ICC case 12361, § 37.

<sup>13</sup> One exception is case 11905 [unpublished], in which the parties concluded an 'Interim Measures Agreement'.

<sup>14</sup> E.g. interim award (2000) in ICC case 10648; partial award (2001) in case 10681, § 6; interim award (2001) in ICC case 11399, §§ 6.2-6.3.

<sup>15</sup> E.g. partial award (2001) in ICC case 10681, § 6; interim award (2003) in ICC case 12361, § 38.

<sup>16</sup> In case 10021, the respondent unsuccessfully argued that the law at the place of the arbitration did not permit interim relief to be granted by the arbitral tribunal (interim award (1999), §§ 24-26).

<sup>17</sup> E.g. interim award (1999) in ICC case 10021, § 36.

<sup>18</sup> See final award (2000) in ICC case 10062, §§ 13.2-13.3. See also final award (2008) in ICC case 14287, IV.11, § 3, indicating that an interim measure may be binding only upon the parties to the dispute, not third parties.

<sup>19</sup> Interim award (1999) in case 10021, § 29, citing P. Bernardini, 'The Powers of the Arbitrator' in *Conservatory and Provisional Measures in International Arbitration*, ICC Publication no. 519 (1993) 23.

<sup>20</sup> Article 23(1) of the 1998 Rules and Article 28(1) of the 2012 Rules.

<sup>21</sup> Partial award (2001) in ICC case 10681, § 10, citing G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996) 144.

<sup>22</sup> Partial award (2002) in case 12122 [unpublished].

<sup>23</sup> *Ibid.* See also interim award (2003) in ICC case 12361, § 81.

<sup>24</sup> In ICC case 12122 [unpublished], a request to prohibit the calling of an on-demand guarantees was rejected.

<sup>25</sup> Interim award (2003) in ICC case 12361, § 85.



The partial award (2002) in case 11866 provides an example of a compelling injunction, requiring the respondent to deposit with the ICC its unpaid share of the advance on costs, for which the claimant had provided a bank guarantee in substitution:

The tribunal considers that it has authority under Article 23 of the Rules [of Arbitration of 1998] to order Respondent to remedy its breach of the arbitration clause during the pendency of these proceedings. Consequently, using its discretion, and without prejudice to its ultimate decision as to the costs of arbitration, the tribunal hereby orders Respondent to transfer to the Secretariat of the ICC, within 15 calendar days from the notification of this Award, the sum of . . . as its share of the advance on costs, and to do whatever is necessary to obtain the release by the ICC of the bank guarantee issued at the Claimant's request. It goes without saying that this order does not in any way affect the power of the Court or of the Secretariat to administer the financial aspects of this arbitration.<sup>26</sup>

Broadly speaking, the ordering of an interim payment is also considered to be a type of injunction. In the interim award (2003) in case 12196, the tribunal granted the request for an interim payment,<sup>27</sup> whereas in the partial award (2004) in case 12553 the arbitrator rejected the application for an interim payment on the ground that the applicant would not suffer irreparable damage if the measure were not granted and there was no urgency for such relief.<sup>28</sup> In contrast, in the partial award (2002) in case 11857, the tribunal ordered payment not as an interim measure, as requested, but as a partial substantial remedy after recharacterizing the request:<sup>29</sup>

The arbitral tribunal refers to the explanations and additional information provided by [Respondents] at the hearing on . . . 2002 in respect of the purpose and scope of [their] request. On this basis, it considers that the request initially characterized by [Respondents] as a 'request for interim measures' is . . . a counterclaim for a final ruling ordering [Claimants] to pay provisional sums calculated in accordance with the provisions of Article 10.6 (i) of the Agreement . . .

## B. Anti-suit injunctions

Controversy reigns over whether arbitrators can order anti-suit injunctions, requiring a party to refrain from pursuing a remedy in a state court. A tribunal affirmed that this was possible, and even necessary, in a case where an action brought before a state court was patently beyond the court's jurisdiction and 'therefore abusive'.<sup>30</sup> Similarly, another tribunal ordered an anti-suit injunction on the basis that the court action could result in damage to a party and 'materially affect the practical effectiveness of the ongoing arbitration proceedings and compromise the subject matter of the arbitration'.<sup>31</sup>

## C. Security for claims/costs/ interim measures

There are three types of security that can be granted as interim measures of protection in arbitration: security for claims, security for the costs of the arbitration, and security for interim measures to ensure funds are available to pay possible future damages.

In case 8307, after assessing the circumstances of the case, the tribunal ordered security as follows:

[Respondent 1] shall within thirty days from the date of this Interim Award put up a security in favour of [Respondent 2] in the amount of . . . in the form of a guarantee issued by a first class bank having offices in Geneva (the place of arbitration). The guarantee shall upon presentation to the issuing bank of a copy of the Final Award certified by the ICC Court of Arbitration under Art. 23(2) of the Rules be payable in such of the amount of [Respondent 2]'s . . . claim against [Respondent 1] as the Final Award shall have granted.<sup>32</sup>

The amount granted as security corresponded to the amount of the debt that had been acknowledged by Respondent 1 towards Respondent 2.<sup>33</sup>

In case 9950, the tribunal rejected a request by the Respondent for an interim measure to facilitate the enforcement of a final award in its favour:

we consider that the Respondent has failed to establish, at this stage of the procedure, a sufficient degree of risk that the Claimant will not have sufficient assets to meet an award against it to justify the measures sought.<sup>34</sup>

<sup>26</sup> Partial award (2002) in ICC case 11866 [unpublished].

<sup>27</sup> Interim award (2003) in ICC case 12196, § 30.

<sup>28</sup> Partial award (2004) in ICC case 12553 [unpublished]. The arbitrator also mentioned that urgency is another criterion for determining whether to grant interim and conservatory measures.

<sup>29</sup> Partial award (2002) in ICC case 11857 [unpublished], translated from the original French. In the partial award (2004) in ICC case 11813, on the other hand, the arbitral tribunal appears to have used its power to render an award on interim measures to order payment of part of the amount claimed by the requesting party as the other party had accepted liability for that part of the amount.

<sup>30</sup> Interim award (2001) in ICC case 8307, §§ 9–10. The arbitrator referred above all to ICC case 8887 (1997), [2000:] ASA Bulletin 37.

<sup>31</sup> Partial award (2001) in ICC case 10681, §§ 13–14.

<sup>32</sup> Interim award (2001) in ICC case 8307, § 19.

<sup>33</sup> *Ibid.*, § 18.

<sup>34</sup> Interim award (2000) in ICC case 9950, § 6.



In case 11399, the tribunal likewise refused to grant a request for security for costs based on the argument that the other party was established in a foreign country. The arbitral tribunal held that the distinction between a foreign and a non-foreign party was inappropriate in international arbitration:

If such a distinction can be made under the municipal procedural law of each single state, it is far more difficult, if not impossible, to maintain the same distinction in international arbitration proceedings. Such proceedings are to a large extent disconnected from any national jurisdiction.<sup>35</sup>

In another case, the tribunal rejected the request for security for costs on the ground that the applicant could not prove the existence of an exceptional situation necessitating a *cautio judicatum solvi*.<sup>36</sup>

As far as security for interim measures is concerned, Article 23(1) of the 1998 ICC Rules (now Article 28(1) of the 2012 Rules) clearly allowed arbitrators to order such security if the circumstances were appropriate. In the interim award (2003) in case 12196, the tribunal rejected the request for security by the party in whose favour an interim payment was ordered as an interim measure of protection. In so doing, the sole arbitrator evaluated the circumstances and ruled as follows:

without expressing any definitive view on the outcome of the arbitration, the Respondent has not established on this application a sufficient evidential basis for its allegations to enable me to conclude that its defences or counterclaim 'will in every likelihood succeed'. The Claimant is accepted to be a substantial company and there is no reason to doubt that, if it fails by the final award to recover the sum of [the deposited amount] it will return the same to the Respondent.<sup>37</sup>

#### D. Attachments

Arbitrators generally lack the power to order attachments, as confirmed in the 1999 interim award in case 10021:

In the present case Claimant has specifically requested the arbitral tribunal to issue an interim conservatory award ordering Respondents to refrain from the further transferring their assets. The arbitral tribunal has decided to issue an award on conservatory measures ... but has found it inappropriate to grant requests of attachment where the power of national courts would be a prerequisite ... This is particularly the case when security is sought by immobilizing real estate and other *in rem* measures requiring cooperation of official national bodies such as land or company registries.<sup>38</sup>

### III. Requirements for ordering interim measures

Like many arbitration laws and rules, the ICC Rules do not specify under what conditions arbitral tribunals may order interim measures. To determine these conditions, arbitrators generally look to trends in arbitration, the law at the place of the arbitration and scholarly writings.<sup>39</sup>

It is generally accepted that the granting of an interim measure generally presupposes an urgent need for interim protection.<sup>40</sup> As for other requirements, it is useful to consider the approaches of various arbitral tribunals. In its partial award of 2001 in case 10681, the arbitral tribunal set out the following list of requirements for granting interim measures:

- a) threat of grave or irreparable damage to the counterparty in the arbitration proceedings;
- b) threat of grave or irreparable damage to the tribunal's jurisdiction; and/or
- c) the preservation of the status quo of the arbitration so as to protect the subject matter from conduct which might render the outcome of the arbitration proceedings useless.<sup>41</sup>

Similarly, in the interim award of 2001 in case 11225, the sole arbitrator ruled that in order to grant interim measures:

the arbitrator must satisfy himself that irreparable harm would be caused to Claimant and that the measures are urgent; the arbitrator also has to be convinced of the likelihood of success of Claimant's position on the merits.<sup>42</sup>

Ruling on a request to prohibit payment of an on-demand guarantee, the arbitral tribunal in case 12122 stated as follows in its partial award of 2002:

An on-demand guarantee may be called pending the final outcome of the dispute. French law, as the governing law, contractual and arbitral, allows arbitral tribunals to issue interim or protective measures in order to forbid payment of a guarantee, especially in case of urgency or risk of imminent damage.<sup>43</sup>

<sup>35</sup> Interim award (2001) in ICC case 11399, § 7.5.

<sup>36</sup> Partial award (2002) in ICC case 11798.

<sup>37</sup> Interim award (2003) in ICC case 12196, § 34.

<sup>38</sup> Interim Award (1999) in ICC case 10021, § 34, citing K.P. Berger, *International Economic Arbitration* (1993) 341.

<sup>39</sup> In its partial award (2002) in ICC case 12040 [unpublished], the arbitral tribunal noted a trend in ICC arbitration practice 'to refer to the requirements either set by the applicable procedural law or deemed appropriate by the tribunal' when determining requirements for granting interim measures of protection.

<sup>40</sup> E.g. interim award (2001) in ICC case 8307, § 16; interim award (2000) in ICC case 10648.

<sup>41</sup> Partial award (2001) in ICC case 10681, § 11.

<sup>42</sup> Interim award (2001) in ICC case 11225 [unpublished], citing M. Blessing, *Introduction to Arbitration - Swiss and International Perspective* (1999) 857.

<sup>43</sup> Partial award (2002) in ICC case 12122 [unpublished].



The arbitral tribunal in case 13194 gave the following list of conditions for granting interim measures:

a party seeking interim relief must demonstrate urgency and irreparable harm and that no pre-judgment of the merits of the dispute is involved in order to warrant relief before a final award is granted.<sup>44</sup>

In case 12040, the arbitral tribunal noted that a trend had emerged in ICC arbitral practice according to which the following three main requirements had to be met for the granting of interim measures of protection: no pre-judgment of a case, urgency and irreparable or substantial harm.<sup>45</sup>

In case 12361, after considering ICC arbitral practice and scholarly opinion, the arbitral tribunal concluded that

in considering whether to order such measures, ICC arbitrators have most frequently required a showing of the need for such measures as a matter of 'urgency' or in order to prevent 'irreparable' or otherwise substantial harm to the applying party.<sup>46</sup>

This last approach seems to sum up the current trend in ICC arbitration. However, it should be noted that 'substantial harm' is to be understood as meaning a sufficient degree of harm for it to be categorized as 'irreparable'. Otherwise, the standard for granting interim protection in ICC arbitration would be too high, meaning that interim measures could be granted only in 'exceptional circumstances'.<sup>47</sup> The standard of 'appropriate circumstances' would seem to be better suited to the language and spirit of the ICC Rules as well as the needs of international commerce. The arbitral tribunal in case 12361 elaborated on this condition, stating that 'arbitrators must endeavour to balance the relative harm to each party that may or may not flow from the granting or denial of the measures requested'.<sup>48</sup>

It must further be noted that ICC arbitral tribunals have generally refrained from ordering interim relief when doing so 'would be equivalent to pre-judging the merits of the case'.<sup>49</sup> To avoid this risk, any review of the merits undertaken when granting or refusing an interim measure should undoubtedly be done on a *prima facie* basis.<sup>50</sup> It may be noted that whenever a substantial remedy is sought that alters the agreement of parties or their contractual obligations, the request is refused.<sup>51</sup>

When it comes to granting security for claims or for costs, a number of other special requirements must be met, as pointed out in case 8307:

In the particular case of an order to provide security for compliance and for costs, such relief is justified if based on special circumstances. Firstly, the financial standing of the party from whom security is requested must be so precarious as to warrant fear that the party will not be able to fulfil its obligations resulting from the arbitral tribunal and to reimburse the costs incurred by the other party in the course of the arbitration should the arbitral tribunal order reimbursement. Secondly, the merits of the claim in respect of which security is requested must have been sufficiently established...<sup>52</sup>

#### IV. Compliance with interim measures ordered by arbitral tribunals

Arbitrators are not generally given coercive powers to enforce their decisions on interim measures. As noted by one arbitral tribunal, 'the arbitral tribunal lacks *imperium* to ensure compliance of a party with an interim or conservatory measure'.<sup>53</sup> However, arbitrators have at their disposal other means of forcing a party to comply with their decisions on interim measures.<sup>54</sup> For instance, although not expressly requested, the arbitrator in case 8307 noted that if the anti-suit injunction directed at one of the respondents were not complied with, 'relief for damages resulting from such breach of the agreement to arbitrate might possibly be sought in this arbitration'.<sup>55</sup>

- <sup>44</sup> Interim award (2003) in ICC case 12361, § 85, citing E.A. Schwartz, *supra* note 7.
- <sup>45</sup> Partial award (2002) in ICC case 12040 [unpublished], citing J.D.M. Lew, *supra* note 2; see also partial award (2002) in ICC case 11740.
- <sup>46</sup> Interim award (2003) in ICC case 12361, §§ 41-45.
- <sup>47</sup> *Ibid.*
- <sup>48</sup> *Ibid.*, § 42.
- <sup>49</sup> Interim award (2001) in ICC case 8307, § 22. See also interim award (2003) in ICC case 12196, § 31; final award (2008) in ICC case 14287, IV.11, § 3.
- <sup>50</sup> E.g. interim award (2001) in ICC case 11225 [unpublished] concerning a request for interim measures enjoining a party from using a trademark and manufacturing competing machinery: 'To succeed in its request for interim relief, [Claimant] has to show convincingly that, under a *prima facie* review of the elements submitted to the Arbitrator, [Respondent] is under an obligation to use the trademark, logo and signs only for the sale of [Claimant]'s products, i.e. the products covered by the Distributorship Agreement.' In another case also concerning use of a trademark, the arbitral tribunal rejected the request for interim relief on the grounds that 'these issues are clearly important fundamental issues which cannot be settled by the arbitration tribunal at this stage of the proceeding' (interim award (2001) in ICC case 11055 [unpublished]).
- <sup>51</sup> See interim award (2000) in ICC case 10648; partial award (2002) in ICC 11740. The interim award (2003) in ICC case 12361, § 71, offers an interesting example of an arbitral tribunal refusing to reallocate through interim relief a risk accepted by the parties when contacting with each other.
- <sup>52</sup> Interim award (2001) in ICC case 8307, § 16, referring to Fouchard Gaillard Goldman, *International Arbitration* (1999) at § 1339.
- <sup>53</sup> Interim award (1999) in ICC case 10021, § 33.



## V. Costs of interim measure proceedings

In most of the awards studied, the issue of costs for handling interim measure requests was expressly reserved for the final award. Some of the decisions were silent on the issue. Even in such cases, there is no doubt that an arbitral tribunal's power to decide on the costs of the arbitration<sup>54</sup> in the final award should extend to the costs of any proceedings for interim measures.

## VI. Relationship between arbitrators and courts

The ICC Rules allow interim measures to be sought from the arbitral tribunal or from a court (referred to more broadly as 'judicial authority').<sup>57</sup> Parties are free to go to the courts before the case file is transmitted to the arbitrators,<sup>58</sup> but may do so thereafter only in 'appropriate circumstances'.<sup>59</sup>

Arbitrators are generally reluctant to interfere with the jurisdiction of the courts in respect of interim measures. For instance, in case 13194 the tribunal refrained from interfering with a court order preventing the expert appointed by the ICC International Centre for Expertise from publishing his report.<sup>60</sup> However, in cases where parallel proceedings for interim relief are pending in the courts, such proceedings should not restrict the power of arbitrators to grant interim measures of protection.<sup>61</sup>

<sup>54</sup> On the force and enforceability of arbitral interim measures, see, e.g., A. Yesilirmak, *supra* note 5 at 237-272.

<sup>55</sup> Interim award (2001) in ICC case 8307, § 12.

<sup>56</sup> See Articles 37(4) and 37(5) of the 2012 ICC Rules.

<sup>57</sup> See Article 23(2) of the 1998 ICC Rules and Article 28(2) of the 2012 ICC Rules. See also final award (2000) in ICC case 9103 confirming that the appointment of an expert by a court is not incompatible with an arbitration agreement.

<sup>58</sup> It should be noted that, for urgent interim and conservatory measures required before the case file is transmitted to the arbitral tribunal, the 2012 ICC Rules offer the possibility of resorting to an emergency arbitrator; see Article 29 and Appendix V of the ICC Rules.

<sup>59</sup> On the meaning of such restriction, see, A. Yesilirmak, *supra* note 5 at 94-97.

<sup>60</sup> Interim award (2005) in ICC case 13194.

<sup>61</sup> See interim award (2000) in ICC case 10648.

## Conclusion

Interim measures of protection are no less important than the final protection of a party's rights. They play a crucial role in preventing or minimizing any disadvantage that might be caused by the sometimes lengthy period before a dispute is finally settled and the result implemented. The awards reviewed clearly show that arbitrators have no difficulty exercising the power the ICC Rules give them to order interim measures. To enhance the quality of the service provided to parties, it is imperative that this power be used effectively. To that end, as demonstrated in the awards reviewed, valuable guidance can be found in the growing body of case law and scholarly writings on the subject.

**Ex. R-ER-16**

Resources 

## Minutes | Meeting of the New gTLD Program Committee

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10 Sep 2013

**Note:** On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at <http://www.icann.org/en/groups/board/new-gTLD>.

A Special Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held telephonically on 10 September 2013 at 13:00 UTC.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Fadi Chehadé (President and CEO, ICANN), Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, Ray Plzak, George Sadowsky, Mike Silber, and Kuo-Wei Wu.

Gonzalo Navarro sent apologies.

Jonne Soininen (IETF Liaison) and Francisco da Silva (TLG Liaison) were in attendance as non-voting liaisons to the Committee. Heather Dryden was in attendance as an observer to the Committee. Bruce Tonkin was in attendance as an invited (non-voting) observer for Item 1 on the Main Agenda.

ICANN Staff in attendance for all or part of the meeting: Akram Atallah, President, Generic Domains Division; John Jeffrey, General Counsel and Secretary; Megan Bishop; Michelle Bright; Samantha Eisner; Allen Grogan; Dan

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- a. [Update on String Similarity](#)
- b. [BGC recommendation on Reconsideration Request 13-5](#)  
[Rationale for Resolution 2013.09.10.NG02](#)
- c. [GAC Communiqué Durban – Comprehensive Review of the Scorecard](#)  
[Rationale for Resolution 2013.09.10.NG03](#)
- d. [GAC Communiqué Beijing – Scorecard](#)

- e. [GAC Communiqué Beijing – Category 1](#)
- f. [ALAC Statement on the Preferential Treatment for Community Applications in String Contention](#)
- g. [ALAC Statement on Community Expertise in Community Priority Evaluation](#)
- h. [AOB](#)

## 1. Consent Agenda

- a. Approval of NGPC Meeting Minutes

The Chair introduced the item on the Consent Agenda. George Sadowsky moved and Chris Disspain seconded the resolution in the Consent Agenda and the Committee took the following action:

Resolved (2013.09.10.NG01), the NGPC approves the minutes of the 13 July 2013 and 17 July 2013 New gTLD Program Committee Meetings.

**All members of the Committee present voted in favor of Resolution 2013.09.10.NG01. Gonzalo Navarro was not available to vote on the Resolution. The Resolution carried.**

## 2. Main Agenda

- a. Update on String Similarity

The Chair provided an overview of the items on the main agenda to be considered by the Committee, and noted that ICANN Board Member Bruce Tonkin would participate in the discussion on the first agenda item to provide input on the string similarity review process.

Bruce Tonkin provided the Committee with an overview of how the string similarity standards were developed, explaining that string similarity is based on the GNSO Policy Recommendation Number 2, which states that strings must not be confusingly similar to an existing or applied-for top-level domain.

Bruce noted that when developing the string similarity standards, the GNSO considered the "confusingly similar" standard used in trademark law in various jurisdictions, and the Paris Convention for protection of intellectual property.

Bruce provided the Committee with a summary of the string similarity review process in initial evaluations, which focuses on visual similarity, and the string confusion objection process. Bruce noted that there was a key decision made early on in the iterations of the Applicant Guidebook that ICANN, in the initial evaluation stage, would only examine strings for visual confusion.

Bruce also explained the role of the string confusion objections in the process, and noted that the policy was to allow for a broader look at confusion – not just visual confusion. Bruce commented that the string similarity objection is a dispute between two parties, and ICANN is not involved.

Bruce commented that some applicants who have received unfavorable determinations from the string similarity review process or the string similarity objection process have proceeded to invoke the Reconsideration Request process provided for in the ICANN Bylaws.

Mike Silber noted three key issues for the Committee to consider with regard to the string similarity decisions. Mike asked the Committee to consider what, if anything, should be done to address the perceived inconsistency between the findings of the various string confusion objection panels. Mike stated that the Committee also should consider the decisions of the string similarity review panel and whether there are changes needed in future rounds in light of the concerns raised in the current round. Mike noted that staff would prepare a briefing paper providing more details about these concerns for discussion at the Committee's next meeting.

The Chair inquired whether Mike was suggesting that any action would only impact future rounds. Erika Mann asked whether Mike recommended that the Committee should ask the experts to provide consistent opinions. Mike clarified that the Committee should first understand whether there is a genuine problem before it takes action. Additionally, Mike recommended that the Committee needs to better understand the consequences of taking action to impact the current round.

Akram Atallah recommended that the Committee keep separate the issues of the string similarity review, which looked only at visual similarity, from the string confusion objection. Akram indicated that staff would prepare a paper regarding these issues for future conversation.

After the conclusion of the discussion, Bruce excused himself from the remainder of the meeting.

b. BGC recommendation on Reconsideration Request 13-5

The Chair introduced the item to the Committee and Amy Stathos presented an overview of Reconsideration Request 13-5, including the Board Governance Committee's (BGC) recommendation to the Committee. Amy noted that the requester argued that the decision of the string similarity review panel should be reversed so that "hotels" and "hoteis" are not in a contention set with each other. Amy also reminded the Committee of the basis in the Bylaws for Reconsideration Requests. The BGC determined that the requester had not stated proper grounds for reconsideration.

George Sadowsky stated that he understood that the BGC did the right thing, but thought the end result that was contrary to ICANN's and the user's best interests. George noted he intended to abstain from voting as a result.

Olga Madruga-Forti noted that she intended to abstain from the vote because there was not sufficient rationale provided for why the string similarity review panel made its determination.

The Chair noted the party submitting the Reconsideration Request essentially just disagrees with the decision. Because the process was followed, the Chair noted that the Committee should not accept the Reconsideration Request.

Ray Plzak agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don't agree with the outcome to make an objection, other than using a Reconsideration Request. Ray recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits. Olga recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted.

Bill Graham agreed with Ray's suggestion, and noted that generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members. The Chair agreed with Bill's sentiment.

The General Counsel and Secretary noted that ICANN has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns.

The President and CEO moved and Ray Plzak seconded the resolution.

The Committee then took the following action:

Whereas, Booking.com B.V.'s ("Booking.com") Reconsideration Request, Request 13-5, sought reconsideration of the ICANN staff action of 26 February 2013, when the results of the String Similarity Panel were posted for the New gTLD Program, placing the applications for .hotels and .hoteis into a string similarity contention set.

Whereas, the BGC considered the issues raised in Reconsideration Request 13-5.

Whereas, the BGC recommended that Reconsideration Request 13-5 be denied because Booking.com has not stated proper grounds for reconsideration.

Resolved (2013.09.10.NG02), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-5, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.pdf> [PDF, 117 KB].

**The Chair took a voice vote of Resolution 2013.09.10.NG02. Cherine Chalaby, Fadi Chehadé, Chris Disspain, Bill Graham, and Mike Silber voted in favor of Resolution 2013.09.10.NG02. Olga Madruga-Forti, Ray Plzak, George Sadowsky and Kuo-Wei Wu abstained from voting on Resolution 2013.09.10.NG02. Erika Mann and Gonzalo Navarro were not available to vote on Resolution 2013.09.10.NG02. The Resolution carried.**

## Rationale for Resolution 2013.09.10.NG02

ICANN's Bylaws call for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Reconsideration Request 13-5 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

The Request seeks a reversal of the 26 February 2013 decision of the String Similarity Review Panel (the "Panel") to place Booking.com's application for .hotels in the same contention set as .hoteis. Specifically, Booking.com asserted that its applied for string of .hotels can co-exist in the root zone with the applied for string .hoteis without concern of confusability, and therefore, .hotels should not have been placed in the same contention set with .hoteis.

The Request calls into consideration: (1) whether the Panel violated any policy or process in conducting its visual similarity review of Booking.com's application; and (2) whether the NGPC has the ability to overturn the Panel's decision on .hotels/.hoteis on the basis that the decision was provided as an "advice to ICANN" and that ICANN made the ultimate decision to accept that advice.

The BGC noted that a similar reconsideration request was previously submitted by Booking.com on 28 March 2013 and placed on hold pending the completion of a request pursuant to ICANN's Documentary Information Disclosure Policy. Therefore, this Request relates back to the date of the original filing and should be evaluated under the Bylaws that were in effect from 20 December 2012 through 10 April 2013.

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachments, and concluded that Booking.com failed to adequately state a Request for Reconsideration of Staff action because they failed to identify any policy or process that was violated by Staff. The BGC noted that Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the Panel's decision to place .hotels and .hoteis in the same contention set. Rather, Booking.com seeks to supplant what it believes the review methodology for assessing visual similarity should have been as opposed to the methodology set out in Section 2.2.1.1.2 of the Applicant Guidebook and asks that the BGC (and the Board through the New gTLD Program Committee) retry the 26 February 2013 decision based upon its proposed methodology. The BGC concluded that this is not sufficient ground for Reconsideration because the Reconsideration process is not available as a mechanism to re-try the decisions of the evaluation panels.

With respect to Booking.com's contention that the 26 February 2013 decision was taken without material information, such as that of Booking.com's linguistic expert's opinion or other "information that would refute the mistaken contention that there is likely to be consumer confusion between '.hotels' and '.hoteis'", the BGC concluded that there is no process in the String Similarity Review for applicants to submit additional information. As ICANN has explained to Booking.com in response to its DIDP requests for documentation regarding the String Similarity Review, the Review was based upon the methodology in the Applicant Guidebook, supplemented by the Panel's process documentation; the process does not allow for additional inputs. The BGC noted that Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).

In consideration of the second issue, the BGC determined that Booking.com's suggestion that the Board (through the NGPC) has the ability to overturn the Panel's decision on .hotels/.hoteis because the Panel merely provided "advice to ICANN" and that ICANN made the ultimate decision to accept that advice is based upon inaccurate conclusions of the String Similarity Review process. As such, the BGC concluded that Booking.com has not stated sufficient grounds for reconsideration. The BGC noted that all applied for strings are reviewed the Panel according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the Panel, ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) Whether the results are transmitted as "advice" or "outcomes" or "reports", ICANN had always made clear that it would rely on the advice of its



evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. The subsequent receipt and consideration of GAC advice on singular and plural strings does not change the established process for the development of contention sets based on visual similarity as the ICANN Board is required under the Bylaws to consider GAC Advice on issues of public policy, such as singular and plural strings. The BGC concluded that Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.

In addition to the above, the full BGC Recommendation that can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.pdf> [PDF, 117 KB] and that is attached to the Reference Materials to the Board Submission supporting this resolution, shall also be deemed a part of this Rationale.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

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

Members of the Committee who abstained from voting offered voting statements. Ray Pizak noted that he abstained from voting because he is disappointed in what is being done to remedy the situation. Ray would like to see more resolve to fix the process.

Olga Madruga-Forti stated that the BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to establish a better record of the rationale of the string similarity review panel in circumstances such as this.

Kuo-Wei Wu agreed with the voting statements of Ray and Olga.

George Sadowsky provided the following voting statement: I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but 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 ICANN community and/or Internet users in general.

The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider.

As a Board member who is aware of ICANN's Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case.

However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.

Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing

decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed *ex ante* analysis of the real issues with respect to user confusion.

The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS. The string similarity exercise is one of the means in the new gTLD process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are 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.

I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect in my opinion an understanding of the current reality of the situation.

The Committee agreed to discuss the process further at its meeting in Los Angeles.

c. GAC Communiqué Durban – Comprehensive Review of the Scorecard

Chris Disspain led the Committee through a discussion of each of the items on the proposed scorecard to address the GAC's advice in the Durban Communiqué. Chris noted that the window for applicants to respond to the GAC's advice had closed and the comments were available for consideration by the Committee.

The Committee discussed that additional time was needed to consider its position on the GAC consensus objection advice concerning .AMAZON given the information presented in the applicant's response.

Chris noted that recently, a series of communications concerning the .THAI application were provided to the Committee, which assert that the GAC's advice was not valid. Chris clarified that GAC's position in respect to its consensus advice on the application for .THAI is supported by the government of Thailand.

Chris discussed the proposed position in the scorecard for .SPA, .YUN, .GUANGZHOU, and .SHENZHEN. Kuo-Wei Wu asked whether the proposed response in the scorecard applied to all strings with geographic indicators. Chris clarified that the scorecard only considers the strings for which the GAC issued advice.

The Committee also discussed the new correspondence from the GAC regarding .WINE and .VIN. Heather Dryden acknowledged the complexity of the issue, and noted that even though the GAC did not arrive at consensus agreement, there is benefit in increasing the Committee's understanding about the reasons for the differing views that exist among the members in the GAC on the applications for .VIN and .WINE. The Committee decided to consider the advice at its next meeting in Los Angeles.

The Committee considered the remaining items in the scorecard.

Chris Disspain moved and George Sadowsky seconded the resolution.

The Committee then took the following action:

Whereas, the GAC met during the ICANN 47 meeting in Durban and issued a Communiqué on 18 July 2013 ("Durban Communiqué").

Whereas, on 1 August 2013, ICANN posted the Durban Communiqué and officially notified applicants of the advice <<http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>>, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

Whereas, the NGPC met on 12 August 2013 to consider a plan for responding to the GAC's advice on the New gTLD Program, transmitted to the Board through its Durban Communiqué.

Whereas, the NGPC has considered the applicant responses submitted during the 21-day applicant response period, and the NGPC has identified items of advice in the attached scorecard where its position is consistent with the GAC's advice in the Durban Communiqué.

Whereas, the NGPC developed a scorecard to respond to the GAC's advice in the Durban Communiqué similar to the one used to address the Beijing Advice as well as during the GAC and the Board meetings in Brussels on 28 February and 1 March 2011, and has identified where the NGPC's position is consistent with GAC advice, noting those as "1A" items.



Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2013.09.10.NG03), the NGPC adopts the "ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué" (10 September 2013), attached as [Annex 1](#) [PDF, 119 KB] to this Resolution, in response to the items of GAC advice in the Durban Communiqué as presented in the scorecard.

**All members of the Committee present voted in favor of Resolution 2013.09.10.NG03. Erika Mann and Gonzalo Navarro were not available to vote on Resolution 2013.09.10.NG03. The Resolution carried.**

Rationale for Resolution 2013.09.10.NG03

### Why the NGPC is addressing the issue?

Article XI, Section 2.1 of the ICANN Bylaws <<http://www.icann.org/en/about/governance/bylaws – XI>> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Durban Communiqué dated 18 July 2013. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

### What is the proposal being considered?

The NGPC is being asked to consider accepting the GAC's Durban advice as described in the attached ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué" (10 September 2013). As noted in the scorecard, most items of advice are scored as "1A," which indicates that the NGPC's position is consistent with GAC advice as described in the scorecard.

### Which stakeholders or others were consulted?

On 1 August 2013, ICANN posted the GAC advice and officially notified applicants of the advice <<http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>>, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant responses are provided at: <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>. The NGPC has considered the applicant responses in formulating its response to the GAC advice as applicable.

### What concerns or issues were raised by the community?

As part of the 21-day applicant response period, several of the applicants indicated that they have entered into dialogue with the affected parties, and they anticipated reaching agreement on the areas of concern. Some of the applicants noted that they have proposed additional safeguards to address the concerns of the relevant governments are unsure as to whether a settlement can be reached. These applicants asked that the ICANN Board allow their applications to proceed even if an agreement among the relevant parties cannot be reached. Additionally, inquiries have been made as to whether applicants and the relevant governments will have the opportunity to comment on conversations among the GAC, ICANN Board, and ICANN staff. There have been requests that the GAC, NGPC, and ICANN staff consult with applicants before decisions regarding any additional safeguards are made.

Other applicants noted the important role of governments in the multi-stakeholder model, but advised the NGPC that it should not allow governments to exercise veto power over ICANN policies adopted through the multi-stakeholder process.

### What significant materials did the Board review?

As part of its deliberations, the NGPC reviewed the following materials and documents:

- GAC Durban Communiqué:  
[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 103 KB]

- Applicant responses to GAC advice:  
<http://newgtlds.icann.org/en/applicants/gac-advice/durban47>
- Applicant Guidebook, Module 3:  
<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]
- Summary of Applicant Responses to GAC Advice in the Durban Communiqué (see reference materials).

#### **What factors did the Board find to be significant?**

In adopting its response to the GAC's advice in the Durban Communiqué, the NGPC considered the applicant comments submitted, the GAC's advice transmitted in the Durban Communiqué, and the procedures established in the AGB.

#### **Are there positive or negative community impacts?**

The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible.

#### **Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There are no foreseen fiscal impacts associated with the adoption of this resolution.

#### **Are there any security, stability or resiliency issues relating to the DNS?**

Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS.

#### **Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?**

ICANN posted the GAC advice and officially notified applicants of the advice on 1 August 2013. This triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

#### **d. GAC Communiqué Beijing – Scorecard**

The Committee engaged in a discussion on the open items of GAC advice in the Beijing Communiqué, including the Category 1 and Category 2 safeguard advice, and the protections for IGOs.

Chris Disspain provided the Committee with an update on the current proposal to address protections for IGOs, which would leverage the functionality of the current Trademark Clearinghouse claims function and the rapid take-down process of the URS. Chris noted that there might be a session among the NGPC and IGOs at the end of September to discuss a proposed approach to providing the protections.

With respect to the Category 2 safeguard advice, Christine Willet provided the Committee with an update of responses received from the applicants of strings identified in the GAC's advice regarding exclusive access for a generic string. Akram Atallah noted that the applicant responses received to date indicate that only a handful of the applicants intended to provide exclusive registry access.

The Committee agreed to discuss the path forward for the Category 2 safeguard advice at its next meeting.

#### **e. GAC Communiqué Beijing – Category 1**

Chris Disspain provided the Committee an update on the proposed approach to respond to the GAC's advice in the Beijing Communiqué regarding the Category 1 safeguards, and the Committee engaged in a discussion regarding a path forward. The discussion included consideration of how the safeguards could be implemented as contractual provisions, and distinguishing the list of Category 1 strings between those strings associated regulated industries, and all other listed strings.

Chris recommended a strategy for continued progress on the Category 1 safeguard advice, which included preparing a paper describing the proposed framework to address the advice, and socializing the paper among a

small number of GAC members before it is communicated to the GAC.

Jonne Soininen recommended that GAC members from non-English speaking nations be included in the discussions. Olga Madruga-Forti concurred with the recommendation.

Heather Dryden commented that the full GAC membership should be able to participate in the process, as appropriate, before the Committee finalizes the proposal.

Jonne inquired whether there are national variations that could cause concern from the GAC about what is considered regulated industry and what is not. Olga noted the importance of beginning to consider the consequences if there is non-compliance with a contractual obligation related to the Category 1 safeguards.

The Committee acknowledged the difficulty in scheduling an intersessional meeting with the GAC on this matter given the timing of the Buenos Aires meeting, and discussed how to move forward in advance of the Buenos Aires meeting.

f. ALAC Statement on the Preferential Treatment for Community Applications in String Contention

George Sadowsky provided the Committee with an overview of the concern expressed by the ALAC in its Statement on the Preferential Treatment for Community Applications in String Contention, noting that ALAC requested the Committee to provide preferential treatment to applications that meet the characteristics of community applications even if not submitted as a community application.

George indicated that he had discussions with the drafter of the ALAC Statement to better understand the concerns underlying the ALAC's letter.

The Committee discussed the concerns with implementing the ALAC's recommendation. Chris Disspain highlighted the need to be consistent with the position the Committee communicated to the GAC on this issue.

George noted that it may be difficult to accept the recommendation in the ALAC Statement, and Ray Plzak agreed.

George agreed to work with staff to prepare a response to the ALAC, and noted that the response should include consideration of the additional questions sent by the ALAC after it submitted the statement at hand.

g. ALAC Statement on Community Expertise in Community Priority Evaluation

George Sadowsky presented the concerns expressed in the ALAC Statement on Community Expertise in Community Priority Evaluation, noting that the ALAC questions the ability of the chosen community priority evaluator to evaluate with respect to a mind-set that is more community-focused as opposed to business-focused.

The Committee considered whether it would be appropriate to accept the ALAC's advice for ALAC to supply evaluators from the community to the panel, and George recommended against adopting this approach. Ray Plzak agreed, and commented that the Committee should not set a precedent in terms of inviting other people into assist with the work of panels, outside of the established process the exists to form the panels.

George proposed that the Committee direct staff to alert the panel of the concerns expressed in the ALAC statement. George also outlined a proposed response to the ALAC and agreed to work with staff on a formal response.

George commented that upon completion of the community priority evaluation process, it may be beneficial to do an informal audit to look for any egregious violations of understanding about the community priority evaluation.

h. AOB

The Committee did not discuss any other business, and the Chair called then called the meeting to a close.

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**Ex. R-ER-17**



## Chapter 5 - Arbitral Provisional Measures


**5-1** Faced with a request for a provisional measure, an arbitral tribunal initially establishes whether it has the necessary power to grant such measure. Once the tribunal establishes its power, it then determines the standards of procedure and principles required to grant such a measure. The determination of these standards and principles is vital as it facilitates consistency and predictability of the arbitration process, regardless of where arbitration takes place.<sup>(1)</sup> Thus, such determination makes the arbitration process more efficient.

**5-2** Arbitration rules and laws are generally silent concerning the standards and principles for the granting of an arbitral provisional measure. However, it should be noted, at the outset, that arbitrators are given broad powers and wide discretion in establishing such standards and principles.<sup>(2)</sup> These broad powers  ["page 160"](#) should be encouraged as the standards and principles should be flexible for tailor-making the appropriate measure in accordance with the circumstances of each individual case.<sup>(3)</sup> In addition, the provisional nature of such measure and "the specific needs of international arbitral practice"<sup>(4)</sup> should be taken into account.

**5-3** In determining the standards of procedure and principles, arbitrators occasionally make reference to or are inspired by various national laws, for example, the law of the place of arbitration or the law of the place of enforcement. Nonetheless, where a national arbitration law is applicable as a default procedure or through a party agreement and such law makes reference to national procedural rules for the grant of provisional measures, these rules will apply to arbitral process. A reference to national procedural law is, however, *hardly ever* done in practice.<sup>(5)</sup>

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**5-4** In their establishment of the standards and principles, arbitration rules or arbitral case law may provide guidance to arbitrators.<sup>(6)</sup> Consequently, comparative appraisal of arbitration rules and in-depth analysis of arbitral case law are to be made. For the purpose of such comparative analysis, seventy sets of arbitration rules<sup>(7)</sup> are examined.<sup>(8)</sup> At the outset, it should be indicated that some of the forty-four sets of arbitration rules containing a provision on provisional measures deal specifically with certain aspects of the standards of procedure and principles.

**5-5** Arbitral case law may provide guidance to arbitrators or "may be persuasive"<sup>(9)</sup> of how an arbitral tribunal handles a request for an interim measure.<sup>(10)</sup> Apparently, one should accept that "there is little precedent in international commercial arbitration" and that each arbitral case is and should be considered individually.<sup>(11)</sup> Nevertheless, arbitral practice has been witnessing the emergence of transnational procedural rules regarding arbitral provisional measures.<sup>(12)</sup> Such practice and rules owe much to the freedom given to arbitrators  ["page 162"](#) in regard of granting provisional measures, in particular, and of establishing rules of procedure in

### Author



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Ali Yesilirmak

### Source

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pp. 159 - 236

general.<sup>(13)</sup> In this regard, it is noteworthy that although most arbitral tribunals were very “cautious” about granting interim measures until the beginning of the 1990s,<sup>(14)</sup> the trend is in the process of change.<sup>(15)</sup> To this end, it should further be noted that arbitration is generally confidential, thus, it is difficult to examine various parts of the arbitral process.<sup>(16)</sup> However, there are a  [page "163"](#) few exceptions, for example, the practice of the Iran-US Claims Tribunal,<sup>(17)</sup> which operates under the UNCITRAL Arbitration Rules<sup>(18)</sup> and of a number of ICSED tribunals that are easily accessible.<sup>(19)</sup> Likewise, some ICC and AAA cases  [page "164"](#) concerning provisional measures are also accessible because their extracts may be published or may be examined in articles.<sup>(20)</sup> Similarly, a small number of arbitral decision issued in accordance with various other arbitration rules have been published. Apart from the above publications, this author has had the benefit of researching through some of the decisions of arbitral tribunals on provisional measures at the AAA and the ICC. The outcome of that research will also be examined below.

**5-6** The research at the AAA extends to a period between late 1997 and early 2000 but excludes then pending files. The research was done through 613 files in English of the AAA-ICDR.<sup>(21)</sup> Out of the files examined, there were twenty-two cases where a request for a provisional measure was made.<sup>(22)</sup> In twelve of those  [page "165"](#) cases, arbitral tribunals reached no decision because either the case was withdrawn or came to an end for another reason. In six cases, the requests were granted in the form of an order or a partial award. In the remaining four cases, the requests were denied.

**5-7** The research at the ICC covered two periods. The first period was between the mid-eighties and 1998. During this period, nearly 75 awards dealing with provisional measures were found.<sup>(23)</sup> The second period covered timeframe of a year beginning in January 1999. The research on the second period was done through awards in English. During this framework, thirty awards were found concerning interim measures.<sup>(24)</sup> As compared to the previous research, there is a clear increase in the requests for provisional measures in ICC arbitration.

**5-8** This chapter examines the standards of procedure and principles for the grant of provisional measures. It deals with: (1) initiation of arbitral proceedings for a provisional measure, (2) priority of the proceedings, (3) requirements for the grant of the measure, (4) its form, (5) its duration, (6) its reconsideration, modification or revocation, (7) types of provisional measures, (8) *ex parte* provisional measures, (9) costs in regard of those measures, and (10) the issue of damages.

### ***1. Initiation of The Proceedings for Arbitral Provisional Measures***

**5-9** There are two main issues in the area of provisional measures: (1) who initiates the proceedings, and (2) what should the request contain?

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#### ***1.1. Who Initiates the Proceedings: A Party or the Tribunal?***

**5-10** A proceeding for an arbitral provisional measure is generally initiated through a party request. Indeed, “[a] situation in which interim measures would be required but where no party makes a request is difficult to conceive”.<sup>(25)</sup> In conformity with this, the view



that the request should be party-oriented is confirmed by twenty-nine sets of the rules surveyed.<sup>(26)</sup> In addition, many national laws require a party request for interim protection of rights.<sup>(27)</sup> However, arbitral tribunals are occasionally empowered to grant a provisional measure without a party request, for example under the CIA Arbitration Rules.<sup>(28)</sup>

**5-11** Giving arbitrating parties the power to seek a provisional measure, if they need it, is a matter of party autonomy.<sup>(29)</sup> In contrast, the main purpose of empowering an arbitral tribunal to grant a measure upon its own initiative in international commercial arbitration is to prevent further aggravation of the dispute. Thus, in those rules allowing arbitral initiated provisional measures the focus is on allowing the tribunal to proceed with the arbitration in as smooth of manner as possible.<sup>(30)</sup>

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**5-12** Some of the rules surveyed do not deal with the issue of who makes the request at all. Nonetheless, it should be safe to assume that it is, in principle, a party who should apply for a measure since the principle of party autonomy is one of the paramount principles of international commercial arbitration. It should, in this regard, be noted that if both parties make a joint request for the same measure, then there is a strong incentive for a tribunal to comply with the request.

### **1.2. What Should a Request Contain?**

**5-13** In general, a party request for a provisional measure should contain certain elements. For example, Rule 39(1) of the ICSID Arbitration Rules describes these elements and may, in this author's view, be used as guidance where the applicable arbitration rules are silent. In accordance with that Rule, the request should "specify the rights to be preserved, the measures the recommendation of which is requested and the circumstances that necessitate such measures".<sup>(31)</sup> The last item is important as without good cause no measure would probably be granted. The detailed analysis of the reasons further "enable comments by the other party and deliberations by the tribunal".<sup>(32)</sup> A response should, obviously, contain the answers to the request.

**5-14** Where the request does not contain any of the above elements, the tribunal may require the relevant party to supply further information concerning the elements prior to rendering its decision.

**5-15** It should further be noted that the request does not necessarily be in writing.<sup>(33)</sup> The request may also be made orally, for instance, during the hearings.<sup>(34)</sup>

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### **2. Priority of Proceedings on Request for Provisional Measures**

**5-16** Since the purpose of a provisional measure is the interim protection of rights pending the final award, priority should be given to a request for this measure. Also the request should be dealt with, as much as possible, in a short period of time.

**5-17** Despite the obvious necessity of a timely action, the timeliness of a provisional measure is specifically addressed or required in only a small number of institutional rules.<sup>(35)</sup> For instance,




under the ICSID arbitration system, there seems to be an “assumption that to preserve the rights of a party [a] speedy action may be required”.<sup>(36)</sup> By relying on this assumption, Rule 39(2) of the ICSID Arbitration Rules provides that the consideration on a request for provisional measures shall have priority. It is, indeed, this author’s experience that nearly all requests for interim measures are handled with a certain speed and generally priority is given to such requests.<sup>(37)</sup>


**5-18** Due to the above priority, many commentators argue that the request tends to disrupt or delay arbitration proceedings.<sup>(38)</sup> It is difficult to agree with this argument<sup>(39)</sup> as it is very easy for an arbitral tribunal to distinguish whether or not the request is flagrant. Further, it should be kept in mind that “[t]he main rule will be that the arbitral process will continue undisturbed by the request”.<sup>(40)</sup> Furthermore, the request for an interim measure may have positive effect in resolution of the dispute.<sup>(41)</sup>

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### 3. Requirements to Grant a Measure

**5-19** For the grant of any provisional measure on an interim basis either by courts or arbitrators, there needs to be “a strong showing of an immediate and compelling need”.<sup>(42)</sup> Apparently, such showing is sought for minimizing “the risk of making an order which may turn out to be premature and erroneous after the facts and law have been fully developed at the hearing on the merits of the dispute”.<sup>(43)</sup> Apart from the above need, national arbitration laws<sup>(44)</sup> and arbitration agreements, (by incorporation, arbitration rules<sup>(45)</sup>) do not generally deal, *in detail*, with the requirements to grant arbitral provisional measures.<sup>(46)</sup> Twenty-nine sets of the rules surveyed deal with the requirements to grant arbitral provisional measures.<sup>(47)</sup> Out of that subset, twenty-five sets of the rules grant the arbitrator  [page "170"](#) wide discretion, such as, “where the tribunal deems necessary”<sup>(48)</sup> or under “appropriate circumstances”.<sup>(49)</sup> This wide language demonstrates that a provisional measure may be granted in a wide range of circumstances. For example, in circumstances where the purpose of the measure is related to securing a claim, which is tried by the tribunal,<sup>(50)</sup> or in circumstances where the measure is aimed at preventing events which could otherwise not be avoided.<sup>(51)</sup> In addition, the broad language allows for the arbitrator to determine that the requirement of “necessity” may also be paired with the “urgency” of the requested measure.<sup>(52)</sup>

**5-20** The above explanations demonstrate that the texts of arbitration rules are not very clear concerning the requirements for the granting of arbitral provisional measures. The clarity is obviously as important as the existence of the right for interim protection. This lack of clarity<sup>(53)</sup> is mainly based on the following issues

- (1) “[i]n international practice authority to prescribe provisional measures was left to the appreciation of the tribunal, presumably because it was difficult to foresee [in advance] the types of situations that might arise”,<sup>(54)</sup>
- (2) arbitral tribunals may apply procedural (or, rarely, substantive) laws on the determination of the requirements;<sup>(55)</sup> accordingly, there is no commonly  [page "171"](#) agreed harmonised one set of principles that would provide guidance for parties and arbitrators,<sup>(56)</sup> and
- (3)

in cases where the tribunal uses his own discretion, if permitted, for determination of the requirements, there is relatively little information on the actual practice of arbitrators on interim protection for rights.

**5-21** In an effort to establish some clarity as to the requirements of granting a provisional measure, an arbitral tribunal, in the absence of a party agreement, may adopt the principles of the applicable procedural law.<sup>(57)</sup> Alternatively, the tribunal may rely on the past experience of its individual members<sup>(58)</sup> or transnational arbitral procedural rules/customary rules in an effort to supplement the governing arbitration rules.<sup>(59)</sup> However, it is generally believed that “arbitral tribunals should grant or deny interim measures on the basis of a comparative law approach”.<sup>(60)</sup> According to this suggestion, arbitral tribunals should consider the following criteria: “*fumus boni iuris*, *periculum in mora*, and [page "172"](#) proportionality”.<sup>(61)</sup> In addition, cases on interim protection of rights under public international law<sup>(62)</sup> or growing number of arbitral decisions on provisional measures may provide guidance to the tribunal.<sup>(63)</sup>

**5-22** This author suggests that in granting a provisional measure, an arbitral tribunal should take guidance from: (1) arbitral case law, (2) comparative analysis of arbitration rules, and (3) scholarly opinions. The examination of these three important sources of arbitration law demonstrates that there are positive and negative requirements that arbitrators generally apply to determine the appropriateness of granting a provisional measure. In addition, the grant of a measure may be subject to a security for damages. Further, the request for a measure could be dismissed upon an undertaking of a party not to infringe the right that is subject of the interim protection.

**5-23** It is noteworthy for evidencing the satisfaction of the requirements that “the facts supporting the request for interim measures of protection have to be substantiated by *prima facie* evidence”.<sup>(64)</sup> Thus, an interim measure could be ordered where there is mere probability of “the relevant facts and rights”.<sup>(65)</sup> The [page "173"](#) probability requires a summary assessment of such facts and rights. This assessment is justified with the interim nature of provisional measures.<sup>(66)</sup>

**5-24** Should the tribunal refrain from granting the request it may nonetheless believe that rights of one or both parties may actually or potentially be infringed. In such cases, the tribunal can expedite the arbitration proceedings to mitigate the possible harm.<sup>(67)</sup>

**5-25** This section examines those: (1) positive and (2) negative requirements, (3) security for damages, and (4) the effect of an undertaking by a party.

### **3.1. Positive Requirements**

**5-26** Arbitration rules commonly refer to “necessity” as a positive requirement to grant a provisional measure.<sup>(68)</sup> This reference implies that to grant a provisional measure there needs to be an imminent danger of prejudice to a right of the applicant should the tribunal not take immediate action. Accordingly, two [page "174"](#) positive requirements arise from the requirement of “necessity”: urgency and prejudice.<sup>(69)</sup> In addition, the arbitral case law and scholarly opinions, assert that there are three more positive requirements. With these additional requirements, the collective requirements to grant a provisional measure are<sup>(70)</sup>

- (1) *prima facie* establishment of jurisdiction;
- (2) *prima facie* establishment of case;
- (3) urgency;
- (4) Imminent danger, serious or substantial prejudice if the measure requested is not granted; and
- (5) proportionality.

### 3.1.1. *Prima Facie Establishment of Jurisdiction*

**5-27** It is not unusual in arbitration for an arbitral tribunal to be faced with a request for a provisional measure prior to the submissions of the parties.<sup>(71)</sup> Consequently, the tribunal may be faced with such requests prior to the definitive establishment of jurisdiction or where its jurisdiction is under challenge. Accordingly, in order to remedy the necessity for urgency, the existence of *prima facie* jurisdiction is generally considered satisfactory for the granting of a provisional measure.<sup>(72)</sup> This approach has been utilized in several instances, for example, in the Iran-US Claims Tribunal. In fact, the Iran-US Claims Tribunals consistently applied the *prima facie* jurisdiction test based upon the decision of the International Court of Justice in *Military and Paramilitary Activities in and* [page "175" against Nicaragua \(Nicaragua v. United States of America\)](#).<sup>(73)</sup> This judgement did not stand alone, for example Judge Holtzmann, in his concurrent opinion in *Bendone-Derossi*, enumerated that in deciding whether the tribunal has *prima facie* jurisdiction, “the benefit of doubt” should be given to the existence of jurisdiction.<sup>(74)</sup> The Iran-US Claims Tribunal are not alone in supporting such a *prima facie* determination, for instance, ICSID tribunals seem to adopt the *prima facie* test. In *Holiday Inns v. Morocco*, following the continuous challenge to its jurisdiction, the arbitral tribunal held that “it has jurisdiction to recommend provisional measures ..., [however] the Parties [have] ... the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspects of the dispute”.<sup>(75)</sup>

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### 3.1.2. *Prima Facie Establishment of Case*

**5-28** The *prima facie* establishment of a case (or right) in dispute may be necessary for the grant of a provisional measure.<sup>(76)</sup> This basic requirement is to satisfy the tribunal that the moving party has, with reasonable probability, a case<sup>(77)</sup> or, alternatively, to determine that the claim is not frivolous or vexatious.<sup>(78)</sup> In this regard, Caron rightly argues that the likelihood of success on the merits is *sotto voce* an element for issuing provisional measures.<sup>(79)</sup> Caron continues


It certainly is appropriate that when a case manifestly lacks merit, necessarily costly and disruptive interim measures to protect such dubious rights should not be granted. A tribunal must determine *prima facie* not only whether it possesses jurisdiction but also whether the question presented by the case is frivolous.<sup>(80)</sup>

**5-29** However, the examination of substance of a case for a *prima facie* test should be limited. Consequently, an arbitral tribunal should make an “overall assessment of the merits of the case” in question in order to determine whether [page "177"](#) the moving party's case is “sufficiently strong to merit protection”.<sup>(81)</sup> However, the tribunal should refrain from prejudging the merits of the case.<sup>(82)</sup>

**5-30** The *prima facie* test is gained substantial recognition. For instance, in ICC case 9301, there was a request for an injunction prohibiting the Respondent or any person under its authority to use no longer the Claimant's trademark logo. The arbitrator, after establishing its power to grant provisional measures, held

since [the Claimant] establishes that *there is a prima facie right of action for illegitimate use of the letterhead in question*, the Arbitrator accepts the request seeking an injunction prohibiting the use of the [the Claimant's] trademark, tradename and logo....<sup>(83)</sup>  
(Emphasis added.)

### 3.1.3. Urgency

**5-31** Urgency is an essential requirement to grant a provisional measure.<sup>(84)</sup> Indeed, it is the promise behind interim protection that there is urgency, which  [page "178"](#) necessitates the grant of an interim measure.<sup>(85)</sup> Otherwise, if the making of decision could await the final determination of the parties' case there is inherently no basis of seeking interim protection of rights.<sup>(86)</sup>

**5-32** The establishment of urgency may vary from one tribunal to another.<sup>(87)</sup> For example, in ICC case 10596, the tribunal defined the requirement of urgency. The dispute in this case arose from termination of distribution agreements. As an interim measure, the respondent made a request for delivery of several documents. The tribunal required the existence of urgency to grant the relief sought. In regard of urgency, the tribunal held that

the request relates to a matter of urgency, it being understood that "urgency" is broadly interpreted; the fact that a party's potential losses are likely to increase with the mere passing of time and that it would be unreasonable to expect that a party to wait for the final award suffices.<sup>(88)</sup>

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### 3.1.4. Imminent Danger, Serious or Substantial Prejudice

**5-33** In order for the tribunal to grant a provisional measure, there needs to be an imminent danger of a prejudice to a right, if the measure requested is not granted before the final resolution of a dispute.<sup>(89)</sup> Interpretation of this requirement varies from one legal system to another. Under common law, a provisional measure is generally granted where there is a risk of irreparable prejudice or harm if the measure requested is not granted. An irreparable harm usually refers to harm "that cannot readily be compensated by an award of monetary damages".<sup>(90)</sup> Under civil law, the principle of *periculum in mora* is generally considered satisfactory.

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**5-34** In arbitration, the requirement of imminent danger or serious or substantial harm should be satisfactory where "the delay in the adjudication of the main claim caused by the arbitral proceedings [or, in other words, the delay in the rendering of the final award] would lead to a 'substantial' (but not necessarily 'irreparable' ...) prejudice for the requesting party".<sup>(91)</sup>

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### 3.1.5. Proportionality

**5-35** An arbitral tribunal should take into account the effect of granting any interim measure on the arbitrating parties' rights. As such, "the possible injury caused by the requested interim measure must not be out of proportion with the advantage which the claimant hopes to derive from it".<sup>(92)</sup>

### 3.2. Negative Requirements

**5-36** In addition to the lack of positive requirements discussed above, the existence of any of the six negative requirements set out below may lead to the denial of an application for a provisional measure

- (1) the request should not necessitate examination of merits of the case in question, [page "182"](#)
- (2) the tribunal may refrain from granting final relief in the form of a provisional measure,
- (3) the request may be denied where the moving party does not have clean hands,
- (4) the request may be denied where such measure is not capable of being carried out;
- (5) when the measure requested is not capable of preventing the alleged harm; or
- (6) the request may be denied where it is moot.<sup>(93)</sup>

**5-37** Arbitrators may observe these requirements either collectively or individually.

#### 3.2.1. If an Examination of the Merits of the Case is Required, the Tribunal may Refrain from Granting the Measure Requested

**5-38** An arbitral tribunal should seek to refrain from examining the merits of the case in dispute as "[t]he taking of interim measures is without prejudice to the outcome of the case"<sup>(94)</sup> because the prejudgment may infringe or, at least, shadow the tribunal's impartiality.<sup>(95)</sup> Consequently, the merits of a case should be examined in a full trial.

**5-39** In many cases, arbitrators deny requests for interim measures of protection when such a request is based on a substantial review of the underlying merits of the case. For instance, in ICC case 6632, both parties applied for a security for costs; however, the arbitral tribunal denied the applications by holding [page "183"](#)

that, in the present stage of its information, it cannot, *without pre-judging the issues relating to the merits of the case*, determine whether the Contract was validly terminated or not and whether the property was legally or illegally seized by Respondent....<sup>(96)</sup> (Emphasis added.)

#### 3.2.2. No Grant of Final Relief

**5-40** An arbitral tribunal "will not (or, at any rate, should not) grant a decision on the merits under the guise of interim relief".<sup>(97)</sup> An arbitral interim measure "may not operate to grant the final relief

sought” for preserving “the provisional nature of the interim measures”.<sup>(98)</sup> Arbitral case law generally confirms this view. For instance, in *Behring International, Inc., v. Iranian Air Force*, the dispute [page "184"](#) arose over the storage charges for warehousing the respondent's property. The Iran-US Claims Tribunal held that

the granting of the full interim relief requested by Respondents, in particular, the transfer to Respondents of possession, custody and control of the warehoused goods ..., would be tantamount to awarding Respondents the final relief sought in their counterclaim.<sup>(99)</sup>

**5-41** However, as it could not convince the claimant to store the goods in a modern portion of its warehouse, in order to avoid further deterioration of the goods, the Tribunal later held

Since a transfer within Claimant's own warehouse has not been made possible, the Tribunal sees no alternative to transferring the goods to a warehouse selected by Respondents. In the circumstances of this case, it would be impractical for this international Tribunal to maintain control of the goods through a warehouse selected by and subject to the discretion of the Tribunal. Certain of the goods may require repackaging, special maintenance or special handling, involving daily management decisions for which the Tribunal cannot assume responsibility. Moreover, the use of a third party conservator is unnecessary in this case as Respondents' title to the goods and eventual right to possession as between the Parties is undisputed.<sup>(100)</sup> (Citations omitted.)

### **3.2.3. The Tribunal may not Grant a Provisional Measure if the Applicant does not Have “Clean Hands”**

**5-42** This principle is self-explanatory and was observed, for instance, in ICC case 7972.<sup>(101)</sup> In this case, the claimant's application for relief would have been time barred under the applicable law. Nonetheless, the claimant sought to escape [page "185"](#) the time limitation by pursuing arbitration. The arbitral tribunal rejected the application and elaborated

the decision whether or not to grant an injunction lies in the discretion of the Tribunal from which it is sought. *Generally, a tribunal will not issue an injunction where it is found that the petitioner does not have clean hands.*

We have found that [the claimant] discovered ... manufacture and sale of [the products by the respondent] in 1991. [The claimant] “sat on this knowledge” for more than two years before, on 28 April 1993, it invoked [the respondent's] breach and sent a notice of termination of the Distribution Agreement. In the meantime, [the claimant] actively sought and obtained, in May 1991, an additional investment of USD 5.000.000 by [the respondent] in [the claimant's business].

In such circumstances, we determine that [the claimant] cannot now be heard to say that it is entitled to an injunction to enjoin [the respondent] henceforth



from manufacturing, distributing and selling [the claimant's] products. (Emphasis added.)

### **3.2.4. The Tribunal may not Grant a Measure where Such Measure is not capable of being Carried Out**

**5-43** In general, “arbitrators will ... normally be concerned to ensure that interim measures ordered by them are capable of being carried out”.<sup>(102)</sup> This concern partly relates to arbitrators' duty, according to certain arbitration rules, to take into account the enforceability of the award they render.<sup>(103)</sup> Further, arbitrators do not intend to waste valuable time and delay the arbitration proceedings when it is unlikely that the measure they would grant is not capable of being carried out. For instance, in ICC case 7210,<sup>(104)</sup> upon the revocation of licenses concerning mineral rights by the State X, the claimant applied for an injunction. The aim of the application was to prevent the State X from making any disposition of the mineral rights in any part of the territory covered by the relevant licences. Despite the existence of an interim measure request, the tribunal did not rule on the issue until its final award at which time it enumerated that it did not rule on the application “because [had it granted the application] *it could not have monitored any order made*”.<sup>(105)</sup> (Emphasis added.). Similarly, in [page "186"](#) ICC case 5835, the tribunal, in denying the request for a provisional measure indicated that it took the enforceability of the provisional measure requested into account.<sup>(106)</sup>

### **3.2.5. When the Measure Requested is not capable of Preventing the Alleged Harm**

**5-44** Inasmuch as provisional measures are designed to safeguard, on an interim basis, the right in question or, in other words, avoid any harm to that right, they should, at least on their face, be capable of serving this purpose.<sup>(107)</sup>

### **3.2.6. Request must not be Moot**

**5-45** It is obvious that where the request is already moot, the measure requested should not be granted. For instance, in *Iran v. United States*, Case No. A/15, the claimant requested from the tribunal to prevent the public sale of nuclear fuel allegedly belonging to it. However, the fuel was sold before the tribunal was able to consider the issue. Consequently, the request became moot and thus, the tribunal refused to entertain it.<sup>(108)</sup>

## **3.3. Security for Damages**

**5-46** The grant of some provisional measures, particularly those ones aiming to preserve the *status quo* may prejudice the counter-party's rights.<sup>(109)</sup> In such cases, an arbitral tribunal should, in this author's view, request from the applicant a security for damages.<sup>(110)</sup> Security for damages is an undertaking whereby the [page "187"](#) successful moving party undertakes to indemnify the adversary, should the measure prove to be unjustified.<sup>(111)</sup> This is because a provisional measure is based on a summary review of the facts and law, which could effect the *prima facie* establishment of jurisdiction and the *prima facie* establishment of the case.<sup>(112)</sup> It is likely that the outcome of such review would change during or at the end of the adjudication.


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**5-47** There are a few arbitral cases where a security for damages was dealt with. For instance, in ICC case 7544, upon application of the Claimant for a provisional payment, the tribunal ruled



The Arbitral Tribunal is ... faced with a delicate task of weighing up the probability as to whether, after the claims and counterclaims have been fully argued before it, the net result will be in favour of Claimant, as the latter alleges, or in favour of Defendant; having decided it can ... [however,] *in order to cover the risk that the final decision might not be consistent with the decision reached in this award*, and not to prejudice the right of set-off, *the Tribunal considers that it is appropriate that the party in whose favour the decision on an interim payment is made provide a guarantee of like amount* Consequently, the order to Defendant to pay the amount of ... to Claimant is made subject to Claimant providing a guarantee of like amount in the form and subject to the conditions set forth in the decision section of this award.<sup>(113)</sup> (Emphasis added.) (Citations omitted.)

**5-48** In addition, the amount of security should cover the actual costs and the potential damages to the adverse party<sup>(114)</sup> while taking into account the financial capability of the moving party.<sup>(115)</sup>

### **3.4. An Undertaking**

**5-49** An arbitral tribunal may deny the request for a provisional measure if there is an undertaking or a declaration in good faith by the party against whom such measure is sought that it does not intend to infringe the right in question. In situations such as this, the arbitrators are given the authority to determine the validity of the undertaking and may in fact decide to not accept the  [page "189"](#) undertaking.<sup>(116)</sup> For instance, in ICC case 7692,<sup>(117)</sup> a dispute arose from the agreement according to which the claimant is entitled to the use of the respondent's "computer programs and technology, which relate to predicting movements in financial instruments". The claimant requested an injunction to prevent the use or dissemination of its technology and data by the respondent, pending the final award. The respondent, contrary to the claimant's arguments, claimed that the claimant's technology is not in their possession. Furthermore, the respondent, in any case, "undertook not to use any of that technology during the course of arbitration". The arbitral tribunal held, based on the undertaking, that "there is no sufficient likelihood or danger" that respondent would use the claimant's technology. Accordingly, the request was denied.

### **4. Form of a Measure**

**5-50** Arbitral provisional measures generally take the form of an order;<sup>(118)</sup> however, such measures are also issued in the form of an award,<sup>(119)</sup> decision,  [page "190"](#) direction,<sup>(120)</sup> request, proposal, recommendation,<sup>(121)</sup> or in another form.<sup>(122)</sup> Provisional measures could further be granted in the form of temporary restraining orders. In this regard, it should be noted that the forms, other than award and order (including temporary restraining order), generally have a moral force<sup>(123)</sup> although there may be some sanctions applicable where they are  [page "191"](#) ignored.<sup>(124)</sup> It should also be noted that if the applicable national law prohibits the grant of provisional measures, such restriction is likely to prevent the granting of an





order or an award on interim measures.<sup>(125)</sup> However, the restriction should not, in any way, prevent the grant of, for instance, a proposal regarding the measure requested.<sup>(126)</sup>


**5-51** This section initially examines the traditional forms under which a provisional measure may be granted: an order or an award. It then deals with decision on the form of the measure and interim protection of rights in cases of extreme urgency after the appointment of arbitrators.

#### 4.1. Award or Order?



**5-52** Although there are difficulties in defining the terms “award” and “order”, it is nonetheless safe to accept that an award aims to finally resolve one or more of the issues in dispute and is binding, whereas an order aims to deal with “technical and procedural matters” and is “rendered without any formality and reasoning”.<sup>(127)</sup> The advantages and disadvantages of one form to the other mainly are

- (1) An award is formal whereas an order is not. The preparation of an award takes longer than that of an order. To this end, in some cases, for instance, in ICC arbitration, an award, unlike an order, needs to be scrutinised by the ICC International Court of Arbitration.<sup>(128)</sup> The preparation time and, scrutiny of an award, as the case may be, naturally have a certain delaying effect in the issuance of the award.
- (2) An order does not have a *res judicata* effect and revised at any time whereas an award, in principle, has a *res judicata* effect.   
[page "192"](#)
- (3) Both an award and an order on provisional measures may be enforceable under a state law generally where the place of arbitration is in such state.<sup>(129)</sup>
- (4) An award may potentially be enforceable under the New York Convention whereas an order is generally considered to be not.<sup>(130)</sup> Indeed, the reason for requesting an award is to enhance the prospect of enforcement.<sup>(131)</sup> However, it should be noted that it is not the tribunal's duty to evaluate, in case it decides to grant an interim measure requested, whether the relief is actually enforceable under the applicable laws or the New York Convention.<sup>(132)</sup> “It is thus the applicant's ultimate responsibility and risk to seek and obtain enforcement of an award granting interim relief”.<sup>(133)</sup>
- (5) An order may be issued *ex parte*, whereas the grant of an *ex parte* award is troublesome because of due process considerations on national and international levels, particularly under Article V(I)(b) of the New York Convention.

**5-53** The approach of national laws to the form under which a provisional measure may be granted differs. Some laws are permissive for the grant of the measure in the form of award whereas others are not.<sup>(134)</sup> There are also conflicting views as to whether a provisional measure may be granted in the form of an award or an order.<sup>(135)</sup> One view is that interim measures are not intended to have *res judicata* effect and that they could be “revised at any time”. Thus, it is not [page "193"](#) appropriate to grant them in the form of an award.<sup>(136)</sup> This view may also be supported with the fact that, in some cases, the grant of an award takes some time due to, for instance, the scrutiny of the award. Because of this delay, it is argued that decisions on provisional measures should normally take the form of an order.<sup>(137)</sup>

**5-54** The counter view, with which this author agrees, is that a tribunal should be able to grant provisional measures in the form of award, including partial or interim but not final award.<sup>(138)</sup> Experience confirms this view.<sup>(139)</sup> However, this view does not fit into the traditional approach taken towards awards because the finality of a provisional measure award has a temporal element and is, strictly speaking, not intended to have a *res judicata* effect like a final award.<sup>(140)</sup> The temporal element is that an award is final and binding for a certain period of time: until it is amended, revoked or confirmed in the final award.<sup>(141)</sup> The  [page "194"](#) acceptability of this approach is ultimately an issue for national laws.<sup>(142)</sup> A provisional measure in the form of an award is useful in making arbitration more effective dispute resolution mechanism as such form facilitates, to a great extent, enforcement of arbitral decisions concerning interim protection of rights. Thus, an award concerning interim protection of rights should, in this author's view, be permissible.<sup>(143)</sup>

#### **4.2. Decision on the Form**

**5-55** It should be noted that parties are generally free to choose the form of a measure. They may specifically exclude or exclusively include any form in their arbitration agreement. Arbitrators, unless otherwise agreed, or specifically or exclusively requested by the parties,<sup>(144)</sup> generally have discretion to determine the form of the measure requested.<sup>(145)</sup> Such discretion, for instance, seems to be given  [page "195"](#) to ICC arbitrators.<sup>(146)</sup> For example, in ICC case 5804, the Claimant sought a provisional measure in the form of an award.<sup>(147)</sup> However, the tribunal rendered the measure in the form of an order. Similarly, in ICC case 7489, the tribunal found "no legal or practical need to decide the issue by a formal award".<sup>(148)</sup> Accordingly, the tribunal issued an order. In two other cases, requests were made either for an award or for an order but they were denied. Instead, the measure was granted in the form of a recommendation<sup>(149)</sup> or a proposal<sup>(150)</sup>. Even though neither a recommendation nor a proposal has a legally binding effect, the parties are likely to accept and implement such decision.<sup>(151)</sup> These forms may particularly  [page "196"](#) be useful where the tribunal is not authorised to grant provisional measures under applicable laws.<sup>(152)</sup>

**5-56** What criteria should a tribunal consider in exercising its discretion as to the form? The criteria recommended for ICC arbitration could, in this author's view, provide useful guidance in this respect: "[p]otential savings of time and costs for the parties, the effective and efficient conduct of the arbitration and the need to make every effort to ensure that an award is enforceable ...".<sup>(153)</sup> Most importantly, the parties' wishes should be taken into account to the fullest possible extent. In addition, the tribunal should take into account the advantages and disadvantages of one form to the other.<sup>(154)</sup> In particular, the form of "award" may be preferred where enforcement of the decision (particularly, international enforcement) is necessary and the decision in this form can be awaited.<sup>(155)</sup> In any case, the choice of an arbitral tribunal on the form is subject to the applicable law.

#### **4.3. Provisional Measures in Cases of Extreme Urgency after the Appointment of Arbitrators**

**5-57** After the appointment of arbitrators, in cases of urgency (e.g. where there is a need for an *ex parte* measure), an arbitrator may

issue an order and then if necessary incorporate it into an award.<sup>(156)</sup> The benefits of this approach are the [page "197"](#) satisfaction of speed and enforceability concerns. Moreover, it is generally considered "a strong reminder to the disobedient to comply with the tribunal's previous decision".<sup>(157)</sup> In this same vein, there is nothing to prevent a temporary restraining measures to a similar end. For example, the Iran US Claims Tribunal uses these "temporary restraining measures" as

[a]nalogous to the temporary restraining order of American procedural law, ... pending further determination of a request for interim measures.<sup>(158)</sup>

**5-58** The temporary restraining serves an important purpose, for example in situations where a member of tribunal may not be reached in time or

because the panel wished to reserve its final decision on the interim measures request until after it received comments from the party against whom interim measures were sought. In this way temporary restraining measures reduce the urgency of the tribunal's rendering its final decision on the interim measures request, and the time necessary to fully and properly consider the request gained.<sup>(159)</sup> (Citations omitted.)

**5-59** On the source of the power to grant temporary restraining measures under the practice of the Iran-US Claims Tribunal, it is argued that such power is either "inherent" or that Article 26(1) of the UNCITRAL Arbitration Rules,<sup>(160)</sup> by implication, "encompasses a power to order temporary restraints".<sup>(161)</sup> This approach should be taken as example for arbitrations taking place under other arbitration rules. The power to issue a temporary restraining measure may be [page "198"](#) given to or exercised by the chairman of an arbitral tribunal if the applicable laws and rules permit it or, indeed, do not prohibit it.

**5-60** The temporary restraining measures have, in the practice of the Iran-US Claims Tribunal, taken the form of either orders or interim awards.<sup>(162)</sup> However, such measures in arbitration should not be granted in the form of an award as such form may be used after hearing the opponent. The requirements to grant temporary restraining measures are more or less similar to those for granting any provisional measure. These requirements are the existence of *prima facie* jurisdiction, urgency, and threat to prejudice the rights in dispute.<sup>(163)</sup> On the determination of the *prima facie* jurisdiction, the claimant should take advantage of the benefit of doubt.<sup>(164)</sup> For the satisfaction of the other conditions, Caron suggests that the benefit of doubt should be used in favour of granting it; for instance, "temporary restraining measures may be granted unless there is a manifest lack of prejudice".<sup>(165)</sup>

**5-61** Both parties do not need to be heard for granting temporary restraining measures as *inter partes* proceedings would undermine the purpose of employing such measures.<sup>(166)</sup> However, as a safeguard, the respondent needs to be heard in a subsequent hearing.<sup>(167)</sup>

### **5. Duration of Provisional Measure**

**5-62** An arbitral tribunal's jurisdiction has a temporal element. An arbitral tribunal is empowered to issue a measure, after its

formation, “upon the commencement of proceedings”,<sup>(168)</sup> “during the course of proceedings”,<sup>(169)</sup> or “at [page "199"](#) any stage of proceedings”.<sup>(170)</sup> The tribunal has no authority to issue a provisional measure once it becomes *functus officio*. The duration of a measure should normally be that of the arbitral proceedings.<sup>(171)</sup> The effect of an interim measure of protection could possibly extend further to cover uncertainty during the time when a deadline runs out for filing an action to set aside the final award.<sup>(172)</sup>

## 6. Revision Reconsideration Modification or Revocation

**5-63** Provisional measures, as the term suggests, are intended to have a provisional effect pending final resolution of the case in dispute. These measures are not, in principle, intended to have a *res judicata* effect in the conventional sense<sup>(173)</sup> because the measure may be reconsidered, amended, finalised or revoked<sup>(174)</sup> either prior to or in the final award. The final award could contain a [page "200"](#) ruling reiterating the earlier provisional measure or amending or revoking such measure.<sup>(175)</sup> However, even prior to the issuance of the final award, under changed circumstances or in accordance with new facts, a need may arise to amend, revise, reconsider, modify, or revoke the provisional measure previously granted. In many cases when the measure is reconsidered the form of the measure becomes the focal point for determining whether such revision or revocation could be made. If the decision takes the form of an order or any other form but an award, there is no objection for reconsideration or modification of the decision. However, if the measure is issued in the form of an award, then modification or reconsideration becomes troublesome.<sup>(176)</sup>

**5-64** As to the revision or revocation of orders or other forms of decisions (excluding awards) on provisional measures, certain arbitration rules give express permission for such revision or revocation.<sup>(177)</sup> A number of tribunals exercised their authority to either revise or revoke their orders on interim measures of protection or accepted the possibility of such revision or revocation. For instance, in *Iran v. United States, Cases A-4 and A-15*, the Iran-US Claims Tribunal denied, in an order, the request for preventing the auction of the goods, which [page "201"](#) constitute a part of the subject matter of the dispute.<sup>(178)</sup> In its order, the Tribunal stated<sup>(179)</sup>

The Tribunal holds that the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its power to order the requested interim measure of protection. The Tribunal notes that this decision not to exercise its power does not prevent the Party which has made the request from making a fresh request in the same case based on new facts.

**5-65** Indeed, within thirteen days from the above decision, the claimant made another request based on the new facts. The Tribunal accepted that the items of the property are irreplaceable, and as a result reconsidered the issue and granted the measure requested.<sup>(180)</sup>

**5-66** With respect to revision or revocation of an award on a provisional measure, it should be noted that an ordinary award normally has a *res judicata* effect.<sup>(181)</sup> Accordingly, its revocation and revision could only be done under very restricted circumstances.<sup>(182)</sup> However, an award for interim protection of rights may need to be revised or revoked under the changed circumstances, in accordance with new facts, or if the term of it is expired or perhaps in the final

[page "202"](#) award.<sup>(183)</sup> As indicated above, although the reconciliation of such revision or revocation with *res judicata* effect of an award is a matter for the applicable law, it is beneficial to have the form of an award on interim protection of rights within armoury of an arbitral tribunal.<sup>(184)</sup> In such cases, where a provisional measure previously issued is revised or revoked due to, for example, changed circumstances, the effect of such measure, in part or in full, should cease to exist from the point of revision or revocation.<sup>(185)</sup> To this end, it should be noted that the arbitral tribunal should, within the text of the new measure or perhaps, most probably, in the final award, take into consideration any adverse effect of the measure revised or revoked. That is to say damages could be granted possibly out of a security.<sup>(186)</sup>


**5-67** The possibility of revision or revocation of an award on provisional measures is confirmed in arbitral practice. For instance, in *Behring International, Inc. v. Iranian Air Force*, the Iran-US Claims Tribunal, after issuing an award on security for costs of the measure issued, retained the jurisdiction to "revise or supplement" its decision.<sup>(187)</sup>

**5-68** Similarly, in ICC case 10021, the tribunal ruled, in an interim conservatory award, that the award should stay in force for a certain period of time unless the final award was issued prior to the end of that period.<sup>(188)</sup> The interim conservatory award was based on the tribunal's assumption that the final award would be rendered within that period of time. However, the tribunal could not render its award within such period. Upon the claimant's request, the tribunal rendered a partial award in which it was held that the award on conservatory [page "203"](#) measures remained in force for a further period of time.<sup>(189)</sup> The tribunal facilitated this extension by specifically amending in the partial award with the relevant terms of the interim conservatory award.

## 7. Types of Measures

**5-69** Unlike the national laws in a minority of states,<sup>(190)</sup> arbitration rules do not generally clarify the types of provisional measures that could be granted by arbitrators.<sup>(191)</sup> Indeed, thirty out of the seventy rules surveyed empower tribunals to take "any" or "all" appropriate interim measures.<sup>(192)</sup> The reference to "any" or "all" provisional measures gives a wide discretion to arbitrators in determining [page "204"](#) the appropriate measure.<sup>(193)</sup> The benefit of discretion is the ability of arbitrators to issue flexible measures that could never be granted by a court operating under the constraints of a national law.<sup>(194)</sup> Having such wide discretion, the tribunal may order any measure available under *lex arbitri*, *lex causae*, or *lex executionis* (law of the forum where the measure is likely to be enforced). However, the tribunal is not generally restricted to the types of measures that are available to a judge. The tribunal may issue any measure that is usually granted in international arbitration practice. In sum, an arbitral tribunal's armoury includes variety of provisional measures and the tribunal is much more flexible in choosing the most appropriate kind of measure.

**5-70** Certain restrictions may, however, be imposed on the tribunal's discretion in respect of types of measures. In this regard, mandatory rules of the applicable law may need to be observed.<sup>(195)</sup> To confirm this, it should be noted that arbitral tribunals would not grant measures that are beyond their powers due [page "205"](#) mainly to consensual nature of arbitration.<sup>(196)</sup> For instance, tribunals may deny requests for a *Mareva*-type injunction,<sup>(197)</sup> an

attachment,<sup>(198)</sup> or a post award attachment<sup>(199)</sup>. Further restrictions may arise from the text of the rules incorporated in their agreement by contracting parties. For instance, Article 26 of the UNCITRAL Arbitration Rules restricts the type of measures that may be granted to “the subject-matter in dispute”.<sup>(200)</sup> The Model Law too contains almost  [page "206"](#) identical restriction: an interim measure needs to be related to the “subject matter of the dispute”. These limitations should generally be interpreted broadly: the restriction should be related to the subject matter of the rights in dispute.<sup>(201)</sup> In any case, the tribunal's jurisdiction is limited to the parties involved and the remedy that it could grant in the final award.<sup>(202)</sup>

**5-71** This section examines the types of measures regularly seen in arbitral practice: (1) measures concerning preservation of evidence, (2) injunctions, (3) security for payment, (4) security for costs, and (5) provisional payment.


### **7.1. Measures Concerning Preservation of Evidence**

**5-72** Preservation of evidence on an interim basis is generally sought where there is a risk that the evidence will be harmed or perished, if an urgent measure is not taken. The aim for such preservation is to facilitate proper conduct of arbitration. This arbitral power is recognised under nearly all the arbitration rules and laws that contain a provision on interim measures.<sup>(203)</sup> Such power is generally exercised with little difficulty in arbitral practice.<sup>(204)</sup>

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### **7.2. Injunctions**


**5-73** The term “injunction” refers to asking a person to do or refrain from doing something. In a broad sense, many arbitral decisions are injunctions. Experience demonstrates that arbitrators grant variety of injunctions, for example, the transfer of goods to another place, sale of goods or stay of the sale, supply of goods, establishing an escrow account to hold proceeds of a letter of credit, preserving or changing the *status quo*,<sup>(205)</sup> and anti suit injunctions. An injunction may be coupled with a fine. To illustrate the arbitral case law, for instance, in *Behring International, Inc. v. Iranian Air Force*,<sup>(206)</sup> upon the request of transfer of goods to another warehouse due to possibility of deterioration, the Iran US Claims Tribunal held

the Respondents' property must be removed from [the claimant's warehouse facility] ... in order to prevent unnecessary damage and/or deterioration. The conditions under which the goods are presently stored are inadequate to conserve and protect them and irreparable  [page "208"](#) prejudice to Respondents' asserted rights may result if they are not transferred to a more appropriate facility.<sup>(207)</sup> (Citation omitted.)


**5-74** In addition, it is possible to request the sale of the goods in question. For example, with respect to stay of sale of goods, the Iran-US Claims Tribunal has granted the request for sale of the goods in dispute,<sup>(208)</sup> and only denied similar requests after the respondent provided undertakings making the issue moot.<sup>(209)</sup> It is also possible for the inverse to be ordered. For example, in *Iran v. United States, Cases, A-4 and A-15*,<sup>(210)</sup> the claimant made a request from the Tribunal to enjoin the respondent “from auctioning movable properties of Iran's Embassy and Consulates in the United States”. The Tribunal ordered the respondent



to take all necessary and appropriate measures to prevent the sale of Iran's diplomatic and consular properties in the United States which possess important historical, cultural, or other unique features, and which, by their nature, are irreplaceable.<sup>(211)</sup>

**5-75** In regard of supply of goods, in an AAA case,<sup>(212)</sup> a dispute arose from various agreements and their amendments concerning exclusive consignment for the storage, marketing and sales of certain surplus parts. The issue in dispute was mainly whether those agreements were rescinded. The sole arbitrator was asked  page "209" to rule on the destiny of the parts, which were in the possession of the respondents until the issuance of the final award. The arbitrator ordered that the respondent should not make or offer to make any sales of the parts without the express permission of the claimant. The respondent was permitted to submit proposals for the sales of goods and the claimant was ordered not to unreasonably withhold or delay its permission to the proposed sales. The aims of such order seem to be the continuation of the respondent's business until the final award is rendered and also the protection of the claimant's benefit by subjecting the sales of the parts to its permission. The arbitrator also kept track of the sale mechanism created by him by ordering the supply of information concerning the proposals and the permissions.

**5-76** As regards establishing an escrow account, in *Sperry International Trade, Inc. v. Government of Israel*, an AAA tribunal ordered, where Israel was trying to withdraw the letter of credit given in its favour, that the proceeds of the letter of credit was to be held in an escrow account in the joint names of Israel and Sperry.<sup>(213)</sup>

**5-77** With respect to preserving or changing *status quo*,<sup>(214)</sup> it is noteworthy that an arbitral tribunal should carefully consider contractual and statutory rights of contracting parties; for instance, what risk allocation is envisaged<sup>(215)</sup> or what rights a party have under the applicable law.<sup>(216)</sup> Further, an applicant should not be permitted to rely on arguments that are or should have known by it at the time of entering into arbitration agreement.<sup>(217)</sup> For instance, in ICC case 5835, the tribunal ruled<sup>(218)</sup>  page "210"

The fact that the Defendant is a company with a relatively small capital and small assets, and that its balance sheet for the year [X] showed a deficit, should normally have been investigated by the Claimant when he signed the [agreement]. Likewise, the Claimant also should have known, that the Defendant's balance sheet for the [next year] showed a higher deficit. The Claimant also knew of the terms and dates of payment by [Claimant] to the Defendant.

**5-78** Whether or not an arbitrator could grant an anti-suit injunction<sup>(219)</sup> is an interesting issue. That is because it, on the one hand, invites the clash of two institutions: judiciary and arbitrators.<sup>(220)</sup> On the other hand

it is highly doubtful whether an arbitral tribunal should be allowed to tell another arbitral tribunal or a state court what to do, or whether it should be allowed to interfere indirectly with the workings of another arbitral tribunal by ordering one of the parties what to do in the other arbitration or litigation.<sup>(221)</sup>

**5-79** In this regard, it is rightly argued that a tribunal, be it arbitral or judicial, should, in principle, decide on only its own jurisdiction; hence refrain from interfering any other tribunal's decision on jurisdiction.<sup>(222)</sup> However, in situations where the party's actions are vexatious, the tribunal should be able to order, propose or recommend that the party cease those acts for protection of the other party's rights or prevention of aggravation of the dispute. In other words, if permitted, the tribunal can take a flexible approach. This is because, by agreeing to arbitrate, contracting parties demonstrate their desire for arbitration to be their dispute resolution forum. Such desire should be upheld. Indeed, an arbitral tribunal ordered an anti suit injunction as early as in 1972. The ICSID tribunal, in *Holiday Inns v. Morocco*, refrained from directly ordering Morocco to withdraw local court actions against the claimant. The tribunal, however, made three recommendations, one of which suggested the withdrawal of court actions. The [page "211"](#) other two, were in an effort to remedy the respondent's concerns for further court actions.<sup>(223)</sup>

**5-80** In addition to an injunction, the tribunal may also order a penalty or fine if the party fails to comply with the tribunal's order. Of course, because this is an order for a penalty, the fine must be permitted under the relevant arbitration agreement<sup>(224)</sup> and should not be prohibited under the applicable law.<sup>(225)</sup> Such fine is a penalty payment to prevent disobedience. For instance, in an AAA case, the arbitral tribunal indicated that it could grant a penalty payment in case the injunction granted would not be obeyed.<sup>(226)</sup> In this case, a dispute arose between the parties with respect to three agreements on assignment, employment and consulting. Upon the claimants' request, the tribunal enjoined, in a partial award, the respondents from, *inter alia*, the use of the claimant's trade name, trademark and know-how. The tribunal in its award refrained from imposing sanctions with the hope that the respondents comply with its directives without the "threat of sanctions". However, the tribunal reserved its jurisdiction to grant any interim measure in case its directives were not complied with. The tribunal expressly indicated that it is within its armoury to sanction the failure to comply with its [page "212"](#) directives by payment of a specified amount for each time period the respondents fail to comply.<sup>(227)</sup>


### **7.3. Security for Payment**


**5-81** A security for payment or claim is a kind of advance payment designed to guarantee the payment and/or enforcement of the final award where the applicant proves to be right on the merits of the case in dispute. The power to grant such security generally arises from the broad interpretation of either power given to the tribunal in regard of interim protection of rights or the arbitration agreement.<sup>(228)</sup> For the grant of security for payment, the moving party needs to demonstrate that it is highly likely that the award, if it were rendered in its favour, would not be enforced. For instance, in ICC case 8786, the respondent requested a security for claim by arguing that the claimant would not comply with the award that would be in its favour and the chances of such award's enforcement in State X "are less than slim".<sup>(229)</sup> The tribunal refused the request on the grounds that the applicant "has failed to sufficiently substantiate the existence [page "213"](#) of a not easily reparable prejudice" and that there was no urgency.<sup>(230)</sup> In ICC case 10021, however, the tribunal indirectly complied with the request for security payment. In this case, the claimant requested the tribunal to attach the assets of the respondents. The tribunal, rather than accepting the request, ordered the respondents to refrain from disposing of the assets in dispute since the power to attach assets would not be within the



domain of arbitration.<sup>(231)</sup> The dispute, in this case, arose from breach of certain agreements including a shareholders agreement concerning a company. The claimant made a request for security for claim by arguing that respondents were transferring their shares in the company. The respondents did not deny the claim and made no reasonable explanation about it. Further, the claimant also claimed that apart from its shares in the company, the respondents no longer had sufficient liquid assets enabling them to satisfy a possible award for damages. In fact, the tribunal observed that the respondents refrained from depositing their share of costs and stating real value of their shares or real estate. In addition, the claimant demonstrated to the tribunal that it had certain monetary claims. Under the above circumstances, the tribunal held that the value of the respondents' shares in the company did not seem to exceed the amount of security requested. Accordingly, the tribunal ordered, the respondents, in an award, not to transfer or in any way dispose of those shares (rather than attaching the respondents' assets). It should in all cases be kept in mind that if there is no change in circumstances as to the satisfaction of the contract, in other words no changes in risks taken parties, then the grant of a security payment is not justified.

#### 7.4. Security for Costs


**5-82** Security for costs may be defined as “[m]oney, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses”.<sup>(232)</sup> Under some national laws, security for costs is referred to as  [page "214"](#) *cautio judicatum solvi*, the duty of an alien claimant to provide security for costs of its defendant.<sup>(233)</sup>

**5-83** The issue of security for costs of arbitral proceedings (e.g. legal costs, tribunal's costs, travelling expenses, etc.) or of arbitrating parties “very occasionally comes up”<sup>(234)</sup> and is highly debated. Such security for costs should not “normally” be required in international arbitration.<sup>(235)</sup> It is rightly argued that a contracting party normally bears, whilst entering into a contract, the risk of having a dispute,<sup>(236)</sup> because such risk is “the general commercial risk of being engaged in business and trade”.<sup>(237)</sup> Further, there is and should be no *alien* claimant in international arbitration because every claimant and counter-claimant should be equally distant to the law of the forum where arbitration takes place due to the fact that there is no *lex fori* in arbitration.<sup>(238)</sup> Nonetheless, there are cases where an arbitral tribunal empowered to grant security for costs, and may grant a security for costs under the appropriate circumstances.<sup>(239)</sup> To this end,  [page "215"](#) there are mainly two issues to examine: (1) whether or not the tribunal has the power to grant such security; and (2) what the appropriate circumstances are.

**5-84** The power to issue security for costs may derive from arbitration rules<sup>(240)</sup> or applicable laws<sup>(241)</sup>. It is generally accepted that arbitrators should have the power to issue security for costs.<sup>(242)</sup> Nineteen of the rules surveyed provide for security for costs of the measure granted.<sup>(243)</sup> For the remaining arbitration rules that do not contain express provisions on security for costs, the general power to grant a provisional measure should mainly be sufficient for the tribunal to grant the request for security for costs.<sup>(244)</sup>


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**5-85** However, none of the rules set forth what the appropriate circumstances are for the tribunal to grant the request for security for costs. It should initially be kept in mind that, in dealing with a request

for security for costs, an arbitrator should not hinder access to justice and should treat the parties with equality, e.g. require the moving party to provide counter security too.<sup>(245)</sup> Arbitral case law is not generally very helpful in determining the appropriate circumstances.<sup>(246)</sup> It is submitted that, in practice, “arbitrators are unlikely to order security for costs  page "217" where their eventual award is enforceable under the New York Convention or similar treaty, unless it is shown convincingly that the losing party will almost certainly be unable to meet an award of costs against it [due, for instance, to its insolvency]”.<sup>(247)</sup> Such unavailability should be a result of changed circumstances following the entry into force of the parties' agreement.<sup>(248)</sup> Otherwise, basing on the unavailability to make a claim for security for costs would infringe the principle of good faith.<sup>(249)</sup>

### 7.5. Provisional Payment

**5-86** Provisional payment is aimed to restore, prior to final adjudication of the merits of the case, an obligation or a right the existence of which is not seriously challenged in the dispute. Provisional payment is not considered a typical kind of interim measure of protection. In fact, it could even be argued that it is not an interim measure because the arbitral tribunal needs to decide, prior to the full adjudication, that the moving party is entitled to a certain amount of money.<sup>(250)</sup> Consequently, for the purpose of arbitration, provisional payment should be considered as interim remedies, which may be amended or revoked in the final award.

**5-87** In order to grant a provisional payment, it is necessary to establish that an arbitral tribunal is empowered to grant such measure. For instance, in ICC case 7544, an arbitral tribunal found that interim payment on account is not prohibited by the ICC Arbitration Rules and thus, where no mandatory provision to contrary existed under the applicable law, the tribunal could allow a payment on account.<sup>(251)</sup> It should be noted, in this regard, that in another ICC case,<sup>(252)</sup> the  page "218" tribunal ruled that under the circumstances of the case, the grant of provisional payment would be “premature”. Nonetheless, the tribunal determined, by implication, that it did have jurisdiction to grant provisional payment.

**5-88** Once the jurisdiction is established it is necessary to determine on what grounds a provisional payment may be granted. An ICC tribunal, for example, found that the principles of procedure of the French law principles<sup>(253)</sup> on interim payment on account provide for a useful guidance as the law of the place of arbitration for granting provisional payment in the case before the tribunal.<sup>(254)</sup> In this vein, an arbitral tribunal should be very careful for not prejudicing the merits of the case in granting provisional payment. If there is any serious challenge to the right in regard of the provisional payment, the tribunal should refrain from granting such payment.<sup>(255)</sup> Even if it grants the measure, the tribunal should seek security for damages in case such measure may prove to be wrong.<sup>(256)</sup>

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## 8. Ex Parte Measures

**5-89** Provisional measures are usually granted through *inter partes* proceedings in which both the applicant and the respondent are heard in adversarial proceedings. An arbitral tribunal may actually convene and hear parties on a request for a provisional measure. Alternatively, in cases where the convening of the tribunal cannot be

awaited (because, e.g. arbitrating parties and arbitrators are from different countries), the parties may be heard, for instance, over a telephone conference<sup>(257)</sup> or a videoconference. Further, in such cases, the parties may, for example in the terms of reference, empower the chairman of the tribunal to grant arbitral provisional measures.<sup>(258)</sup> However, whilst all of the above may facilitate the speedy adjudication of requests for interim protection of rights, there may sometimes be a further need for interim protection of rights, particularly, in cases of urgency or where element of surprise is required,<sup>(259)</sup> for example where a trade secret is likely to be disclosed, where there is likelihood of dissipation of assets, or where vital evidence is likely to be lost. In these situations, it is appropriate for the tribunal to entertain *ex parte*<sup>(260)</sup> provisional measures<sup>(261)</sup> just as national courts are generally able to grant *ex parte* measures.<sup>(262)</sup> The reasons justifying the grant of arbitral provisional measures [page "220"](#) also support the arbitral power to issue *ex parte* measures.<sup>(263)</sup> The most important of these reasons is the parties' will to seek protection of their rights, including interim protection from an arbitral tribunal. Thus, an arbitral tribunal is the natural forum to seek *ex parte* provisional measures, although it may not be the most appropriate forum in every case. In fact, the need for *ex parte* arbitral measures is likely to be very low as such measures would normally be available from an arbitral tribunal once such tribunal is formed long after the time of a dispute's appearance. The need for *ex parte* measures generally arises at the time of or right after the dispute's appearance but long before submission of a case to an arbitral tribunal. Further, such *ex parte* measures generally require enforceability *per se*. In such cases, a court would be the most appropriate forum to apply for. In this regard, it is noteworthy that the request for and the grant of *ex parte* measures occasionally occur in arbitration practice. For instance, a survey done by the AAA demonstrates that only one out of fifty cases on interim measures were held *ex parte*.<sup>(264)</sup> Further, this author has not come across any *ex* [page "221"](#) *parte* decision on an interim measure in his research at the AAA and the ICC out of thousands of decisions.<sup>(265)</sup>


**5-90** Thus, when there is an occasional need for *ex parte* measures, an arbitral tribunal should be empowered to grant such measure. However, the arbitral power to grant *ex parte* provisional measures faces with, among others, two main objections. These objections are generally related to the right to be heard<sup>(266)</sup> and the principle of impartiality in arbitration.<sup>(267)</sup>

**5-91** This section examines the right to be heard and the principle of impartiality. It also deals with certain other issues on *ex parte* measures.

### **8.1. Right to be Heard as an Objection to Arbitral Power to Grant Ex Parte Provisional Measures**

**5-92** The right to be heard should certainly be observed in the adjudication of substantive claims; however, there is a question as to the extent this rule in the area of provisional measures. In general, *inter partes* proceedings are required for the grant of interim measures of protection. Arbitration rules and practice also seem to confirm this view.<sup>(268)</sup> For instance, the ICSID Arbitration Rules specifically require that an arbitral tribunal "shall only recommend provisional measures, or modify or revoke its recommendation, after giving each party an [page "222"](#) opportunity of presenting its observations".<sup>(269)</sup> This rule aims at avoiding "unintentionally unfair dispositions".<sup>(270)</sup> It seems to be envisaged under the ICSID arbitration system that the arbitral tribunal "must decide how this


opportunity will be given".<sup>(271)</sup> The examination of published awards demonstrates that ICSID arbitral tribunals did not make a decision on interim protection without giving each party an opportunity of presenting its case.<sup>(272)</sup> Similarly, with respect to the practice under the ICC Arbitration Rules, it is submitted that<sup>(273)</sup> "[i]t would be inconsistent with the principles generally governing arbitration ... to permit *ex parte* relief". It is further indicated that the ICC tribunals hear all of the parties before rendering any decision on provisional measures.<sup>(274)</sup> The Iran-US Claims Tribunal too, applying the UNCITRAL Arbitration Rules, has consistently given parties opportunity to comment in writing, whenever possible, when it dealt with requests for a provisional measure.<sup>(275)</sup> This practice seems to be based on the principle of the right to be heard which is envisaged under Article 15(1) of the UNCITRAL Arbitration Rules.<sup>(276)</sup>

**5-93** However, in some cases, there is a need to determine issues *ex parte* as the circumstance presented suggest a degree of urgency or the need to maintain an element of surprise, for example, where vital evidence would be lost. In such situations, *ex parte* measures are appropriate because the principle of fairness requires acting in a speedy manner without giving notice to the responding party. Indeed, the concept of granting *ex parte* measures is recognised by several legal systems.<sup>(277)</sup> A set of the arbitration rules surveyed also expressly recognise such a  [page "223"](#) possibility provided the motion granted is time limited.<sup>(278)</sup> For example, the Iran-US Claims Tribunal has used a similar vehicle for interim protection of rights, a temporary restraining measure,<sup>(279)</sup> when urgency was at issue in the case. However, as the title of this remedy suggests, it is temporary in nature, and thus, when an *ex parte* measure is granted, the respondent ought to be heard in a subsequent hearing.<sup>(280)</sup> Although this issue may seem controversial, some commentators support the possibility of *ex parte* arbitral measures. Berger, for instance, rightly states

Granting the parties the firm right to be heard would be hardly reconcilable with the function of provisional relief which often requires the surprise effect of *ex parte* measures to be effective. Also, the arbitrators can later amend or even withdraw their decision at the request of the other party in a subsequent hearing.<sup>(281)</sup>

**5-94** In sum, this author believes that arbitral tribunals should be given the power to grant *ex parte* provisional measures. Although, such power may be used scarcely in practice, it would provide a useful addition to the armoury of the tribunal. So the right to be heard should not be extended to provisional measures.

## **8.2. Observance of the Principle of Impartiality as an Objection to Arbitral Power to Grant Ex Parte Provisional Measures**

**5-95** Impartiality of the fact finder is a fundamental principle of international arbitration. This principle would normally prevent an arbitral tribunal to engage  [page "224"](#) in *ex parte* communications with arbitrating parties.<sup>(282)</sup> It is argued that such prevention extends to the tribunals *ex parte* contacts even for *ex parte* provisional measures.<sup>(283)</sup> However, such restriction should, in this author's view, be related to the merits of the case and interim protection of rights should constitute an exception to the restriction. The principle of fairness justifies the exception because of the need to safeguard a party right in cases of utmost urgency. In addition, in order to grant an *ex parte* measure, the tribunal needs to be satisfied, among others, that there is a grave danger, which would require the tribunal's immediate interference. As a result, the tribunal would


grant an *ex parte* measure that was time limited. The tribunal is aware of the fact that it has heard only the applicant but not the respondent and that the respondent's side of story should and will need to be heard. Consequently, an *ex parte* communication with a party for granting a provisional measure should not be considered as violation of the principle of impartiality. Indeed, in such countries as Turkey, a judge adjudicating the merits of a case is empowered to grant an *ex parte* provisional measure and that would not be considered as a breach of his impartiality.<sup>(284)</sup>

**5-96** However, to safeguard the appearance of impartiality, the tribunal should make sure that any *ex parte* communication is recorded and communicated to the respondent later prior to the *inter partes* hearing. The tribunal should clearly indicate its reasoning for issuing the *ex parte* measure in the text of the measure. It should also indicate that such measure stands until it is confirmed or revoked in an *inter partes* proceedings, which will take place upon the respondent's petition.

**5-97** In addition, the right to a hearing<sup>(285)</sup> should not, in principle, extend to applications for interim measures of protection.<sup>(286)</sup> However, arbitrators, where necessary,<sup>(287)</sup> can invite parties to present their case orally.<sup>(288)</sup>

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### **8.3. Certain Other Considerations on Ex Parte Arbitral Measures**

**5-98** For the grant of an *ex parte* arbitral measure, all requirements sought for the grant of an *inter partes* measure should be satisfied. In addition, it is clear that the onus is on the applicant to prove that the tribunal has *prima facie* jurisdiction on the case, if the jurisdiction is yet to be established. It is further, imperative that the applicant should submit convincing evidence that would justify an *ex parte* measure. Moreover, the claimant should act in good faith and disclose all facts, circumstances and documents that are known to it. The absence  [page "226"](#) of the respondent in the proceedings justifies the claimant's duty to act in good faith.<sup>(289)</sup>

**5-99** The fairness, which forms the basis of the arbitral power to grant an *ex parte* provisional measure or a temporary restraining order requires taking certain measures for safeguarding the right of the respondent since the respondent was not heard in granting such measure.<sup>(290)</sup> There are many safeguarding measures that can be taken.<sup>(291)</sup> Initially, the grant of an *ex parte* measure should be subject to appropriate security. In addition, such measure, as indicated above, needs to be open for amendment or withdrawal following the respondent's subsequent hearing, which should be done as soon as possible.<sup>(292)</sup> It is submitted, in this regard, that *ex parte* measures should be given in the form of an order whose revision or amendment is relatively easier than an award in practice.

**5-100** Even if *ex parte* arbitral provisional measures are not available, an arbitral tribunal can still give priority to the request for interim measures for safeguarding the petitioner's rights.<sup>(293)</sup> This approach of giving priority relies on the assumption that the resolution of a request for a provisional measure may require a speedy action.<sup>(294)</sup>

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## 9. Costs Regarding Provisional Measure proceedings

**5-101** The costs associated with proceedings for provisional measures may be substantial despite the fact that such proceedings constitute only a part of arbitration proceedings.

**5-102** On the issue of who would bear such costs, national laws and arbitration rules are, generally silent. There are a couple of exceptions. For instance, Article 21(4) of the AAA-ICDR (International) Arbitration Rules 2003 provides that “[t]he tribunal may in its discretion apportion costs associated with applications for interim relief in any interim award or in the final award”.<sup>(295)</sup> The logic behind this provision is clear. Subject to the tribunal's full discretion, the losing party may have to bear the costs<sup>(296)</sup> of provisional measure proceedings.<sup>(297)</sup> This logic should, in this author's view, be supported mainly because liability as to costs may be used as a deterrent factor to avoid vexatious applications<sup>(298)</sup> for provisional measures. There are, indeed, a few cases supporting the above logic.<sup>(299)</sup> For instance, in ICC case 10062, the arbitral tribunal denied the application for a provisional measure. The tribunal expressly held that the costs are to be born by the losing party in the provisional measure proceedings.<sup>(300)</sup> [page "228"](#) Similarly, another ICC tribunal expressly left the burden of costs to the losing party in those proceedings.<sup>(301)</sup>

**5-103** Likewise, in *Behring International, Inc. v. Iranian Airforce*, the respondents claimed that property warehoused by the claimant needed to move in a more modern air-conditioned and humidity-controlled facility in order to avoid further deterioration. The respondents also requested appointment of an expert primarily to inventory the warehoused goods. The Tribunal granted both of the measures. In regard of the goods, as both parties agreed that there was a necessity to avoid deterioration, the Tribunal asked the claimant if it could make available a modern part of its warehouse for the storage of the goods. In its interim award,<sup>(302)</sup> with respect to the costs of the measures concerned, the Tribunal ruled


The Tribunal orders that, in accordance with Article 26, paragraph 2 and Article 41, paragraph 2, of the Tribunal Rules, [which are identical to the UNCITRAL Arbitration Rules] Respondents shall provide ... [a certain sum of money] toward the expenses of the expert and costs associated with his work, including the leasing of the full Behring warehouse, to be deposited within 30 days from the date of this Decision (and prior to actual commencement of inventorying and the other tasks assigned specifically to the expert). This amount shall be remitted to account number ... in the name of the Secretary General of the Iran-United States Claims Tribunal .... This account shall be administered by the Secretary-General of the Tribunal, who shall consult with the Tribunal.

The Tribunal further retains jurisdiction to request from arbitrating parties such other amounts as may be required from time to time in connection with the expert's work, or to [page "229"](#) decide any disputes which may arise in connection with that work. The Tribunal shall later determine which party will bear the costs of the expert's work.<sup>(303)</sup>

The tribunals' power to apportion costs should, if not expressly given, arise from arbitration agreement or the power to grant provisional measures.<sup>(304)</sup>

### **10. Damages as Compensation for Arbitral Provisional measures Found to be Unjustified or Disobeyed**

**5-104** Where an arbitral provisional measure granted proves to be unjustified or where it is disobeyed, the damages caused by such measure or disobedience should be recoverable.<sup>(305)</sup> For the purpose of such recovery, costs regarding such measure may be considered as part of damages.<sup>(306)</sup> The power to grant such damages, if not expressly given, should arise from the broad interpretation of arbitration agreement or may imply from the power to grant a provisional measure. Any such damages should be granted upon request and substantiated by the moving party.<sup>(307)</sup>

**5-105** In assessing whether the measure is unjustified, the tribunal should use its discretion and consider whether or not  [page "230"](#)


- (1) there was, indeed, a real urgency,
- (2) the request for the measure was aimed at delaying or obstructing the arbitration proceedings, and
- (3) the moving party claims were ultimately unsuccessful.<sup>(308)</sup>

**5-106** In the exercise of such discretion, arbitrating parties' behaviour throughout the arbitration should also be taken into account. The damages are generally paid out from the security, if taken.<sup>(309)</sup>

### **11. Conclusion**

**5-107** The standards of procedure and principles for the grant of arbitral provisional measures should be predictable and flexible. That assists in efficacy of arbitration process by making it consistent and predictable.<sup>(310)</sup>

**5-108** Arbitration laws and rules are generally silent in respect of such standards and principles. According to those laws and rules, arbitrators are generally given broad discretion.<sup>(311)</sup> They could either apply or adopt the principles set out under the applicable law(s) (e.g. the law of place of arbitration) or may take the guidance from arbitral case law in establishing such standards and principles.<sup>(312)</sup> The former is *hardly ever* done in practice whereas the latter is *often* observed.<sup>(313)</sup> In any case, these standards and principles should be flexible to tailor-made the appropriate measure in each case. Further, provisional nature of such measure and specific needs of international commerce should generally be taken into account.<sup>(314)</sup>

**5-109** This author suggests that the guidelines for the grant of arbitral provisional measures may derive from comparative analysis of arbitration rules, arbitral case law, and scholarly opinions. This analysis demonstrates that there is an emerging principles and standards regarding transnational procedural rules on  [page "231"](#) arbitral provisional measures.<sup>(315)</sup> In this respect, it should be noted that although arbitrators were very cautious about granting provisional measures until the 1990s, the trend has been changing.<sup>(316)</sup>


**5-110** This author suggests the following principles and standards for the grant of arbitral provisional measures: It is the applicant who

should generally make a request for a measure.<sup>(317)</sup> That is mainly because of the principle of party autonomy. In rare cases, an arbitral tribunal may too, in the absence of a request, grant such measure in order to avoid aggravation of a dispute.

**5-111** Such request should contain certain basic elements in order for assisting the tribunal to render a decision.<sup>(318)</sup> The request should at least include the relevant right whose protection is sought, kind of the measure that is sought, and the circumstances that necessitate such measure. The request may be made orally or in writing.

**5-112** The request, as it is generally the case in practice, should be given priority and handled in a short period of time.<sup>(319)</sup>

**5-113** The requirements to grant a measure are not clearly defined under arbitration rules or laws, although many of them leave the determination of the requirements to the discretion of the tribunal.<sup>(320)</sup> The examination of arbitration rules, laws, arbitral practice and scholarly opinions demonstrates that there are positive and negative requirements.<sup>(321)</sup> The positive requirements are

- (1) *prima facie* establishment of jurisdiction,
- (2) *prima facie* establishment of case,
- (3) urgency,
- (4) imminent danger, serious or substantial prejudice to the moving party if the request for the measure is denied, and  page "232"
- (5) proportionality.

**5-114** The negative requirements are

- (1) the request should not necessitate examination of merits of the case in question,
- (2) the tribunal may refrain from granting final relief in the form of a provisional measure,
- (3) the request may be denied where the moving party does not have clean hands,
- (4) the request may be denied where such measure is not capable of being carried out;
- (5) when the measure requested is not capable of preventing the alleged harm; or
- (6) the request must not be moot.

**5-115** The tribunal may seek the satisfaction of any or all of the above requirements. The tribunal may further require from the applicant a security for damages.<sup>(322)</sup> Alternatively, the tribunal may deny the request upon receipt of an undertaking by the respondent that it will not infringe the right whose protection was sought with the request.<sup>(323)</sup> Even if the tribunal refrains from granting the measure requested, it may nevertheless expedite the proceeding in order to avoid any potential or actual prejudice to the rights of the applicant.<sup>(324)</sup> The provisional nature of an interim measure justifies summary assessment in regard of the asserted facts and rights.<sup>(325)</sup>

**5-116** An arbitral provisional measure traditionally takes the form of either an order or an award.<sup>(326)</sup> This measure may also be granted in the form of decision, direction, request, proposal, recommendation or temporary restraining order. The parties are free to agree on the form of a decision on such measure. In the absence of such agreement, an arbitral tribunal generally has the discretion to determine the most appropriate form. In such determination, the



tribunal should [page "233"](#) mainly take into account parties' will, potential savings of time and costs for arbitrating parties, and effective and efficient conduct of arbitration.<sup>(327)</sup> In any case, the tribunal ought to take into consideration mandatory provisions of *lex arbitri*.<sup>(328)</sup> The form of "award" is chosen where, among others, enforcement of the decision would be necessary. In cases of urgency, the tribunal initially issues an *ex parte* order and then, if necessary, incorporate it, into an award or a further order. The *ex parte* order may take the form of a temporary restraining order.<sup>(329)</sup>

**5-117** Since the jurisdiction of an arbitral tribunal has a temporal element, the tribunal could issue a provisional measure in a period between its formation and its becoming *functus officio*.<sup>(330)</sup>

**5-118** A provisional measure is aimed to have a provisional effect pending final resolution of the case in dispute.<sup>(331)</sup> Accordingly, the measure may be amended, revoked, or otherwise finalised in the final award.

**5-119** Arbitration laws and, particularly, arbitration rules generally, in the absence of party agreement, leave the discretion to determine types of measures to an arbitral tribunal.<sup>(332)</sup> The laws and rules generally empower the tribunal to grant any and all types of provisional measures. This power gives wide discretion to the tribunal. Such discretion invites flexibility. The tribunal may generally grant any measure available under *lex arbitri*, *lex causae*, and *lex executionis*. The tribunal may also grant the types of measures that are generally granted in arbitration practice. To this end, it should be noted that the tribunal is, in principle, not restricted with the types of measures available to a judge. Experience demonstrates that arbitral tribunals generally grant on an interim basis

- (1) measures for preservation of evidence,
- (2) injunctions,
- (3) security for payment,
- (4) security for costs, and [page "234"](#)
- (5) provisional payment.

**5-120** Arbitral provisional measures are usually granted in *inter partes* proceedings. However, where there is utmost urgency or where the element of surprise is required, there is a need to have measures in *ex parte* arbitration proceedings.<sup>(333)</sup> *Ex parte* arbitral provisional measures should be allowed in arbitration provided that certain safeguards are taken.

**5-121** Costs regarding provisional measure proceedings should generally be borne by the losing party.<sup>(334)</sup> The logic behind such trend is to deter or punish any vexatious applications.

**5-122** In cases where provisional measures granted prove to be unjustified or disobeyed, damages caused by such measures or disobedience may, in principle, be recoverable.<sup>(335)</sup> [page "235"](#)

<sup>1</sup> Naimark/Keer, 23.

<sup>2</sup> Broad powers are generally given to arbitrators to supplement the applicable procedural rules at their discretion in order to avoid procedural particularities of national laws and local court procedure. See, e.g., Article 16 of the AAA-ICDR Arbitration Rules; Article 15(1) of the ICC Arbitration Rules; Article 14 of the LCIA Arbitration Rules;

Article 20 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC; Article 38 of the WIPO Arbitration Rules; Article 15(1) of the UNCITRAL Arbitration Rules; Article 25(2) of the Egyptian Law 1994; Sections 33(1) and 34 of the EAA 1996; Article 1494 of the French CCP; Article 19(2) of the Model Law; Article 1036 of the Netherlands AA; Article 16 of the Portuguese Arbitration Law; Article 816 of the Italian CCP; Article 182 of the SPIL. The arbitrators' discretion to supplement the applicable procedural rules was initially provided under the Article 11 of the ICC Arbitration Rules 1975. This Article was described as a "revolutionary innovation". Eisemann, 398. This innovation was designed "to separate the arbitration, to the extent possible, from local procedural law". Derains/Schwartz, 209. In this regard, see, e.g., Dominique Hascher, "The Law Governing Procedure: Express or Implied Choice by the Parties – Contractual Practice" ("Law Governing Procedure") in: van den Berg (ed.), *Planning Efficient Arbitration*, 322. On the powers of arbitrators, see also Chapter 3, paras 3-6 – 3-13. It is noteworthy that UNCITRAL is currently undertaking a study on, *inter alia*, arbitral provisional measures indicating applicable standards and principles. See A/CN.9/WG.II/WP.123.

<sup>3</sup> Berger, *International Economic Arbitration*, 338. In this respect, Boissésou indicates

As a matter of fact, arbitration is a vibrant experience: meeting parties and arbitrators from different cultures, allowing them to express themselves in their own style and avoiding as is too often the case these days, excessive predictability, abrupt authoritarianism, an administrative or technical vision of law, in short, permitting an experience of invention, which is the essence of modern arbitration.

Matthieu de Boissésou, "Introductory Note" in: Anne-Véronique Schlaepfer/Philippe Pinsolle/Louis Degos (eds.), *Towards a Uniform International Arbitration Law*, New York (Bern: Juris Publishing/Staempfli 2005), 125, 126-127. See also, e.g., Redfern/Hunter, para. 1-129 (indicating that "adaptability" is a principal advantage of arbitration). To this end, it is noteworthy that an arbitral tribunal has a duty to "adopt procedures suitable to the circumstances of the particular case" under Article 33(1) of the EAA 1996.

<sup>4</sup> Berger, *International Economic Arbitration*, 335.

<sup>5</sup> See, e.g., Craig/Park/Paulsson, *ICC Arbitration 2000*, 299-300; and Marc Blessing, "The ICC Arbitral Procedure under the 1998 ICC Rules – What has Changed?", 8(2) *ICC Int'l Ct Arb Bull* 16, 23 (1997) (stating that "the freeing of the international arbitral procedure from local procedural rules is one of the most significant milestones and achievements of international arbitration, and much of the worldwide success of arbitration and its recognition as the most reliable method for settling disputes ...").

<sup>6</sup> In this regard, it should be noted that arbitrators would take into account and, if required, apply, the mandatory principles of the law of the place of arbitration and/or, if known, the law of place of enforcement. See, e.g., Bösch, Introduction in: Bösch (ed.) 7 (arguing that the arbitrator should take the law of the place of enforcement into account for serving the petitioner well by issuing enforceable interim measures). Otherwise, the arbitrator's decision would be set aside at the place of arbitration or refused to be enforced elsewhere.

<sup>7</sup> See Annex. For text of the rules, see, generally, Eric Bergsten (ed.), *International Commercial Arbitration* (Kluwer); and Jan Paulsson (gen. ed.), *International Handbook*.

<sup>8</sup> The rules are chosen by taking into consideration the geographical location of the institutions, the size of their caseload and the type of disputes administered e.g., maritime, and intellectual property.

<sup>9</sup> Julian D.M. Lew, "Commentary on Interim Measures in ICC Arbitration Cases", 11(1) ICC Int'l Ct Arb Bull 23 ("Commentary").

<sup>10</sup> Yesilirmak, *Interim Measures*, 36.

<sup>11</sup> Lew, *Commentary*, 23. On the issue of precedential effect of arbitral decisions, see, e.g., Julian D.M. Lew, "The Case for the Publication of Arbitration Awards" in: Jan C. Schultz/Albert J. van den Berg (eds.), *The Art of Arbitration* (Deventer: Kluwer 1982), 223-232; Horacio A. Grigera Naón, "Editorial", 5(2) J Int'l Arb 5 (1988); Berger, *International Economic Arbitration*, 509-525; R. A. Schutze, "The Precedential Effect of Arbitration Decisions", 11(3) J Int'l Arb 69 (1994); Craig/Park/Paulsson, *ICC Arbitration 2000*, 641, Lew/Mistelis/Kröll, paras 2-31, 2-43, 1-44, and 2-46; and Pierre Duprey, "Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration be Distinguished in this Regard from Arbitration Based on Investment Treaties" in: Schlaepfer/Pinsolle/Degos (eds.), 251.

<sup>12</sup> See, e.g., Craig/Park/Paulsson, *ICC Arbitration 2000*, 639-641; and Vratislav Pechota, "The Future of the Law Governing the International Arbitral Process: Unification and Beyond", 3 *Am Rev Int'l Arb* 17-29 (1992). Such transnational procedural rules undoubtedly affected from procedural principles common to many nations, and such works as the ILA Principles (see 67 *ILA Rep* 185 (1996)); and the Draft European Model Law on Civil Procedure (see, e.g., Hakan Pekcanitez/Bilgehan Yeşilova, "Avrupa Medeni Usul Kanunu Tasarısı ve Değerlendirilmesi" in: Dokuz Eylül University (ed.), *Prof. Dr. Mahmut T. Birselle Armağan* (İzmir 2001), 335. But see, e.g., Christoph W. O. Stoecker, "The Lex Mercatoria: To What Extent Does it Exist?", 7(1) J Int'l Arb 101-126 (1990) (arguing that there is no room in arbitration for *lex mercatoria arbitralis*).

<sup>13</sup> See Chapter 5, note 2 above and accompanying text. Further, this chapter 5 examines from the beginning to the end, the arbitrators' freedom in regard of issuing provisional measures.

<sup>14</sup> Indeed, for instance, Broches stated, during the preparation of the ICSID Convention, "experience indicated that arbitral tribunals were extremely loath to order provisional or interim measures and one should have some confidence in the self-restraint which tribunals would impose upon themselves". *History*, 516. See also Sanders, *Procedures*, 453-454 (indicating that in the mid 1970s, "[t]he question of interim measures only occasionally present[ed] itself in an arbitration"). Even in the 1980s, an arbitral tribunal stated that it "has anguished over the wisdom of granting interim relief ...". See *Southern Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692, 693 (S.D.N.Y. 1985). The approach taken today towards that issue described by an arbitral tribunal: "[t]he imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal". See *Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 of 28 October 1999, extracts reprinted in XXVII *YCA* 13, 18 (2002).

<sup>15</sup> The success rate of interim measure requests is reported to be fifty percent (twenty five out of fifty cases). See Naimark/Keer, 25. See also, in this regard, M.I.M. Aboul-Enein, "Issuing Interim Relief Measures in International Arbitration in the Arab States", 3(1) *J World Inv* 77, 81 (2002) (indicating that forty percent of the requests concerning provisional measures are accepted under the practice of the Cairo Regional Centre for International Commercial Arbitration). This is due mainly to arbitrators' recognition of the importance of interim protection of arbitrating parties' rights. See Chapter 1, paras 1-16 – 1-21 above. But see Lew/Mistelis/Kröll, para. 23-4 (stating that "[i]nterim measures are granted only in limited circumstances as they can be determinative of the dispute and may be hard or even impossible to repair"); and Born, *International Arbitration*, 933. The

last author indicates that arbitrators' hesitance for granting provisional measures is based on the fact that their power arose from a private agreement, that there are many uncertainties surrounding arbitral provisional measures and that such measures are not self-executing. *Id.* In addition, according to Born, arbitrators may be concerned that, by issuing the provisional measure requested, they would pre-judge the merits of the case in dispute or would appear impartial. *Id.* Further, the grant of arbitral provisional measures is, according to him, "time-consuming and distracting". *Id.* But see Chapter 3, para. 3-5 above.

<sup>16</sup> On the issue of confidentiality, see Chapter 3, notes 23-24 above and accompanying text.

<sup>17</sup> The Tribunal has established under serious of extraordinary events that took place in the Islamic Republic of Iran ("Iran") and their reflection in the U.S. A crisis occurred as a result of various reasons between Iran and the U.S. in 1979, and this crisis led to seizure of the U.S. Embassy in Iran as a result of which a number of Americans were held hostage, and to freeze of Iranian assets worth over 8 billion dollars in the U.S. See, e.g., Aldrich, 2-6; Aida Avanesian, *Iran-United States Claims Tribunal in Action* (London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff 1993), 1-5; and, generally, W. Christopher/H. H. Saunders/G. Sick/R. Carswell/R. H. Davis/J. E. Hoffman, Jr./R. B. Owen, *American Hostages in Iran – The Conduct of a Crisis* (London/New Haven: Yale University Press 1985). Iran and the U.S. eventually found a peaceful solution by agreement called the Algiers Accords. The Accords contain a number of declarations (Declaration of the Government of the Democratic and Popular Republic of Algeria, 19 January 1981 (the "General Declaration"), and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981 (the "Claims Settlement Declaration"), collectively reprinted in 1 Iran-US CTR 1-12), undertakings (Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, 19 January 1981, reprinted in 1 Iran-US CTR 13-15), and some technical documents (e.g., Escrow Agreement, 20 January 1981, and the other technical documents collectively reprinted in 1 Iran-US CTR 16-54). The Accords provide for the release of Iranian assets frozen in the U.S. and the transfer of those assets to an escrow account held by the Central Bank of Algeria. Upon realisation of the transfer, as envisaged by the Accords, the hostages were released. The Accords also provide for the settlement of claims between a government and a national of the other State in a "binding arbitration". See General Principle B of the General Declaration. See also, generally, Articles I and II of the Claims Settlement Declaration. For this purpose, the Iran-US Claims Tribunal was established. The Tribunal composes of three chambers and nine arbitrators. See Article III(1) of the Claims Settlement Declaration. "All decisions and the awards of the Tribunal shall be final and binding". Article IV(1) of the Claims Settlement Declaration.

<sup>18</sup> The Rules have employed with slight modifications by the Iran-United States Claims Tribunal. See Article III(2) of the Claims Settlement Declaration. The modified version of the Rules does not contain any material change concerning Article 26 of the UNCITRAL Arbitration Rules. See Final Tribunal Rules of Procedure (3 May 1983), reprinted in 2 Iran-US CTR 405-442; and Provisionally Adopted Tribunal Rules (10 March 1982), reprinted in 1 Iran-US CTR 57-94.

<sup>19</sup> Surely, the Iran-US Claims Tribunal's practice is the most important source of information on the interpretation of the

UNCITRAL Arbitration Rules. There is an abundant amount of publications on the Tribunal's practice. See, e.g., Charles N. Brower/Jason D. Brueschke, *The Iran-U.S. Claims Tribunal* (The Hague/Boston/London: Martinus Nijhoff 1998); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford: Clarendon Press 1996); and J. J. van Hof, *Commentary on the UNCITRAL Arbitration Rules – The Application by the Iran – U.S. Claims Tribunal* (Deventer/Boston: Kluwer 1991) (“Commentary”). Indeed, the case law of the Tribunal has already “lead to a better understanding and growing confidence in the smooth functioning of the Rules ...”. Berger, *International Economic Arbitration*, 64. See also, e.g., Charles H. Brower, “The Iran-United States Claims Tribunal”, 224 RCADI 123, 170-174 (1990-V); and Caron, *Interim Measures*, 468. The Tribunal “consistently filled the gaps in its procedural rules by reference to customary international arbitration practice and not, for example, by reference to Dutch law [as it is the law of the place of arbitration]”. See Caron, *Interim Measures*, 472. See also, e.g., *E-Systems, Inc. v. Iran, Bank Melli Iran*, Case No. 388, Interim Award No. ITM 13-388-FT (4 February 1983), reprinted in 2 *Iran-US CTR* 51-57. The Tribunal's practice provides for guidance in regard of uniform interpretation of arbitration rules on interim protection. For ICSID tribunals' practice regarding provisional measures, see, e.g., Parra, *The Practices in: ICC* (ed.), *Provisional Measures*, 37. Some decisions of ICSID tribunals are available in the ICSID's web page at <www.wb-icsid.org> and some others are published in ICSID Reports.

<sup>20</sup> For decisions of ICC tribunals on provisional measures, see, e.g., Schwartz, *Provisional Measures*, 45-69; and Yesilirmak, *Interim Measures*, 36. Further, various issues of the *Clunet*, *YCA*, and *Swiss Arbitration Association Bulletin* contain a quite number of decisions on the same issue of ICC tribunals and of some other tribunals. For decisions of AAA tribunals, see, e.g., Michael F. Hoellering, “The Practices and Experience of the American Arbitration Association”, in: ICC (ed.), *1998 ICC Rules*, 31-36. Aboul-Enein indicates in regard of the practice of the Cairo Regional Centre for International Commercial Arbitration that the Centre administered 50 cases in 2000. In the same year, ten requests were made for provisional measures. Six of those denied meanwhile four were granted. Aboul-Enein, 81.

<sup>21</sup> The Center deals mainly with, where there is an international element, cases held under the AAA-ICDR Arbitration Rules, the AAA Commercial Dispute Resolution Procedures, and the Arbitration Rules of the Inter-American Arbitration Commission. The Center administers disputes regarding variety of areas of law and administers cases under several other arbitration rules. In this regard, see <www.adr.org>.

<sup>22</sup> The cases examined were dealing with such issues as sales, employment, joint marketing, service, manufacturing, distribution, development agent, consulting, capital contribution, mining and exploitation, franchising, option, driver, purchase, operating, resale of software, construction, software distribution, non-disclosure, and representation agreements. The parties to those cases were from such countries as Canada, Chile, Colombia, Dominican Republic, England, France, Germany, India, Singapore, Spain, Sudan, Sweden, and the U.S. Undoubtedly, the number of provisional measure requests made before AAA arbitral tribunals is a lot more than the number found by this author as the files of the cases then pending could not be examined.

<sup>23</sup> Twenty-three of those awards published in the Spring 2000 issue of the *ICC Int'l Ct Arb Bull*.

<sup>24</sup> The cases examined were dealing with such agreements as agency, construction, delivery, distribution, joint venture, mining, print and supply, power purchase, procurement and co-operation, purchase, sale of goods and service, intellectual property licence,



share purchase, software, and supply and service. The parties to those cases were, *inter alia* Argentina, Austria, Bangladesh, Bermuda, Brazil, the British Virgin Islands, China, Egypt, England, France, Germany, Hungary, Iran, Italy, Japan, Lithuania, Netherlands, Norway, Romania, Saudi Arabia, Slovakia, Sweden, Switzerland, Turkey, Turkmenistan, and the U.S. In this regard, see also Lew, Commentary, 23, note 3. It should be indicated that these are the decisions that the author was able to find and that there may be more decisions dealing with provisional measures than the cases found by this author.

<sup>25</sup> Caron, *Interim Measures*, 481. In fact, a party request was essential under the ICC Arbitration Rules 1931. See Chapter 2, para. 2-18 above. But see for a case where the tribunal is granted *sua sponte*, without a request from any party, Hoellering, *The Practices*, 33-34.

<sup>26</sup> Annex.

<sup>27</sup> See, e.g., Article 17 of the Model Law; and Article 183(1) of the SPIL.

<sup>28</sup> Rule 7(9) of the Arbitration Rules 2000 of the CIA; Rule 39 of the Arbitration Rules of the ICSID; Article 47 of the Arbitration Rules of the ICSID Additional Facility; Article 1134 of the North American Free Trade Area Agreement (“NAFTA”); Rule 25 of the Arbitration Rules 1997 of the SIAC. See also Article 41 of the Statute of the International Court of Justice, 15 *Documents of the United Nations Conference on International Organization* 355 (San Francisco, 1945) (“ICJ Statute”); and Article 66 (4) of the Rules of the International Court of Justice, Acts and Documents concerning the Organization of the Court, No. 2, 3 (1972) and No. 3, 93 (1977) (“ICJ Rules”).

<sup>29</sup> See, e.g., Berger, *International Economic Arbitration*, 335.

<sup>30</sup> It should be noted that none of the ICSID tribunals seems to have practised, in light of the published decisions, the power to recommend a provisional measure upon its own initiative. In *Holiday Inns v. Morocco* (see Lalive, 133), *MINE v. Guinea* (see 4 ICSID Rep 41), *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia* (see 1 ICSID Rep 410), *Vacuum Salt v. Ghana* (see 4 ICSID Rep 423), and *Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 of 28 October 1999, extracts published in XXVII YCA 17 (2002)) the requests for provisional measures were made by one of the parties whereas in *Atlantic Triton v. Guinea* (see Friedland, *Provisional Measures*, 344) both parties had requested certain provisional measures. To this end, it is noteworthy that, in *Vacuum Salt v. Ghana*, the tribunal reserved to act upon its own initiative to make a recommendation, should the need arise. See Decision 3 of the Tribunal, 14 June 1993, 4 ICSID Rep 328.

<sup>31</sup> See also Article 66(1) of the ICJ Rules. Apparently, the response to the request should too contain the same elements as the request. On what should a request contain for emergency arbitral measures, see Chapter 4, para. 4-39 above.

<sup>32</sup> Caron, *Interim Measures*, 480.

<sup>33</sup> But see *id.*

<sup>34</sup> See Pellonpää/Caron, 438. Further, Caron states in respect of the Iran-US Claims Tribunal's practice that “the Tribunal accepted initially, in at least one instance, an oral request by a party for interim measures”. Caron, *Interim Measures*, 480-481, note 45.

<sup>35</sup> See, e.g., Article R37 of the Court of Arbitration for Sport Arbitration Rules; and Rule 39 of the ICSID Arbitration Rules. Article 66(2) of the ECJ Rules is also noteworthy: “[a] request for the indication on interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.”

<sup>36</sup> Note C to the ICSID Arbitration Rules 1968, 1 ICSID Rep 99.

<sup>37</sup> ICSID arbitral tribunals, for example, not only gave priority to the requests for provisional measures but they also dealt with them in a “reasonable speed”. Schreuer, 763-764. In fact, the requests before the ICSID tribunals were generally responded approximately within two to five months. *Id.*, 229, para. 43. Similarly, the Iran-US Claims Tribunal too gives priority to such requests. Indeed, the Tribunal uses temporary restraining measures for dealing with very urgent applications. On temporary restraining measures, see Chapter 5, paras 5-57 – 5-61 below. For such applications, the Tribunal generally renders its decision upon hearing both parties within a reasonable time.

<sup>38</sup> See, e.g., History, 814; and Karrer, *Less Theory*, 110.

<sup>39</sup> Karrer, *Less Theory*, 110.

<sup>40</sup> *Id.*

<sup>41</sup> Karrer rightly states that a request may have an overall speeding up effect. A motion for interim measures may be used to “load up” a terms of reference hearing with matters which will become important on the merits of a main claim anyway and whose discussion may be significantly furthered by early attention.

By asking for urgent preliminary relief, a party can dramatize its request on the main point. If an interim relief was requested, but denied, or if interim measures are in place that may turn out to be wrongly taken, then arbitral tribunal will tend to speed up proceedings on the main point so that the impact of the interim measures or their absence is minimized.

*Id.*

<sup>42</sup> Wagoner, 73. Indeed, “the more the requested measure affects the rights of the party concerned the more diligence is required from the arbitral tribunal in ascertaining” and adjudging the need. See Berger, *International Economic Arbitration*, 336.

<sup>43</sup> Berger, *International Economic Arbitration*, 336.

<sup>44</sup> Karrer indicates that “[t]he *lex arbitri* says of course nothing about the matter”. Karrer, *Less Theory*, 104. It is needless to say that each legal system contains certain requirements for the grant judicial provisional measures. See Chapter 5, note 61 below and accompanying text.

<sup>45</sup> It is interesting to note, in this regard, that, for instance, even the drafting history of the ICSID Convention does not shed much light to the circumstances under which the grant of provisional measures is appropriate. See History, 337, 422, and 515. Arbitrating parties may, nonetheless, set forth, in their arbitration agreement, the requirements to grant arbitral provisional measures, though such reference is, if ever, rarely made in practice.

<sup>46</sup> However, there are a few exceptions. For instance, Article 32 of the Rules of Procedure 1993 of the Permanent Court of Arbitration Attached to the Chamber of Economy of Slovenia provides for a well-detailed explanation of the requirements. Under these Rules, prior to granting a measure, the tribunal may require “demonstration of the probability of the existence of the claim and of the danger that obtaining of the relief or remedy sought would otherwise become impossible or considerably more difficult”. Further, it should be noted with interest that, in accordance with Note A to the ICSID Arbitration Rules, “the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of award”. See 1 ICSID Rep 99.

<sup>47</sup> Annex.

<sup>48</sup> See, e.g., Article 21 of the AAA-ICDR Arbitration Rules; and Article 26 of the UNCITRAL Arbitration Rules. In regard of the last Rules, Pellonpää & Caron suggest that “the Rules provide that [in order to be granted] interim measures should be *necessary* – not

just “desirable” or “recommendable”. (Emphasis in the original.) Pellonpää/Caron, 441.

<sup>49</sup> See, e.g., Article 23 of the ICC Arbitration Rules.

<sup>50</sup> Article 31 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC.

<sup>51</sup> See Article 14 of the (previous) International Arbitration Rules 1996 Chamber of National and International Arbitration of Milan.

<sup>52</sup> See, in this respect, Article 21 of the Arbitration Rules 1997 of the ECA.

<sup>53</sup> The lack of clarity may cause problems on the exercise of the right itself by arbitrating parties and thus may “affect the rights of the parties to a significant extent”. Berger, *International Economic Arbitration*, 335. It should also be noted that “[i]t is in the interest of justice that certainty in the exercise of the arbitrators’ discretion ....” Peter Bowsher, “Security for Costs”, 63 *Arbitration* 36, 38 (1997).

<sup>54</sup> See History, 515.

<sup>55</sup> The parties or arbitrators are generally empowered to subject the arbitration proceedings to a national law. Apparently, that law is likely to be the law of the place of arbitration. Indeed, in the Interim Award 8786 of 1996 (extracts published in 11(1) *ICC Int’l Ct Arb Bull* 81-84 (2000)) the arbitral tribunal applied the local standards for the grant of an interim measure. In this respect, it should be noted that not for long ago, arbitrators usually applied the law of the place of arbitration to the procedural issues, including (at least certain) interim measures.

<sup>56</sup> That is because the applicable procedural laws may differ depending mainly upon the place of arbitration. Also there is another reason why those laws should not be chosen as the applicable law: the place of arbitration is generally determined as a geographically convenient neutral venue; thus, there is “no good reason to rely on the law of civil procedure of the seat of arbitration to fill the gap”. Karrer, *Less Theory*, 104.

<sup>57</sup> E.g., law of the place of arbitration or any other law applicable to arbitration. See, e.g., Yesilirmak, *Interim Measures*, 34; Cremades, *The Need*, 228; and NAI Interim Award 1694 of 1996, extracts published in XXIII *YCA* 97-112 (1998). See also Chapter 5, notes 2 and 55 above and accompanying text. Indeed, to the extent provisional measures considered as procedural issues, until a few decades ago, the law of the place of arbitration was applicable in the absence of a party agreement to contrary. See, e.g., Article 16 of the ICC Arbitration Rules 1955; and Article 15 of the Draft Uniform Law on Inter-American Arbitration, *Inter-American Juridical Yearbook (1955-1957)* (Pan American Union, Washington, D.C. 1958), 219. Article 11 of the ICC Arbitration Rules 1975, for instance, changed the above practice. For the view that an arbitrator should disassociate himself from both the legal system to which he belongs and procedural law of the place of arbitration, see Rubino-Sammartano, 650. The requirements, under common law, for the grant of provisional measures generally are the existence of irreparable harm; likelihood of success on the merits or sufficiently serious question as regards the merits of the dispute in question, and a balance of hardship tipping towards the applicant. The requirements, in civil law countries, generally are *fumus boni juris* (summary finding that the claim is founded) and *periculum in mora* (danger that rights may be impaired by the lapse of time). Further, it is submitted that similar requirements need to be satisfied for the grant of provisional measures by both courts and arbitrators in most of the Arab states. Aboul-Enein, 79.

<sup>58</sup> Caron, *Interim Measures*, 472.

<sup>59</sup> In this regard, see Chapter 5, notes 2, 12 and 15 above and accompanying text.

<sup>60</sup> Karrer, *Less Theory*, 104.



<sup>61</sup> Id., 104. See also Article 17 of the Joint American Law Institute/UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, UNIDROIT 2002, Study LXXVI-Doc 7 (May 2002) (“UNIDROIT Principles”). Further, the condition “*periculum in mora*” may be applied by a tribunal operating under the SPIL. See Wirth, 37-38. *Fumus boni iuris* may be referred to *prima facie* establishment of a case or likelihood of success on the merits of the case whereas *periculum in mora* is similar to imminent danger, serious or substantial prejudice to a right if the measure sought is not granted. On which see Chapter 5, paras 5-28 – 5-30 and paras 5-33 – 534 above, respectively.

<sup>62</sup> For instance, the Iran-US Claims Tribunal referred, in many of its decisions, to the ICJ's case law. The Tribunal chooses to follow the practice of that court perhaps because many of the members of it were/are lawyers practicing public international law. Such approach may also be attributable to the mixed nature of the Tribunal. On the mixed nature of the Tribunal, see, e.g., David D. Caron, “The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution”, 84 Am J Int'l L 104 (1990).

<sup>63</sup> Apparently, customary rules or case law has no binding effect on the tribunal. See Chapter 5, notes 9-11 above and accompanying text.

<sup>64</sup> Berger, International Economic Arbitration, 336. See also ICC Interlocutory Award 10596 of 2000 (unpublished) (the tribunal applied “a *prima facie* standard of review”).

<sup>65</sup> Wirth, 38.

<sup>66</sup> Id. It is also noteworthy that the tribunal should give reasons where it grants the measure requested. If the reasons for interim protection of rights “are understood, there is a better chance that they will be obeyed in the right spirit”. Karrer, Less Theory, 109.

<sup>67</sup> For instance, a dispute related to contracts regarding various infrastructure projects, the contractors brought a claim for, *inter alia*, termination of the contract and release of the performance guarantees given to the Employer. During the proceedings, the contractors requested from the tribunal, as an interim measure, to order the employer not to pursue the cashing of the guarantees. The respondent argued that the term of the guarantees would expire prior to the termination of arbitration proceedings therefore they should be encashed and put into an escrow account. The tribunal rejected this argument for, *inter alia*, that such solution “could potentially create considerable cash flow problems” to the claimants but suggested the claimants to extend the term of the guarantees to a certain period of time. The tribunal also considered [despite the possibility of having a lengthy arbitration proceedings] that, in its view, the best solution was to render an award as soon as possible ...”. Indeed, the tribunal rendered its final award within a year from its decision on the interim measure request. ICC Final Award 9928 of 1999 (unpublished). A similar result reached in an AAA case. The dispute, in this case, arose from an exclusive distributorship agreement. The claimant requested a preliminary injunctive relief preventing the respondent, as its distributor, from selling any competitive products due to the distribution agreement. The respondent claimed that the agreement was invalid and unenforceable. The tribunal denied the preliminary relief request, adjudication of which, according to the tribunal went to the “very heart of the case”. However, the tribunal noted that the final adjudication in the case should be “conducted as expeditiously as possible. Indeed, the tribunal rendered its final award within six months from its order on the request. Order of 1999 in AAA Case No. [3] (unpublished).

<sup>68</sup> See Chapter 5, notes 48-49 above and accompanying text.

<sup>69</sup> Caron, Interim Measures, 491.

<sup>70</sup> A similar list of requirements was suggested by, e.g., Blessing, Introduction, para. 857. In this regard, this author agrees with Blessing that the availability of a concurrent power of a national judge to issue an interim measure has no relevance in the tribunals' decision on whether or not to issue an interim measure. *Id.*, para. 862. It should be noted that the second, third and fourth requirements have applied in full or in part by ICC tribunals. See, Yesilirmak, Interim Measures, 34. See also Donovan, Survey of Jurisdictions in: van den Berg (ed.), Contemporary Questions, 124-125.

<sup>71</sup> See, in this regard, Chapter 4, note 7 above and accompanying text.

<sup>72</sup> See Bond, 18; Berger, International Economic Arbitration, 335; Lew/Mistelis/Kröll, para. 23-68; and Pyoung-Keun Kang, *The Relationship Between International Arbitration and National Courts with Specific Reference to Provisional Measures* (1996) (unpublished PhD thesis), 181-182.

<sup>73</sup> Provisional Measure Order (10 May 1984), 1984 ICJ Reports 169. It is noteworthy that the part of the Order on the *prima facie* jurisdiction test is adopted unanimously. See also *Ford Aerospace v. The Air Force of Iran*, Case No. 159, Interim Award No. ITM 39-159-3 (4 June 1984), reprinted in 6 Iran-US CTR 104, 108. The Tribunal, in this case, made a specific reference to the *Nicaragua* decision. Prior to the *Ford Aerospace* decision, the Tribunal generally did not deal with jurisdictional questions or mainly used such statements as "it would appear that the Tribunal has jurisdiction over ... [the] claim ...". See *Rockwell International Systems, Inc. v. Iran*, Case No. 430, Interim Award No. ITM 20-430-1 (6 June 1983), reprinted in 2 Iran-US CTR 369-371. See also *RCA Global Communications v. Iran*, Case No. 160, Interim Award No. ITM 29-160-1 (30 October 1983), reprinted in 4 Iran-US CTR 5-8. Following *Ford Aerospace*, the Tribunal consistently apply the *prima facie* jurisdiction test. See, e.g., *Bendone-Derossi International v. Iran*, Case No. 375, Interim Award No. ITM 40-375-1 (7 June 1984), reprinted in 6 Iran-US CTR 130, 131-132; *Iran v. United States*, Decision No. DEC 116-A15(IV) & A24-FT (18 May 1993), extracts published in Pellonpää/Caron, 462. The same line of practice generally followed by other tribunals acting under the UNCITRAL Arbitration Rules too.

<sup>74</sup> 6 Iran-US CTR 134.

<sup>75</sup> Decision (2 July 1972). See Lalive, 136. See also *Vacuum Salt v. Ghana* where the decision embodied an undertaking in which the party assured the tribunal to comply with the terms of the claimant's request for a provisional measure. In this case, the jurisdiction was successfully challenged by Ghana. This challenge, which was made in the beginning of the proceedings, did not prevent the tribunal from embodying the undertaking into its decision. It should, however, be noted that the decision was not a recommendation, though the tribunal implied that it had the power to make a recommendation. See Decision No. 3 of the Tribunal, 14 June 1993, 4 ICSID Rep 328. In regard of ICSID arbitration, it needs to be noted that some commentators argue that the registration of a request for arbitration by the ICSID's Secretary General after his screening power is exercised in accordance with Article 36(3) of the ICSID Convention provides a sufficient basis for a recommendation of a provisional measure. See Brower/Goodman, 451-456; G. R. Delaume, "ICSID Tribunals and Provisional Measures – A Review of the Cases", 1 ICSID Rev – FILJ 392, 393 (1986); Friedland, Provisional Measures, 341; and Masood, 145. It is difficult to agree with such argument as, *inter alia*, "the determination by the Secretary General, 'based only on the information contained in the request,' should not exempt the tribunal from independently satisfying itself as to its authority to issue provisional measures". Parra, The Practices, 42.

<sup>76</sup> The requirement for *prima facie* establishment of a case is similar to the requirement of *fumus boni juris* or likelihood of success on the merits. On the last point, an ICC tribunal ruled that “the applicant [should] render plausible that it has a prima facie contractual or legal right to obtain the relief it seeks”. ICC Interlocutory Award 10596 of 2000 (unpublished). Apparently, the pre-requisite for such *prima facie* establishment of a case is the existing of a right whose protection is sought. See *Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 of 28 October 1999, extracts reprinted in XXVII YCA 13, 18 (2002); and Order for Interim Measures and Arbitral Award 2002 in SCC Case No. 096/2001 extracts published in (2003) 2 Stockholm Arbitration Report 47. It is noteworthy that such right should fall within the ambit of the case in dispute and within the coverage of the relevant arbitration agreement.

<sup>77</sup> It is not necessary to establish the whole case but it is sufficient to establish *prima facie* the right, which the measure requested is aimed to protect. See, Wirth, 37.

<sup>78</sup> Arbitrators should consider whether or not the applicant has a legitimate interest in its request by limited examination of the merits of the case in dispute. See ICC Second Interim Award 7544 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 56, 59 (2000). It should be noted that the assessment of legitimate interest carries weight for avoiding vexatious applications for a provisional measure.

<sup>79</sup> Caron, Interim Measures, 490. See also Pellonpää/Caron, 442. Berger, in this regard, states that “[d]epending upon the degree to which the requested measure infringes the rights of the other party, success on the merits of the underlying claim by the requesting party has to be likely.” Berger, International Economic Arbitration, 337. But see, van Hof, Commentary, 190.

<sup>80</sup> Caron, Interim Measures, 491.

<sup>81</sup> Redfern/Hunter/Blackaby/Partasides, para. 7-30.

<sup>82</sup> See Chapter 5, paras 5-38 – 5-39 below.

<sup>83</sup> ICC Interim Award 9301 of 1997 (unpublished). See also, e.g., ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993) (denying a request for a provisional measure for, *inter alia*, the lack of *prima facie* establishment of the case); ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993); ICC First Interim Award 8894 of 1997, extracts published in 11(1) ICC Int'l Ct Arb Bull 94 (2000) (the tribunal postponed its decision on the application for a provisional measure because of the fact that the evidence before the tribunal was confusing); ICC Second Interim Award 5835 of 1992 (unpublished) (holding that the Claimant filed his request for provisional measure almost one year after the signature of the Terms of Reference, in the absence of any sudden or unforeseeable events justifying the grant of such measure).

<sup>84</sup> It is stated, in this regard, that “[i]n respect of all categories of provisional measures ... urgency is a *sine qua non* ....” Brower/Goodman, 461. In ICC case 8113, the arbitral tribunal denied the request for a provisional payment on the ground that “the Tribunal, after having examined all the facts of the case, is not convinced of *the existence of urgency, the basic requirement for granting a provisional measure in the Claimant's favour*”. (Emphasis added.) ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65-69 (2000). See also ICC Interim Award 6632 of 1993 (unpublished) (holding *inter alia* that “the application lacks the urgency required to address the issue by way of an interim award”); *Panacaviar, S.A. v. Iran*, Case No. 498, Interim Award No. ITM 64-498-1 (4 December 1986), reprinted in 13 Iran-US CTR 193, 197 (observing, whilst denying the request for a stay of the parallel court proceedings, that no request was made within six years from the commencement of such proceedings); *Atlantic Richfield Co. v. Iran*, Case No. 396, Interim Award No. ITM 50-396-1 (8 May 1985), reprinted in 8 Iran-US CTR 179-182, on

this case, see Pellonpää/Caron, 442, note 28; *Concurring Opinion of Howard Holtzmann to Bendone-Derossi International v. Iran*, reprinted in 6 Iran-US CTR 133, 140 (upon the respondents' application to stay parallel court proceedings initiated in Germany to obtain a provisional measure, Judge Holtzmann concurred with the Tribunal by arguing, *inter alia*, that the "Respondent has made no showing of urgency justifying the issuance of interim relief: the court order was entered in June 1983, ten months before Respondent sought a stay"); Order for Interim Measures and Arbitral Award 2002 in SCC Case No. 096/2001 extracts published in (2003) 2 Stockholm Arbitration Report 47; and Order of 1999 in AAA Case No. [4] (unpublished) (denying the motion for interim relief in an order because of the fact that the tribunal would render the final award within three months). However, in this last case, the tribunal reserved the parties' right to re-present the motion should the issuance of the final award be delayed. The tribunal apparently considered that urgency would be remedied as the matter in question would finally be resolved within a short period of time. See also *Tanzania Electric Supply Company Limited v. Independent Power Tanzania*, Appendix A to Final ICSID Award of 22 June 2001 available at <[www.icsid/casestancesco-appA.pdf](http://www.icsid/casestancesco-appA.pdf)> last visited on 30 May 2005.

<sup>85</sup> See Baker/Davis, 139. The urgency is not required for interim payment on account. See Chapter 5, paras 5-86 – 5-88 below.

<sup>86</sup> The requirement of urgency plays little role or, mostly, no role for the grant of security (for costs, payment, and damages) and provisional payment.

<sup>87</sup> The determination may vary "depending on the arbitral tribunal and the national procedural law, if any used by the tribunal as a reference". Schwartz, *Provisional Measures*, 60.

<sup>88</sup> ICC Interlocutory Award 10596 of 2000 (unpublished). See also Schwartz, *Provisional Measures*, 60; and Bond, 18-19. Further, for instance, two tribunals whose seats were in Paris dealt with urgency. The first tribunal held that urgency arises when there is "a risk of serious and irreparable harm, present or future ... that would render indispensable the taking of an immediate decision such as to eliminate, avoid or reduce such harm". The second tribunal held that "[a] situation has an urgent character when it requires that measures be taken in order to avoid that the legitimate rights of a party are not placed in peril". See Schwartz, *Provisional Measures*, 60.

<sup>89</sup> This requirement seems to be similar to the requirement of "*periculum in mora*". It should be noted that there is a clear and inherent link between the requirements of urgency and grave harm. See Caron, *Interim Measures*, 497; and Baker/Davis, 139. But see van Hof, *Commentary*, 190. She argues that "[p]rejudice or preventing prejudice may be urgent and thus related to the concept, but this relationship need not necessarily exist". *Id.* As regards the concept of "inherent link", see, e.g., ICC Second Partial Award 8113 of 1995, extracts published 11(1) ICC Int'l Ct Arb Bull 65-69 (2000); and ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993). It should also be noted that an imminent danger may occur where there is a risk of aggravation of a dispute. For example, in ICC case 3896, the arbitral tribunal held that

in order to prevent the aggravation of the dispute submitted to arbitration, it was justified in proposing that one of the parties not call bank guarantees issued by a third party bank in connection with the matter in dispute, although the guarantees were otherwise callable on demand.

ICC Partial Award 3896 of 1982, extracts published in (1983) *Clunet* 914; X YCA 47 (1985); and Jarvin Derains, 161. See also Second Interim Award 5835 of 1992 (unpublished); ICC Award 3896 of

1982, extracts published in (1983) Clunet 914, and X YCA 47 (1985); and ICC Interlocutory Award 10596 of 2000 (unpublished). The tribunal held, in this last case, that under longstanding practice in ICC arbitration, “the parties must refrain from taking any action which may aggravate the dispute”. The tribunal further ruled that

any non marginal risk of aggravation of the dispute is sufficient to warrant an order for interim relief. Indeed, it would be foolish for the Tribunal to wait for a foreseeable, or at least plausibly foreseeable, loss to occur, to then provide for its compensation in the form of damages ..., rather than to prevent the loss from occurring in the first place.

<sup>90</sup> Schwartz, Provisional Measures, 61. However,

[w]hile the existence of mere financial harm is not usually the basis for exercising extraordinary power of granting interim relief, [it is clear from the case law that] the potential or a bankruptcy or extraordinary financial consequence [which could] not be repaired by a damage award is a valid reason for disturbing the status quo.

*Southern Navigation Ltd v. Petroleos Mexicanos*, Interim Award No. 2015 of 1985, extracts published in XI YCA 209, 210 (1989).

<sup>91</sup> Berger, International Economic Arbitration, 336 (arguing that “an act prejudicial to the right of one of the parties should not be characterized as being acceptable simply because damages are available”). He rightly argues for requiring a standard less than irreparable harm. He supports his argument with the example given under Article 26 of the UNCITRAL Arbitration Rules: the sale of perishable goods. *Id.* See also Chapter 4, note 131 above and accompanying text; van Hof, Commentary, 190; and Baker/Davis, 139-40. Further, “[f]rom a commercial point of view – which is the position that a tribunal in international economic arbitration has to take – the disruption to business relations and the waste resulting from such acts cannot be truly compensated by damages.” Berger, International Economic Arbitration, 336; and Caron, Interim Measures, 493-94. Moreover, according to Schwartz

ICC tribunals have sometimes construed the risk of financial loss itself to constitute irreparable harm. Such loss may, of course, be truly ‘irreparable’ when its severity threatens the financial existence of the applicant for relief.

Schwartz, Provisional Measures, 60. See also ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993) (holding, in denial of the request for a provisional measure, that “[i]t has not been clearly shown that the damage, potential or actual, would be very serious for the applicant if the measure is not adopted”). But see, e.g., ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65-69 (2000) (holding that “the Claimant would not incur any *grave and irreparable harm* if not granted the sought measure before the Final Award expected to be issue in 1995”). (Emphasis added.) Similarly, in more than one occasion, the Iran-US Claims Tribunal ruled that “injury that can be made whole by monetary relief does not constitute irreparable harm”. See, e.g., *Iran v. The United States of America*, Decision No. Dec. 116-A 15(IV) & A24-FT (18 May 1993), extracts published in Pellonpää/Caron, 462-463. See also, e.g., *Iran v. the United States of America*, Case No. B 1 (Claim 4), Partial Award No. 382-B1-FT (31 August 1988), reprinted in 19 Iran-US CTR 273; *Iran v. the United States of America*, Cases Nos. A-4 and



A-15, Order (18 January 1984), reprinted in 5 Iran-US CTR 112-114 (holding that “the circumstances as presented to the Tribunal at the time were not such as to require the exercise of its power to order the requested interim measure of protection, as these circumstances did not appear to create a risk of an irreparable prejudice, *not capable of reparation by payment of damages*”). (Emphasis added.) Id., 114. In addition, see *Tanzania Electric Supply Company Limited v. Independent Power Tanzania*, Appendix A to Final ICSID Award of 22 June 2001 available at <[www.icsid/casestanco-appA.pdf](http://www.icsid/casestanco-appA.pdf)> last visited on 30 May 2005 (denying application for security for claim on the basis, among others, that the balance of convenience or balance of harm is not a sufficient ground on its own for seeking the relief requested). But see, Chapter 4, note 131 above.

<sup>92</sup> Berger, *International Economic Arbitration*, 336-37. See also, Karrer, *Less Theory*, 104; Cremades, *The Need*, 230; and Lew/Mistelis/Kröll, para. 23-65. The principle of proportionality may also be referred to as the principle of reasonableness. Berger, *International Economic Arbitration*, 337. On this principle, see also *MAT Cie d'Électricité de Sofia et de Bulgarie (Belgium v. Bulgaria)*, (1922) 2 TAM 924, 926-27 (arguing that “the possible injury that may be caused by the proposed interim measures of protection must not be out of proportion with the advantage which the claimant hopes to derive from them”); and Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens 1953), 273. In applying this principle, the tribunal should carefully examine the allocation of the risks between the parties at the signing of the contract or, if the risk allocation is changed over the life of the contract, at the time when a dispute arises. For determination of such risk allocation, the tribunal need to look into the terms of the contract, if they are silent, it “is likely to make an overall **interpretation** of the contract ...”. (Emphasis in the original.) Blessing, *Introduction*, para. 859. According to Blessing

such an overall interpretation may, for instance, show that the parties had assumed and accepted, in the underlying contract, very considerable and uncovered commercial risks – and if such were the conclusion, it would hardly be justified to direct far-reaching protective measures. By contrast, if the interpretation of the overall spirit of the contract shows that the parties had pain-stickingly endeavoured to confine the limits of their risks and had themselves provided for numerous protective tools etc., a Tribunal will probably find it appropriate to issue a protective interim order, if the circumstances have driven the accepted risk-sphere way out of the contractually accepted range.

Id. In this regard, it is interesting to note that a tribunal refrained from restoring the *status quo* existed right before the dispute arose in an ICC case. The tribunal refrained from ordering, without posting a security, the party to lift attachments obtained from a local court. See ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int'l Ct Arb Bull 67 (1997).

<sup>93</sup> Some of these requirements resemble to the requirements to grant provisional measures under English law. See, e.g., L.A. Sheridan, *Injunctions and Similar Orders* (Barry Rose: Chichester 1999), 119, etc.

<sup>94</sup> Sanders, *Commentary*, 196. Apparently, the tribunal has to take into account, albeit to a limited extent, the substance of a case in dispute for *prima facie* establishment of case or disputed right. See Chapter 5, paras 5-28 – 5-30 above.

<sup>95</sup> Any such pre-judgment may cause setting aside or refusal of enforcement of an award. See, in this regard, e.g., Articles 34(2)(a) (iv), 34(2)(b)(ii) of the Model Law; and Articles V(1)(d), V(2)(b) of the NY Convention. In any case, a provisional measure should not prejudice the decision on the substance. See Article 292 of the Netherlands AA.

<sup>96</sup> ICC Interim Award 6632 of 1993 (unpublished). In addition see, e.g., ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65-69 (2000) (the arbitral tribunal denied the request for an interim measure as “the grant of the measure requested by Claimant implies a *pre-judgement of the dispute* ...” (Emphasis added.)); ICC First Partial Award 8540 of 1999 (unpublished) (the tribunal refrained from pre-judging the merits of the case in dispute concerning the request for certain injunctions); *Holiday Inns v. Morocco* (where, with respect to the tribunal's recommendation, Lalive states that “[n]othing is said or implied could touch the merits in litigation”. Lalive, 193); *Atlantic Triton v. Guinea* (denying the request on pre-judgment security on the ground, *inter alia*, that “the fact that both requests were *directly linked to, and dependent on*, resolution of the basic claims in the arbitration. This was particularly so with respect to Atlantic Triton's request, which virtually restated its principal claim”. (Emphasis added.)); *Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 of 28 October 1999, extracts reprinted in XXVII YCA 13, 18 (2002) (indicating that “[i]t would be improper for the Tribunal to pre-judge the claimant's case”). Further, in an AAA case, a dispute arose from a distribution agreement and the claimant requested from the tribunal to enjoin, on an interim basis, the respondent from selling competitive products. The respondent's objection to the preliminary injunctive relief was that it had never been a party to the agreement. Because of the fact that this claim was also the essence of the respondent's defence, the tribunal refrained from dealing with the substance of the case. Accordingly, the tribunal denied to issue the relief sought. Order of 1999 in AAA Case No. [4] (unpublished). See also Friedland, *Provisional Measures*, 348.

<sup>97</sup> Bond, 18. Van Hof argues, on the contrary, that

[t]he conclusion that a tribunal would not be able to order interim relief if this happened to constitute the principal relief sought appears unconvincing .... It is understandable that a certain safeguards might be required, for example, to prevent the Claimant from dismissing his suit, but it is hard to conceive of any fundamental objections apart from this.

Van Hof, *Commentary*, 191.

<sup>98</sup> Berger, *International Economic Arbitration*, 337. See also Baker/Davis, 340. Perhaps another reason for not granting the final relief on an interim basis may be to avoid changing the *status quo*. For instance, in ICC case 9950, the arbitral tribunal denied changing the *status quo* that was existed at the date when the request for arbitration was filed on factual grounds. ICC Interim Award 9950 of 2000 (unpublished). But see Lew/Mistelis/Kröll, para. 23-64.

<sup>99</sup> Case No. 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-US CTR 44, 46. See also, e.g., *United Technologies Int'l, Inc. v. Iran*, Case No. 114, Decision No. Dec 53-114-3 (10 December 1986), reprinted in 13 Iran-US CTR 254, 259. In this case, the dispute arose out of contracts “for servicing and overhaul of helicopter components owned by one of the respondents”. Upon the claimant's request for reimbursement of the storage costs for preservation of the goods, the Iran-US Claims Tribunal, by taking into account the fact that one of the claims submitted by the claimant is for storage charges, denied the request by ruling that “it appears that the request for interim measures is, in

this respect, identical to one of the Claimant's claims on the merits. Under such circumstances, to grant this request would amount to a provisional judgment on one of the Claimant's claims".

<sup>100</sup> Case No. 382, Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-US CTR 238, 278. In regard of this case, Caron rightly suggests that "[i]t may be possible by creative thinking on the part of the tribunal and parties to find measures that will not simultaneously grant the final relief requested." Caron, *Interim Measures*, 488.

<sup>101</sup> ICC Partial Award 7972 of 1997 (unpublished).

<sup>102</sup> Schwartz, *Provisional Measures*, 62.

<sup>103</sup> See, e.g., Article 35 of the ICC Arbitration Rules.

<sup>104</sup> ICC Final Award 7210 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 49-52 (2000). In this case, the place of arbitration was Paris and the applicable law was the law of the Country X. See, for a similar case, Schwartz, *Provisional Measures*, 62.

<sup>105</sup> ICC Final Award 7210 of 1994, extracts published in 11(1) ICC Int'l Ct Arb 49-52 (2000).

<sup>106</sup> ICC Second Interim Award 5835 of 1992 (unpublished). See also ICC Final Award 7489 of 1993, extracts published in (1993) *Clunet* 1078; 8(1) ICC Int'l Ct Arb Bull 68 (1997); and Hascher, *Procedural Decisions*, 48.

<sup>107</sup> Schwartz, *Provisional Measures*, 62.

<sup>108</sup> *Iran v. The United States of America*, Case A-15, Dec. No. Dec 52-A/15-FT (24 November 1986), reprinted in 13 Iran-US CTR 173-175.

<sup>109</sup> This is despite the fact that a request to a court for a provisional measure should not normally affect the outcome of arbitration proceedings. See, e.g., Article 37(1) of the Arbitration Rules 1993 of the Netherlands Arbitration Institute (the "NAI"); and Article 11 of the Arbitration Rules 1980 of the FAA.

<sup>110</sup> In fact, the ECJ ruled that interim payment would not be considered within the meaning of Article 24 of the Brussels Convention unless, *inter alia*, the repayment is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim. The repayment is guaranteed where a security for damages is obtained. See, e.g., *Van Uden Maritime BV, Trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another*, Case C-391/95, (1998) ECR I-7091, I-7131, para. 22; and *Hans Hermann Mietz v. Intership Yatching Sneek BV*, Case C-99/96, (1999) ECR I-2277, I-2314, para. 42. Not many arbitration laws do contain express provision on security for damages. For instance, the Model Law refrains from mentioning security for damages. See, in this regard, UN Doc A/40/17, para. 166, reprinted in Holtzmann/Neuhaus, 546-47. However, Article 17 does not exclude the possibility of a tribunal's granting of security for damages. See e.g., *id.* But see also, e.g., Article 28(3) of the Arbitration Law of the People's Republic of China (stating that damages may be recoverable in case the application proved to be faulty); Article 9(1) of the Ecuadorian Law on Arbitration and Mediation 1997; Section 25(4) of the Swedish AA 1999; and Section 9-9-35 of the Arbitration Code of Georgia. Thirty sets of the arbitration rules surveyed contain a provision on the security. See Annex. According to these rules, the tribunal is generally empowered to ask for appropriate security. Further, only two of the rules surveyed contain a provision, which expressly empowers the tribunal to grant security for damages. See Article 18 of the Arbitration Rules 1993 of the Arbitration Institute of the Central Chamber of Commerce of Finland; and Article 31 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC. However, in some cases, a tribunal's power is restricted in regard of the security for damages. See, e.g., Article 21(2) of the AAA-ICDR Arbitration Rules; and Article 26(2) of the UNCITRAL Arbitration Rules (empowering to grant security for the costs of provisional



measures). Where there is no express power to grant security for damages, such power may derive from the broad interpretation of the arbitration agreement. Where a security is requested about an interim measure, it is apparent that the tribunal's jurisdiction extends to damages claims arising from such measure. See, e.g., Wirth, 38; Berger, *International Economic Arbitration*, 342 (stating that security for damages claim may be handled within the same arbitration since such claim arose "out of or in connection with the contract"); and Donovan, *Survey of Jurisdictions in: van den Berg (ed.), Contemporary Questions*, 130-131. It is also submitted that the obligation "to mitigate damages or not to worsen the dispute" could also be the basis for security for damages. Buscher/Tschanz, 88. It is, in this regard, noteworthy that security for damages could be granted, without the need for a specific request, as the purpose of it is to avoid unjust suffering of a party. See, e.g. Article 23(1) of the ICC Arbitration Rules; and Article 46 of the WIPO Arbitration Rules. See also, e.g., Article 17 of the Model Law; and Article 183(3) of the SPIL. That should be, however, subject to the existence of any risk of loss, which may arise out of the interim relief granted.

<sup>111</sup> On the issue of damages as compensation, see Chapter 5, paras 5-104 – 5-106 below.

<sup>112</sup> See Chapter 5, paras 5-27 – 5-30 above.

<sup>113</sup> ICC Second Interim Award 7544 of 1996, extracts published in 11 (1) ICC Int'l Ct Arb Bull 56-60 (2000). See also, e.g., ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int'l Ct Arb Bull 67 (1997); and Order of 1999 in AAA Case No. [2] (unpublished) (ordering, in a case concerning allegedly unjust termination of the Joint Marketing Service and Manufacturing Agreement, the respondent to comply with its injunction pending the final award and to subject the injunction's coming into effect posting of either cash or other kind of bond) (unpublished). In ordering of any measure of security, a tribunal should consider whether the type of security that will be issued is available from a bank. For instance, whether a bank is willing to provide a security until the tribunal renders its final award or whether it would be advisable to obtain a security in the form of blocking by a party of a certain amount of money in the bank account jointly held by the parties. See, generally, Karrer, *Less Theory*, 104.

<sup>114</sup> Berger, *International Economic Arbitration*, 342.

<sup>115</sup> That is particularly important where the security for damages is a precondition for the grant of the measure requested.

<sup>116</sup> In using such discretion, the circumstances of the case and previous actions of the arbitrating parties may be taken into account.

<sup>117</sup> ICC Interim Award 7692 of 1995, extracts published in 11(1) ICC Ct Int'l Arb 62-63. There are several other published cases in which an undertaking given by a party, by itself or along with other causes, was held sufficient reason for denying interim measure applications. See, e.g., *Fluor Corporation v. Iran*, Case No. 333, Interim Award No. ITM 62-333-1 (6 August 1986), reprinted in 11 Iran-US CTR 292, 298; *Avco Corporation v. Iran Aircraft Industries, Iran Helicopter Support and Renewal Company, National Iranian Oil Company and Iran*, Case No. 261, Order of 27 January 1984, cited in Case 261, Partial Award No. 377-261-3 (18 July 1988), reprinted in 19 Iran-US CTR 200, 201-202; *United Technologies Int'l, Inc. v. Iran etc.*, reprinted in 13 Iran-US CTR 254, 258; and *Vacuum Salt v. Ghana*, Decision No. 3, 14 June 1993, reprinted in 4 ICSID Rep 323-324. In this last case, upon the undertaking of Ghana that it would not deny Vacuum Salt's access to records, the tribunal refrained from recommending the preservation of evidence as requested by the Respondent but instead it embodied this undertaking into its decision by way of noting its existence. Perhaps, that was because such indication would later justify taking actions against the recalcitrant party.

<sup>118</sup> Twenty-seven out of the seventy sets of rules surveyed provide for order as the form of a decision concerning provisional measures. See Annex. It is not clear from the text of those rules whether a tribunal may grant the measure in any other form, including an award. In regard of the Iran-US Claims Tribunal's practice, Pellonpää & Caron indicate that the number of orders concerning interim measures "seems at least double the number of awards". See Pellonpää/Caron, 448, note 62.

<sup>119</sup> Fifteen of those rules expressly permit the tribunal to issue orders as well as awards in respect of interim measures. See Annex. The authority to grant provisional measures in the form of an award may also be found under the laws of some countries. See, e.g., England (Section 47(1) and 39 of the AA (permitting the grant of a "provisional award"); France (Pluyette in ICC (ed.), *Conservatory Measures*, 88); India (Bhasin, 95); Scotland (Article 17(2) of Schedule 7 to the Law Reform Act 1990 (Miscellaneous Provisions)); Switzerland (see Blessing, Introduction, para. 867); and the U.S. (see Chapter 6, paras 6-38 – 6-41 below). It is argued, in this respect, that due to the scrutiny of an ICC award, the presumption in ICC arbitration is to issue provisional measures in the form of an "order". Final Report on Awards, paras 6 and 37.6; and Bernardini, 28. However, this chapter 5 cites several ICC decisions on interim measures rendered in the form of award. See also, e.g., C. H. Brower, "The Iran-United States Claims Tribunal", 224 RCADI 123, 175 (1990-V).

<sup>120</sup> See, e.g., Section 17 of the Arbitration Rules 1995 of the Permanent Court of Arbitration of the Mauritius Chamber of Commerce and Industry.

<sup>121</sup> See, e.g., Rule 39 of the ICSID Arbitration Rules; and Article 34 of the Rules of International Arbitration of the Croatian Chamber of Commerce. The term "recommendation" under these Rules should be read as "order". Indeed, an ICSID tribunal recently held, in an order

While there is a semantic difference between the word 'recommend' as used in Rule 39 and the word 'order' as used elsewhere in the [ICSID] Rules to describe the Tribunal's ability to require a party to take a certain action, that difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word '*dictation*'. The Tribunal does not believe that the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal's authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purpose of this Order, the Tribunal deems the word 'recommend' to be of equivalent value as the word 'order'.

*Maffezini v. The Kingdom of Spain*, Procedural Order No. 2 of 28 October 1999, extracts reprinted in XXVII YCA 13, 18 (2002). But see Schreuer, 758. The Maffezini tribunal's view is more in line with the view taken by the ICJ and the European Court of Human Rights regarding provisional measures. In any case, possibility of an ICSID tribunal's drawing adverse inferences if its recommendation on an interim protection of rights is not complied with, and the backing of the World Bank of the ICSID and the potential economic pressure that may be exerted against a recalcitrant state may facilitate voluntary compliance with such recommendation. See, e.g., Lew/Mistelis/Kröll, para. 23-29.

<sup>122</sup> See, e.g., Article 23 of the Arbitration Rules 1996 of the Commercial Arbitration and Mediation Centre for Americas (the "CAMCA"). This Article, however, does not define what the term "else" refers to. In this regard, it is noteworthy that the chairman,

after consultation with its co-arbitrators may send a letter to the parties indicating its provisional views regarding protection of parties' rights. Such letter may facilitate interim protection of parties' rights. Craig/Park/Paulsson, ICC Arbitration, 2000, 463-64. In this regard, see also ICC Case No. 6445, extracts published in Hascher, Procedural Decisions, 80-92. For examples to all of the above categories of decisions, see generally Brower, 175, notes 178-181.

<sup>123</sup> The exception to this is a "recommendation" that may be granted under the ICSID Convention and the ICSID Arbitration Rules. See Chapter 5, note 121 above.

<sup>124</sup> See Chapter 6, paras 6-4 – 6-11 below.

<sup>125</sup> Indeed, a similar reference to applicable local law was made under the ICC Arbitration Rules 1931. See Chapter 2, para. 2-18 above. The reference to local law conformed with the Geneva Convention. In accordance with Article 1(1) of the Convention, law of the place of arbitration, in the absence of a party agreement, governed the procedure.

<sup>126</sup> See Chapter 3, para. 3-19 above.

<sup>127</sup> Lew/Mistelis/Kröll, para. 24-5. On the form "award" and "order", see, e.g., *id.* paras 24-3 – 24-34; Redfern/Hunter/Blackaby/Partasides, paras 8-01-8-03, 8-32-8-42; and Rolf Trittman, "When Should Arbitrators Issue Interim or Partial Awards and or Procedural Orders?", 20(3) J Intl Arb 255-265 (2003).

<sup>128</sup> Article 27 of the ICC Arbitration Rules.

<sup>129</sup> See Chapter 6, paras 6-35 – 6-42 below.

<sup>130</sup> On this issue, there are arguments both in favour and against. See *id.*

<sup>131</sup> On the issue of enforcement, see *id.*

<sup>132</sup> In this regard, the issue as to whether finality is a characteristic of an award needs to be examined. See *id.*

<sup>133</sup> ICC Interlocutory Award 10596 of 2000 (unpublished).

<sup>134</sup> American law (see, e.g., *Sperry International Trade, Inc. v. Government of Israel*, 532 F. Supp. 901 (S.D.N.Y.), *aff'd.*, 689 F.2d 301 (2 Cir. 1982)) is an example to permissive laws whereas Australian law is an example to non-permissive laws (see *Resort Condominiums International Inc. v. (1) Ray Bolwell and (2) Resort Condominiums (Australasia) Pty. Ltd.*, excerpts published in XX YCA, 628-650 (1995) (Supreme Court of Queensland, 29 October 1993). Michael Pryles, "Interlocutory Orders and Convention Awards: the Case of *Resort Condominiums v. Bolwell*", 10(4) Arb Int 385 (1994)). In this respect, see Chapter 6, paras 6-36 – 6-41 below. It should also be noted that it may not be up to the arbitral tribunal to freely determine the form. See, e.g., *Braspetro Oil Services Company – Brasoil (Cayman Islands) v. The Management and Implementation Authority of the Great Man-Made River Project (Libya)*, extracts from the French original is published in XXIVa YCA 296 (1999) (Court of Appeal, Paris, 1 July 1999); and Final Report on Awards, para. 28.

<sup>135</sup> There is generally no objection for the grant of provisional measures in the other forms.

<sup>136</sup> See, e.g., Karrer, *Less Theory*, 109.

<sup>137</sup> Final Report on Awards, para. 26.

<sup>138</sup> This chapter 5 contains several partial, interim or interlocutory awards dealing with provisional measures. The form of an award is generally considered as interim (occasionally partial, preliminary, interim, interlocutory etc). It should be noted that "the terms 'interim' and 'partial' are virtually used interchangeably, without any particular meaning being attributed to either expression ...". Final Report on Awards, para. 5. The statement was used to refer to ICC practice, which, in this author's belief and experience, also reflects international commercial arbitration practice. Even if the measure takes the form of an order it is suggested that it should contain

reasons. See, e.g., Article 23 of the ICC Arbitration Rules 1998. See Sigvard Jarvin, “Aspects of the Arbitral Proceedings” in: ICC (ed.), *The New 1998 ICC Rules of Arbitration*, (ICC Publication No. 586) (Paris: ICC Publishing 1997), 26, 28 (“1998 ICC Rules”). This is mainly because if the reasons “are understood, there is a better chance that they will be obeyed in the right spirit”. Karrer, *Less Theory*, 109. Further, in some states, orders of an arbitrator may be enforceable. See Chapter 6, paras 6-19 – 6-30 below. It may be useful to indicate the reasons for enhancing the enforceability in those states.

<sup>139</sup> See various awards cited in chapter 5. This is despite the fact that most of arbitral decisions on interim protection of rights are rendered in the form of order in practice.

<sup>140</sup> See Karrer, *Less Theory*, 109. Otherwise, an award is “generally final and binding and has *res judicata* effect between the [arbitrating] parties, *i.e.*, no claim can be brought in respect of the same matter”. Lew/Mistelis/Kröll, para. 24-1. For more information on the concept of *res judicata*, see, e.g., G. Richard Shell, “Res Judicata and Collateral Estoppel Effects of Commercial Arbitration”, 35 *UCLA Law Rev* 623-675 (1988).

<sup>141</sup> For this reason, certain U.S. courts take the view that an award on provisional measure deals with a separable issue (from the underlying issues) which is finally resolved for a certain period of time. Thus such courts find no illegality or impropriety regarding that award. See Chapter 6, para. 6-38 below. This view is in line with the specific needs of arbitration world in regard of interim protection of rights. Indeed, according to Caron

[t]he substantive effect of an interim award may be cancelled by rendering of a further interim award superceding the earlier interim relief. In such a case the earlier relief is not revoked *ab initio* but rather the temporary period for which it was to exist is drawn to a close. (Citations omitted.)

Caron, *Interim Measures*, 515. It should be noted that “supercession implicitly recognizes that the earlier measures were binding for some time and that a failure to observe those measures for that time would be a breach of the agreement to arbitrate”. (Citations omitted.)  
Id.

<sup>142</sup> See Chapter 5, note 125 above.

<sup>143</sup> See, in this regard Chapter 6, paras 6-39 – 6-41 below. But see, e.g., Karrer, *Less Theory*, 109.

<sup>144</sup> See, e.g., *Final Report on Awards*, paras 33 and 37.2. Where only one of the parties requests an award on a provisional remedy, the *Final Report on Awards* recommended that

the arbitrator must exercise his discretion, but bearing in mind that the presumption is in favour of a single final award. Potential savings of time and costs for the parties, the effective and efficient conduct of the arbitration and the need to make every effort to ensure that an award is enforceable are the primary factors to be taken into consideration by the arbitrator.

Id., paras 34 and 37.3.

<sup>145</sup> See Bernardini, 27; and Berger, *International Economic Arbitration*, 343 (arguing that for ensuring “the necessary procedural flexibility”, the determination of the form should be left to the tribunal). But see Lew, *Commentary*, 28 (arguing that “where the request is made for a specific form, then the tribunal should not use any discretion”). In order to avoid refusal of its request, a party may request both order and award as alternative forms. See, e.g., ICC

Final Award No. 9154 of 1998, extracts published in 11(1) ICC Int'l Ct Arb Bull. 98-103 (2000). Rather than refusal of its request, if it is made for a specific form, a party may prefer to have interim protection measure in any other form. That is confirmed with the fact that “[f]requently, parties are anxious to have the tribunal's order, whatever its form”. Lew, Commentary, 28.

<sup>146</sup> Final Report on Awards, para. 37.3. Jarvin, *Arbitral Proceedings*, 43; and Yves Derains/Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration* (The Hague/London/Boston: Kluwer 1998), 275. The last two authors indicate

The ICC was reluctant to specify in Article 23(1) [of the 1998 ICC Arbitration Rules] what form orders of interim or conservatory relief ought to take. Article 23 (1), thus, leaves it up to the arbitrators to determine whether such a decision should take the form of an order, with reasons, or an award, a matter that will often depend upon the nature of the measure and the laws of the place of arbitration or the country where the measure is to be carried out. (Citation omitted.)

Derains/Schwartz, 275.

<sup>147</sup> ICC Final Award 5804 of 1989, extracts published in 4(2) ICC Int'l Ct Arb Bull 76 (1993).

<sup>148</sup> ICC Final Award 7489 of 1993, extracts published in 8(1) ICC Int'l Ct Arb Bull 68 (1997), (1993) *Clunet* 1078; and Hascher, *Procedural Decisions*, 48.

<sup>149</sup> In ICC case 5887, the claimant and the respondents entered into a contract for realisation of a brewery. A dispute arose on a payment of a contractual obligation. The claimant pleaded for a payment of the allegedly outstanding amount and the release of performance guarantee provided by the claimant in favour of the respondents. While arbitration proceedings had been continued, the respondents called the bank guarantee. Upon this event, the claimant

*asked the Tribunal to order* the defendants to abstain from any action which might de facto change unilaterally the Terms of Reference and the course of arbitration procedures and, in particular, to abstain from calling the bank guarantees pending the arbitration proceedings. In its reply ... the Tribunal *recommended* the defendants to formally renounce from calling the bank guarantee pending the arbitration proceedings. (Emphasis added.)

See ICC Final Award 5887 of 1991 (unpublished). See Yesilirmak, *Interim Measures*, 31, note 6.

<sup>150</sup> See ICC Partial Award 3896 of 1982, extracts published in (1983) *Clunet* 914; X YCA 47(1985), and Jarvin/Derains, 161.

<sup>151</sup> In this connection, see Craig/Park/Paulsson, *ICC Arbitration*, 418; and ICC Award No. 3896, extracts published in (1983) *Clunet* 914; X YCA 47 (1985), and Jarvin/Derains, 161. See also generally Chapter 6, note 2 below. It should, in this regard, be noted that the ICC Court of International Arbitration “has regularly approved” awards that contain recommendations or proposals. Schwartz, *Provisional Measures*, 63. A decision in the form of “recommendation” in ICSID arbitration does indeed have a binding effect. See Chapter 5, note 121 above and accompanying text.

<sup>152</sup> See Chapter 3, para. 3-19 above.

<sup>153</sup> Final Report on Awards, para. 37.3.

<sup>154</sup> See Chapter 5, para. 5-52 above.



<sup>155</sup> On the issue of enforcement, see Chapter 5, notes 130-133 above and Chapter 6, paras 6-16 – 6-44 below. In this regard, it is noteworthy that Article 26 of the UNCITRAL Arbitration Rules empowers an arbitrator to grant an “interim award”. This provision was suggested in the discussion of the Preliminary Draft about the Rules in the Fifth International Arbitration Congress, New Delhi, India, in 1975. *The Vth International Arbitration Congress – Proceedings* (New Delhi: Printaid 1975), D-99. Upon such suggestion, the provision on interim measures (Article 22) was clarified so as to provide “[s]uch interim measures may be established in the form of an interim award”. See UN Doc A/CN.9/97/Add. 2, reprinted in VI UNCITRAL Yearbook, 182, 184 (1975). This clarification contained in the revised draft (Article 23). See UN Doc A/CN.9/112 reprinted in VII UNCITRAL Yearbook 157 (1976). The UNCITRAL Secretariat's comment on Article 23 is noteworthy. It provides

In order to facilitate the enforcement of interim measures taken by the arbitrators ... [this Article] authorizes the arbitrators to establish these measures in the form of interim awards.

See Van Hof, Commentary, 176.

<sup>156</sup> See, e.g., ICC Interim Award 8879 of 1998, extracts published in 11(1) ICC Int'l Ct Arb Bull 84 (2000).

<sup>157</sup> Lew, Commentary, 28.

<sup>158</sup> Brower, 180. Brower further indicates

In various municipal systems “interlocutory relief is granted within weeks, days or even hours of the threatened detriment and this is anticipated in the procedure by which it is granted in most jurisdictions”. ... Such speed of deliberation cannot be assumed in international claims litigation, however.

*Concurring Opinion of Charles N. Brower to Component Builders, Inc. et al. v. Iran*, Case No. 395, Order (10 January 1985), reprinted in 8 Iran-US CTR 3, 6 (“Concurrent Opinion of Charles Brower”). Judge Brower cited to Jerome Elkind, *Interim Protection, A Functional Approach* (The Hague: The Martinus Nijhoff 1981), 191. It is stated, in this respect, that “only where there is a specific and compelling need will the Tribunal grant a request for interim measures prior to receiving the views of the opposing party”. Brower/Brueschke, 224.

<sup>159</sup> Caron, Interim Measures, 482-483. See also Pellonpää/Caron, 447; and The Government of the United States of America on behalf and for the benefit of *Teledyne Industries Incorporated v. Iran*, Case No. 10812, Order (8 September 1983), reprinted in 3 Iran-US CTR 336-337 (holding that urgency is an essential element on the grant of the order to stay of the parallel court proceedings pending the Tribunal's decision on the basis of the parties' views).

<sup>160</sup> See, alternatively, Article 26 of the Iran-US Claims Tribunal's Rules.

<sup>161</sup> Pellonpää/Caron, 448; and Caron, Interim Measures, 484.

<sup>162</sup> For examples on each category, see, e.g., Caron, Interim Measures, 483, note 52.

<sup>163</sup> See in this respect, Brower, 181; and Concurring Opinion of Charles Brower, 7-8. See also *Shipside Packing Co. v. Iran*, Interim Award No. ITM 27-11875-1 (6 September 1983), reprinted in 3 Iran-US CTR 331 (grant of a measure of temporary restraint upon threat to sell goods forming the subject matter). Although urgency is not expressly mentioned in any of the awards, it is, in principle, an

essential element for granting any provisional measure. On the issue of urgency, see Chapter 5, paras 5-31 – 5-32 above.

<sup>164</sup> Pellonpää/Caron, 448; and Caron, Interim Measures, 484. See also Brower/Brueschke, 225-226.

<sup>165</sup> Caron, Interim Measures, 484.

<sup>166</sup> See *id.*

<sup>167</sup> See Chapter 5, paras 5-92 – 5-94 below.

<sup>168</sup> See, e.g., Section 21 of the Arbitration Rules of the Court of Arbitration of the Slovak Chamber of Commerce and Industry.

<sup>169</sup> See, e.g., Article 31 of the Arbitration Rules 1999 of the Arbitration Institute of the SCC.

<sup>170</sup> See, e.g., Article 38 of the Arbitration Rules 1998 of the NAI. In fact, a request for a provisional measure could, in principle, be made at any time before the final award is rendered. That is true regardless of the fact that whether or not the resolution of that measure is contained in the terms of reference. At the post-award stage, a provisional measure may be obtained, if necessary, from the competent national court prior to the recognition or enforcement of the award. In this regard, it should be noted that Article VI of the New York Convention provides for stay of an arbitral award's execution. According to that Article, if a request for setting aside or suspension of an arbitral award is made to a judicial authority, this authority "may, if it considers it proper, adjourn the decision on the enforcement of the award" and may also, upon application, order the party in whose favour the enforcement is stayed to provide "suitable security". The stay of enforcement, at the post-award stage, may also be requested under Article 50(2) of the ICSID Convention where a request is made for interpretation, revision or annulment of an arbitral award. See Articles, 50(2), 51(4), and 52(5) of the ICSID Convention.

<sup>171</sup> In this respect, see Rule 39(4) of the ICSID Arbitration Rules. Note D to the 1968 ICSID Arbitration Rules also provided: "[t]he measures recommended must be 'provisional' in character and be appropriate in nature, extent and duration to the risk existing for the rights to be preserved". See 1 ICSID Rep 100. These Notes accompany to the 1968 Rules and they aim at providing explanations with regard to the Rules but they, themselves, do not have a legally binding force. However, ICSID tribunals may take these Notes into account. See, e.g., *Lalive*, 133, note 2. See also *Bucher/Tschanz*, para. 178 (stating that a provisional measure "ceases to be effective" upon the issuance of the final award).

<sup>172</sup> *Karrer, Less Theory*, 102.

<sup>173</sup> *Id.*, 109. See also Chapter 5, note 140 above and accompanying text.

<sup>174</sup> The submission that an arbitral tribunal could have a physiological difficulty in amending or revoking its earlier decision for an interim measure of protection is misconceived. See *Karrer, Less Theory*, 109. The tribunal, like a state court, should have and, indeed, has, no difficulty in recognising the fact that its earlier decision on the measure given without full examination on the merits (basing on limited facts and under time pressure) and, thus, such examination could result in a further decision or a final award substantially different from the earlier decision. *Id.* See also ICC Interim Conservatory Award 10021 of 1999 where the tribunal expressly indicated that the decision may be different, amended, or revoked in the final award (unpublished).

<sup>175</sup> The submission that an arbitral tribunal could have a physiological difficulty in amending or revoking its earlier decision for an interim measure of protection is misconceived. See *Karrer, Less Theory*, 109. The tribunal, like a state court, should have and, indeed, has, no difficulty in recognising the fact that its earlier decision on the measure given without full examination on the merits (basing on limited facts and under time pressure) and, thus, such

examination could result in a further decision or a final award substantially different from the earlier decision. *Id.* See also ICC Interim Conservatory Award 10021 of 1999 where the tribunal expressly indicated that the decision might be different (amended or revoked) in the final award (unpublished).

<sup>176</sup> Caron, *Interim Measures*, 513-514.

<sup>177</sup> See Article 19 of the Rules for International Arbitration 1994 of the AIA, and Rule 39 of the Arbitration Rules of the ICSID, and Article 47 of the ICSID Additional Facility Rules. It is further worthwhile to note Rule 7(11) of the Arbitration Rules 1997 of the SIAC. This Rule provides that “[a]n order for provisional relief may be confirmed, varied or revoked in whole or in part by the arbitrator who made it or any other arbitrator who may subsequently have jurisdiction over the dispute to which it relates.” Similarly, decisions of the ICJ on provisional measures could be modified or revoked where “some changes in the situation justifies” so. Article 76(1) of the ICJ Rules. In this regard, see also *Sino-Belgian Treaty case (Belgium v. China)*, 1927 PCIJ Reports, Ser. A, No. 8, 9 (Order of 15 February 1927) (where the tribunal revoked its earlier order). The revision and revocation were expressly permitted under the ICC Arbitration Rules 1923. See Chapter 2, para. 2-17 above.

<sup>178</sup> Cases Nos. A-4 and A-15, Order (18 January 1984), reprinted in 5 Iran-US CTR 112-114. See also Order of 1999 in AAA Case No. [4] (preserving, where a request for interim measure is denied, the right to re-present the request in case “a substantial change of facts may cause irreparable harm to” the moving party's business) (unpublished). Similarly, in accordance with Rule 39(3) of the ICSID Arbitration Rules, an ICSID tribunal “may at any time modify or revoke its recommendation”. Such modification or revocation could generally be done where there are new circumstances justifying them. In this regard, Schreuer states that “[i]f the circumstances requiring the provisional measures no longer exist, the Tribunal is under obligation to revoke them”. Schreuer, 766. Apparently, the determination of the existence or non-existence of the circumstances is within the sole discretion of the Tribunal.

<sup>179</sup> Cases Nos. A-4 and A-15, Order (18 January 1984), reprinted in 5 Iran-US CTR 114. However, one should keep in mind that this case was between two states.

<sup>180</sup> Interlocutory Award No. ITL 33-A-4/A-15(III)-2, (1 February 1984), reprinted in 5 Iran-US CTR 131-133.

<sup>181</sup> See Chapter 5, para. 5-53 above.

<sup>182</sup> An award is generally corrected in limited circumstances, e.g. where there is clerical, typographical or computation errors or where there is a need to interpret specific point or part of the award. On the issue of correction or interpretation, see, e.g., Article 30 of the AAA-ICDR Arbitration Rules; Article 29 of the ICC Arbitration Rules; Article 27 of the LCIA Arbitration Rules; Articles 35-37 of the UNCITRAL Arbitration Rules; Article 66 of the WIPO Arbitration Rules; and Article 33 of the Model Law.

<sup>183</sup> See Caron, *Interim Measures*, 515. The circumstances that has already considered in full should not be a cause for reconsideration or revocation unless, for instance, the earlier measure is granted *ex parte*. *Id.* On *ex parte* measures, see Chapter 5, paras 5-90 – 5-101 below.

<sup>184</sup> See Chapter 5, para. 5-54 above.

<sup>185</sup> See Chapter 5, note 141 above.

<sup>186</sup> This is, indeed, one of the reasons justifying the grant of a security for damages.

<sup>187</sup> Case No. 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-US CTR 44, 48. Similarly, in *Fluor Corporation*, after denying the request for a provisional measure in an interim award, the Tribunal held that such denial “is without prejudice to the Respondent renewing its request ... in the event of



change in the ... circumstances". *Fluor Corporation v. Iran*, Case No. 333, Interim Award No. ITM 62-333-1 (6 August 1986), reprinted in 11 Iran-US CTR 296, 298. See also *Boeing Company v. Iran*, Case No. 222, Interim Award No. ITM 38-222-1 (25 May 1984), reprinted in 6 Iran-US CTR 43, 46.

<sup>188</sup> Interim Conservatory Award 10021 of 1999 (unpublished). On this award, see Chapter 5, note 198 below and accompanying text.

<sup>189</sup> ICC Partial Award 10021 of 2000 (unpublished).

<sup>190</sup> See, e.g., Sections 38 & 39 of the EAA 1996; and Section 2GB of the Hong Kong AO.

<sup>191</sup> For an exception, see, e.g., Rule 25 of the Arbitration Rules 1997 of the SIAC. For a long period of time, arbitration rules referred to measures aimed at protection of goods/merchandise in question. The reference was related to the fact that those rules were prepared for resolving disputes in relation to sale of goods transactions. See, generally, chapter 2 above. It is noteworthy, in this regard, that arbitrating parties can determine the measures that would be granted by the arbitral tribunal in their tailor-made arbitration rules although such express determination rarely occurs.

<sup>192</sup> See Annex. Some of the examples given, in this respect, are preservation of goods or property (by ordering that the goods be deposited with a third person or that perishable goods be sold), preserving evidence, appointment of an expert for a survey, injunctive relief, preventing dissipation of assets, security for costs, and security for payment. See, e.g., Article 7(8) of the Arbitration Rules 2000 of the CIA; Article 28 of the Arbitration Rules 1993 of the Court of Arbitration at the Bulgarian Chamber of Commerce; and Article 8(2) of the Rules of Arbitration and Appeal of the GAFTA. Article 26 of the UNCITRAL Arbitration Rules refers to the conservation of goods, ordering their deposit with a third person or the sale of perishable goods, which are only examples. See, in this regard, e.g., Sanders, Commentary, 196; Baker/Davis, 133; and *E-Systems, Inc. v Iran*, Case No. 388, Interim Award No. ITM 13-388-FT (4 February 1983), reprinted in 2 Iran-US CTR 51, 60. Some more examples could be added, for example, an arbitral tribunal

may, instead of ordering the goods to be deposited with a third party, order them transferred to a more appropriate storing facility or even take temporary control over them itself. The possibility of utilizing third party depositories is not restricted to "goods"; funds (represented, e.g., by a letter of credit) may be placed to in escrow as an interim measure. (Citations omitted)

Pellonpää/Caron, 444. With respect to types of arbitral provisional measures granted, for instance, in ICC arbitration practice, see Lew, Commentary, 29. In addition, arbitral tribunals are generally empowered to collect evidence. See Chapter 5, para. 5-72 below.

<sup>193</sup> See, in this respect, Lew/Mistelis/Kröll, para. 23-3 (indicating that "[w]hat interim measures are appropriate in international commercial arbitration is determined according to the specific facts of each dispute and the arbitrators' subjective perception of the risks involved"). In using their wide discretion, arbitrators occasionally refer to procedural law of the seat of arbitration (as the law applicable to arbitration) in practice. See ICC Second Interim Award 7544 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 56-60 (2000); and ICC Interim Awards 8670 of 1995 and 1996 (unpublished) (in both cases the arbitral tribunals mainly applied the principles of the law of the place of arbitration in reaching the conclusion that security for payment was available under the ICC Arbitration Rules 1988 despite the fact that the Rules were thought not to regulate this kind of security). See also, for the extracts from the decision of the arbitral tribunal in *Sperry International Trade, Inc.*

v. *Israel*, 689 F2d 301 (2d Cir. 1982). It should be noted that arbitrators should not restrict themselves with the measures available at the seat of arbitration provided that the measure is intended to have effect at the seat. The seat is often a neutral place in international commercial arbitration. Arbitrating parties and the subject matter may have no connecting element with the seat. Karrer, *Less Theory*, 109. Further, even if the measure is intended to have effect at the seat and elsewhere, it should be kept in mind that measures not available in the form granted under the local law may still be enforceable in some countries, e.g., Germany with some adaptations. *Id.* See also Chapter 6, paras 6-31 – 6-32 below; and Berger, *International Economic Arbitration*, 339 (stating that “the arbitrators are not limited to the remedies known in the procedural law of the country of the seat”).

<sup>194</sup> See, in this regard, Craig/Park/Paulsson, *ICC Arbitration 2000*, 462-63 (stating that an arbitral tribunal has “an obligation to try to find an equitable and commercially practicable procedural solution to prevent irreparable and unnecessary injury to the parties”).

<sup>195</sup> See, Lew, *Commentary*, 29. The observation of, for instance, the *lex arbitri* is necessary for upholding the measures' validity (particularly if it is an award) whereas that of the *lex executionis* (if known) is important if the enforcement of the measure will be sought.

<sup>196</sup> Also because arbitrators do not wish to be in conflict with *lex arbitri* or law of place of enforcement. That is to say that where those laws empower arbitrators to grant, for instance, measures against third parties or measures that intrinsically require the use of coercive powers, arbitrators are likely to grant those measures. But see Karrer, *Less Theory*, 106. He argues that whether or not an arbitrator can grant, for instance a *Mareva* injunction is a matter of comity. *Id.* But see Chapter 3, note 91 above.

<sup>197</sup> ICC Interim Award 6251 of 1990 (unpublished) (holding that the tribunal does not have the authority to issue a *Mareva* injunction). Indeed, it is stated that *Mareva* or *Anton Piller* relief requires the use of draconian powers which “are best left to be applied” by judiciary. 1996 DAC Report, para. 201. See also *Kastner v. Jason*, [2005] 1 Lloyd's Rep. 397, [2004] EWCA Civ 1599 (Court of Appeal, Civil Division, 2 December 2004) (holding that freezing orders operate *in personam*). But see Lew/Mistelis/Kröll, paras 23-47 – 23-51. Apparently, the reason for not equipping arbitrators with such powers is more political than philosophical. See Karrer, *Less Theory*, 106.

<sup>198</sup> ICC Partial Award 10021 of 2000 (unpublished) (finding “it inappropriate to grant requests of attachment where the power of national courts would be a prerequisite”). See, e.g., Berger, *International Economic Arbitration*, 341 (attachment, as a coercive remedy, is reserved to jurisdiction of judicial authorities). See also Article 1696(1) of the Belgian Judicial Code.

<sup>199</sup> ICC Final Award 7828 of 1995 (unpublished) (holding that “[i]t exceeds the arbitrator's competence to subject the Defendant to attachment if he fails to pay the ordered amount within the period of two weeks”).

<sup>200</sup> Further, several of the rules surveyed contain similar or other kind of restrictions. See, e.g., Article 21 of the AAA-ICDR Arbitration Rules (“including injunctive relief and measures for the protection or preservation of property”); Article 35 of the Securities Arbitration Rules 1993 of the AAA (“including measures for conservation of property, without prejudice to the rights of the parties or to the final determination of the dispute”); Article 52 of the Arbitration Rules 1986 of the Center for Conciliation and Arbitration of the Chamber of Commerce, Industry and Agriculture of Panama (“including measures for the preservation of the goods forming the subject matter in dispute, such as ordering that the goods be deposited with a third person or that perishable goods be sold”); Article 34 of the

Rules of International Arbitration 1992 the Croatian Chamber of Commerce (“including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods”); Rule 13 of the Non-administered Arbitration of International Disputes 1992 of the CPR Institute for Dispute Resolution (“including measures for the preservation of assets, the conservation of goods or the sale of perishable goods”); Article 27 of the Arbitration Rules of the European Development Fund (“including measures for the conservation, preservation or safe-custody of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable good”); and Article 46 of the WIPO Arbitration Rules 1994 (“including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as order for their deposit with a third person or for the sale of perishable goods”). See also Article 7(11) of the Arbitration Rules 2000 of the CIA; Rule 25 of the Arbitration Rules 1997 of the SIAC; and Articles 27 of the UNECE Arbitration Rules 1966.

<sup>201</sup> See Chapter 3, note 104 above and accompanying text.

However, it is submitted that whether a tribunal operating under the above rules or the Model Law could grant a measure aimed at preserving the *status quo* is “doubtful”, and security for claim. Redfern/Hunter, para. 7-26. Such argument could not be made in regard of the restriction contained, for example, under Article 25(l)(c) of the LCIA Arbitration Rules. The tribunal is, under these Rules, empowered to order “any relief which the [a]rbitral [t]ribunal would have power to grant in an award ...”. See also *Charles Construction Company v. Derderian*, 586 N.E.2d 992 (Mass. 1992) (denying an argument that an arbitrator has the power to grant a security for claim where the arbitration agreement empowered arbitrators with the power to grant interim relief to safeguard the property that was the subject matter of the arbitration).

<sup>202</sup> See, e.g., Section 39(1) of the EAA 1996.

<sup>203</sup> In addition, institutional or *ad hoc* arbitration rules or national laws generally deal with collection of evidence. For instance, under Article 20(1) of the ICC Arbitration Rules, an arbitral tribunal is empowered to establish the facts by all appropriate means. The similar powers are entrusted to an arbitral tribunal in accordance with, e.g., Article 19(3) of the AAA-ICDR Arbitration Rules; Article 18 of the Arbitration Rules 2005 of the CIETAC; Rule 4 of the Rules of Arbitration and Appeal 1997 of the FOSFA; Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules; Article 3 of the International Bar Association's 1999 Rules of Evidence; Article 20 of the ICC Arbitration Rules; Article 22(1)(d)-(e) of the LCIA Arbitration Rules; and Article 24(3) of the UNCITRAL Arbitration Rules. The protection of evidence on an interim basis could be done either by the above provisions or through powers entrusted to arbitrators under the relevant rules or laws for interim protection of rights. The power regarding the collection of evidence is generally used – where there is no urgent need of protection of evidence – for simply establishment of the case in dispute. The benefit of relying on this power is that it is more likely than not that court assistance could be sought for collection of evidence. See, e.g., Article 38(4) of the EAA 1996; Article 27 of the Model Law; Articles 184(2) and 185 of the SPIL; and Section 7 of the U.S. Federal AA 1925. It should, however, be noted that an arbitral tribunal, in principle, ought to be free to rely on whatever power it thinks effective to protect the evidence in peril.

<sup>204</sup> See, e.g., *Behring International, Inc. v. Iranian Air Force*, Case No. 382, Decision (19 December 1983), reprinted in 4 Iran-US CTR 89 (appointing an expert for determining the status of the goods that were deteriorating); and *AGIP v. Congo*, cited in Award, 30 November 1979, 1 ICSID Rep 311 (recommending the collection of all books and documents that might be lost). But see, e.g., *Vacuum*

*Salt v. Ghana* (denying the request for preservation of evidence because of the respondent's undertaking).

<sup>205</sup> The preservation of *status quo* may sometimes be vital as in certain cases an award of damages cannot fully remedy the loss of a party. For instance, "damage to reputation, loss of business opportunities and similar heads of claim, which are real enough but difficult to prove and to quantify ..." may be avoided through provisional measures. Redfern/Hunter/Blackaby/Partasides, para. 7-28.

<sup>206</sup> Case No. 382, Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-US CTR 238. See also, e.g., *Iran v. The United States of America*, Case A-15, Dec. No. Dec 52-A/15-FT (24 November 1986), reprinted in 13 Iran-US CTR 173-175.

<sup>207</sup> Case No. 382, Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-US CTR 276. However, the Iran US-Claims Tribunal, by recognising the possibility that the claimant might have a warehouseman's lien over the goods in dispute, granted forty-five days to the claimant to apply to a court in the U.S. for establishing measures protecting its security interest. *Id.*, 282.

<sup>208</sup> See *Behring International, Inc. v. Iranian Air Force*, Case No. 382, Award No. ITM 25-382-3 (21 June 1985), reprinted in 3 Iran-US CTR 173-175 (holding that, under Article 26 of the Tribunal Rules, the Tribunal is authorised to grant the stay of sale of goods); and *U.S. (Shipside Packing) v. Iran*, Case No. 11875, Interim Award No. ITM 27-11875-1 (6 September 1983), reprinted in 3 Iran-US CTR 331 (ordering the claimant to halt the proposed sale of goods in dispute).

<sup>209</sup> See *Avco Corporation v. Iran*, Case No. 261, Partial Award No. 377-261-3 (18 July 1988), reprinted in 19 Iran-US CTR 200, 201-202; and *United Technologies Int'l, Inc. v. Iran*, Case No. 114, Dec. No. 53-114-3 (10 December 1986), reprinted in 13 Iran-US CTR 254-260. See also, in this regard, *Iran v. United States*, Case A/15, Dec. No. 35-A/15(II)-FT (5 March 1985), reprinted in 8 Iran-US CTR 63-64 (holding that the denial was based on the fact that the request became moot).

<sup>210</sup> Case Nos. A-4 and A-15, Interlocutory Award No. ITL 33-A-4/A-15(III)-2 (1 February 1984), reprinted in 5 Iran-US CTR 131-133. See also ICC Interim Conservatory Award 10021 of 1999 (unpublished) (ordering a party to refrain from, on an interim basis, selling encumbering, leasing or otherwise disposing its interests in shares of a company).

<sup>211</sup> *Iran v. United States*, Case Nos. A-4 and A-15, Interlocutory Award No. ITL 33-A-4/A-15(III)-2 (1 February 1984), reprinted in 5 Iran-US CTR 133.

<sup>212</sup> Order No. 5 of 1998 in AAA Case No. [1] (unpublished).

<sup>213</sup> See *Sperry International Trade Co. v. Government of Israel*, 689 F 2d 301, 303, note 2 (2nd Cir. 1982).

<sup>214</sup> For instance, measures for prohibiting withdrawal of a bank guarantee, selling shares of a company, changing its board of directors, etc.

<sup>215</sup> On risk allocation, see Chapter 5, note 92 above.

<sup>216</sup> Apparently, as regards the contractual rights, generally, the balance existed between the parties under the agreement should be maintained whereas as regards the statutory rights and remedies, normally, the balance existed at the initiation of arbitration proceedings should be maintained. On the latter, see Cremades, *The Need*, 227.

<sup>217</sup> A party, for example, cannot argue, if it knew or should have known, that the other party is from or established under the laws of a country that is not a party to major treaties facilitating enforcement of arbitration awards. But see Cremades, *The Need*, 227.

<sup>218</sup> ICC Second Interim Award 5835 of 1992 (unpublished). On the facts regarding this case, see ICC First Interim Award 5835 of 1988, extracts published in 8(1) ICC Int'l Ct Arb Bull 67 (1997)

<sup>219</sup> For a review of judicial anti-suit injunctions, see, e.g., Gaillard (gen. ed.), *Anti-Suit Injunctions*, 17-112; and Lew/Mistelis/Kröll, paras 15-24 – 15-33.

<sup>220</sup> The courts traditionally have hostility towards arbitrators. See Chapter 2, paras 2-32 – 2-33 above. Article 2(3) of the New York Convention generally resolves the potential clash. See also, e.g., Article 26 of the ICSID Convention. Domestic laws may too provide for provisions that cause courts or other arbitral tribunals to refer the case to the tribunal validly seized the case in dispute. See, e.g., Article 8 of the Model Law; Section 9 of the EAA 1996. In fact, if a dispute is agreed to be resolved through arbitration, judicial authorities should deny any request to them for the resolution of the dispute and refer the parties to arbitration.

<sup>221</sup> Karrer, *Less Theory*, 106.

<sup>222</sup> *Id.*

<sup>223</sup> Decision of Tribunal (2 July 1972). See Lalive, 136-137. Generally, ICSID tribunals base their jurisdiction to issue anti-suit injunction on Articles 26 and 47 of the ICSID Convention. In another words, such jurisdiction is mainly based on the rule of judicial abstention in ICSID arbitration. On ICSID tribunals further practice concerning anti-suit injunctions, see, e.g., Konstantinos D. Kerameus, "Anti-Suit Injunctions in ICSID Arbitration" in: Gaillard (gen. ed.), *Anti-Suit Injunctions*, 131-146. See also Wirth, 37 (indicating that, in two unpublished cases, the tribunals granted anti-suit injunctions basing their decisions on the arguments that either by agreeing to arbitrate parties obliged not to seek any relief outside arbitration or confidentiality clause contained in the substantive contract prevented such relief). Wirth, 37. On the issue of comity, see Chapter 3, note 91 above.

<sup>224</sup> The power to issue such fine may expressly be contained in the arbitration agreement. Otherwise, the power arises from broad interpretation of the agreement. See, Karrer, *Less Theory*, 105. But see Berger, *International Economic Arbitration*, 341 (stating that the issuance of a penalty payment is "beyond the authority and the mandate of an arbitral tribunal").

<sup>225</sup> ICC Final Award 7895 of 1994, extracts published in 11(1) ICC Int'l Ct Arb Bull 64-65 (2000) (the tribunal found itself with the power to order an injunction coupled with a fine under the ICC Arbitration Rules 1988 in "the absence of (i) an agreement of the parties to the contrary, and (ii) a mandatory provision of French procedural law requiring otherwise ..."). See also ICC Interim Award 9301 of 1997 (unpublished) and ICC Final Award 9154 of 1998, extracts published in 11(1) ICC Int'l Ct Arb Bull 98-103 (2000). Laws of such countries as Belgium, France, and Netherlands (Article 1056 of the Netherlands AA) seem to recognise the adoption of such arbitral power. Karrer, *Less Theory*, 105. But, for instance, Swedish law expressly prohibits imposition of fines. Section 25 of the Swedish AA 1999.

<sup>226</sup> Partial Award of 1999 and Final Award of 2000 in AAA Case No. [7] (unpublished). The place of arbitration was Nevada, in the U.S.

<sup>227</sup> It is noteworthy that the respondents did not comply with the tribunal's directives. The tribunal sanctioned the non-compliance, in its final award. Accordingly, the sanction became a post-award relief. The tribunal ruled that if any of its injunctions as provided in its partial award was not complied with, the respondents were to pay USD 1000 for each day of non-compliance for a period of twenty days.

<sup>228</sup> The arbitration rules surveyed, save for a few, do not generally empower an arbitrator to grant security for payment. For the exceptions, see Article 38(1) of the NAI Arbitration Rules; Article 25



(1)(a) of the LCIA Arbitration Rules; and Article 17(1) of the CEPANI Arbitration Rules. In this regard, see also NAI Interim Award No. 1694 (21 December 1996), extracts reprinted in XXIII YCA 97 (1998). For the concept of broad interpretation of arbitration agreement, see, e.g., ICC Second Partial Award 8113 of 1995, extracts published in 11(1) ICC Int'l Ct Arb Bull 65 (2000); and Lew/Mistelis/Kröll, para. 23-44. See also *Charles Construction Company v. Derderian*, 586 NE 2d 992 (Mass. 1992) (Massachusetts Supreme Court) (holding that where the arbitration agreement or the applicable law is silent on the power to take security for claim, "the arbitrator's authority to act would be reasonably implied from the agreement to arbitrate itself"). But see *Swift Industries Inc. v. Botany Ind. Inc.*, 466 F 2d 1125 (3d Cir. 1972) (holding that "to award [security for claim] as an adjunct to declaratory relief a form of pre-judgment execution which the agreement by its lack of reference to security seems to exclude rather than to intend, is to eclipse the framework of the agreement and to venture on to unprotected grounds").

<sup>229</sup> ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 81-84 (2000). Another arbitral tribunal denied a similar request on the ground that the law of the place of arbitration did not provide for security for claim. ICC Final Award 7560 of 1990 (unpublished). See Yesilirmak, *Interim Measures*, 33, note 29.

<sup>230</sup> ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 82-83 (2000). The tribunal relied mainly on the requirements set forth under the law of the place of arbitration for the grant of the measure requested. See also NAI Interim Award 1694, extracts reprinted in XXIII YCA 97 (1998).

<sup>231</sup> ICC Interim Conservatory Award 10021 of 1999 (unpublished).

<sup>232</sup> *Black's Law Dictionary*, 8th ed., (St Paul, Minnesota: West 2004), 1387.

<sup>233</sup> See Sandrock, 17. The examples to those countries where a security for costs may be required in litigation, see, e.g., Austria (Article 57 of the CCP); Germany (Article 110 of the CCP); Turkey (Article 32 of the International Private and Procedural Law; see also Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, 2nd ed. (İstanbul: Beta 2002), 128-136); and the USA (see, e.g., Noah Rubins, "In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration", 11(3) *Am Rev Int'l Arb* 307, 327 (2000)). But see Article 17 of the Convention Relating to Civil Procedure, done at the Hague on 1 March 1954, 286 UNTS 265, No. 4173; and Article 9(1) of the European Convention on Establishment of 1955, signed at Paris on 13 December 1955, 1955 UNTS 141, No. 7660.

<sup>234</sup> Craig/Park/Paulsson, ICC Arbitration 2000,467.

<sup>235</sup> See, e.g., Blessing, Introduction, para. 886; Redfera/Hunter/Blackaby/Partasides, para. 7-40 (indicating that arbitrators are unlikely to grant security for costs); V. V. Veeder, "England" in: Paulsson (gen. ed.), *International Handbook, Supplement 23* (March 1997), 43 (indicating that an arbitrator's broad discretion to order security for costs under the EAA 1996 "is likely to be exercised most sparingly where the arbitration is truly international"). Indeed, it is observed that ICC arbitrators "were extremely reluctant to grant" such measures. Craig/Park/Paulsson, ICC Arbitration 2000,467.

<sup>236</sup> Apparently, where a party becomes successful at the end of arbitration proceedings, the costs would be apportioned in accordance with the applicable rule or law (e.g., costs follow the event, or each party bears its own costs).

<sup>237</sup> Blessing, Introduction, para. 886.

<sup>238</sup> See Chapter 3, note 94 above.

<sup>239</sup> See, e.g., Sandrock, 30-37. For the appropriate circumstances under English law, see, e.g., Daniel Brown/Peter Fenn, "Security for Costs in Arbitration in England and Wales", [2003] Int ALR 191.

<sup>240</sup> Annex.

<sup>241</sup> See e.g., SPIL (see, e.g., Wirth, 36 (stating that under exceptional circumstances, e.g., where there is a "clear and present danger" or even where there is a "potential risk" of non-recovery of legal costs, an arbitral tribunal may order security for costs)); Section 38(3) of the EAA 1996 (stating that, unless otherwise agreed, a tribunal may order security for costs though such order, under that Section, could not be based on the fact that a party is ordinarily resides out of England or that a company or association incorporated under the law of a foreign country or managed or controlled from such country); Section 2GB(1)(a) of the Hong Kong AO; Section 7(2) of the Ireland AA 1998; Section 12(1) of the Singapore International AA. However, it should be noted that the device of security for costs is unfamiliar to many legal systems. W. Laurence Craig/William W. Park/Jan Paulsson, *Craig, Park & Paulsson's Annotated Guide to the 1998 ICC Arbitration Rules with Commentary* (Oceana Publications, Inc. 1998), 139 ("Annotated Guide").

<sup>242</sup> Craig/Park/Paulsson, ICC Arbitration 2000, 467.

<sup>243</sup> See, e.g., Article 21 of the Arbitration Rules of the AAA-ICDR; Article 35 of the Securities Arbitration 1993 of the AAA; Article 18 of the Arbitration Rules 1993 of the Board of Arbitration of the Central Chamber of Commerce of Finland; 25(2) of the LCIA Arbitration Rules; Article 38 of the NAI Arbitration Rules; Article 46 (b) of the WIPO Arbitration Rules (under "exceptional circumstances"); and Article 26(2) of the UNCITRAL Arbitration Rules. It is noteworthy, in this regard, that, under Article 25(2) of the LCIA Arbitration Rules, an arbitral tribunal is exclusively (and not a court) empowered to grant security for costs (legal or otherwise). Further, the scope of the security, e.g., whether it covers legal expenses, costs of arbitration, attorney's fees, remuneration of the tribunal is not generally dealt with under the above rules. See, e.g., Article 7(8)(b) of the Arbitration Rules 2000 of the CIA (provides only for security for costs). But see Rule 11 of the Arbitration Rules 1981 of the Copenhagen Court of International Arbitration provides "[p]arties to a dispute shall provide security for all expenses of the arbitral proceedings".

<sup>244</sup> It should be noted, in regard of the power to grant security for costs, that thirty sets of the rules surveyed contain a general provision on the security. According to these rules, the tribunal is generally empowered to ask for appropriate security. The broad interpretation of such rules enables the grant of security for costs by arbitrators. See, e.g., Article R37 of the Arbitration Rules 1994 of the Court of Arbitration for Sport Arbitration; and Article 23 of the Arbitration Rules 1998 of the ICC. It should be noted, in this regard, that during the preparation of the ICC Arbitration Rules 1998, several suggestions were made to expressly deal with security for costs in the Rules as a result of the founding in the *Ken Ren* decision of the House of Lords. See *S.A. Coppée-Lavalin N.V. v. Ken-Ren Chemicals and Fertilizers Limited*, [1995] 1 AC 38, [1994] 2 All ER 499, (1994) 2 WLR 63, [1994] 2 Lloyd's Rep 109. This decision reversed the Court of Appeal's earlier decision in *Bank Mellat v. Helliniki Techniki, S.A.* [1984] Q.B. 291. However, the ICC's "Working Party preferred not to make any specific reference in this respect, but the wording of Article 23 would seem broad enough to allow the making of an application for and the issuing of a ruling by the Tribunal on, the security for costs". See Marc Blessing, "Keynotes on Arbitral Decision Making" in: ICC, 1998 ICC Rules, 44, 44-45. See also, in this regard, Derains/Schwartz, 274, note 622 (stating that "[n]otwithstanding the experience of the *Ken-Ren* cases, those drafting the New Rules were reluctant to mention



security for costs expressly because they did not wish to encourage the proliferation of such applications, which, apart from being rare, are generally disfavoured in ICC arbitrations"); Sigvard Jarvin, "Aspects of the Arbitral Proceedings" in: 1998 ICC Rules, 38, 43 (1997); and Craig/Park/Paulsson, Annotated Guide, 139; ICC Final Award No. 7047 of 1994, extracts published in 8(1) ICC Int'l Ct Arb Bull 61 (1997); ICC Interim Award No. 6632 of 1993 (unpublished); and ICC cases cited in the Craig/Park/Paulsson, Annotated Guide, 139.

<sup>245</sup> In this regard, see Wirth, 36. Since the moving party generally deposits advance on costs under institutional arbitration rules, an order to deposit further amount in the name of security for costs may have the effect of preventing a commercially weak party to pursue its claims. See Craig/Park/Paulsson, ICC Arbitration 2000, para. 26.05; and Lew/Mistelis/Kröll, para. 23-55.

<sup>246</sup> See, e.g., ICC Final Award No. 7489 of 1993, extracts published in (1993) Clunet 1078; 8(1) ICC Int'l Ct Arb Bull 68 (1997); and Hascher, Procedural Decisions, 48 (denying the exercise of the power to grant security for costs by arguing that the application was not "irreconcilable with its ground"); ICC Final Award No. 7047 of 1994, extracts published in 8(1) ICC Int'l Ct Arb Bull 61 (1997) (denying the request for security for costs mainly because the moving party based its reasoning on the ground that it knew or should have known at the time of entering into the arbitration agreement); ICC Final Award No. 7137, extracts published in Emmanuel Jolivet, "Quelques questions de procédure dans l'arbitrage commercial international" in: (2003) 2 Les Cahiers de l'arbitrage 36 (denying the application for security for costs on the basis that the solution provided in Article 9 of the 1988 ICC Arbitration Rules is sufficient not to justify the grant of the request). Similarly, in ICC case 6632, upon the raise of the issue of liquidation of the Claimant, the Respondent requested security for costs. The Claimant too made the same request. The Respondent claimed that the Claimant's liquidation was for the purpose of being judgment proof. The Respondent did not object Claimant's request for security for costs. It, indeed, expressly offered to provide a security for costs. The Tribunal, under the circumstances of the case, requested from both parties to provide for security for costs. ICC Interim Award 6632 of 1993 (unpublished).

<sup>247</sup> Redfern/Hunter, para. 7-32. Whether or not the claimant resides or is incorporated in a place other than the place of arbitration should never be taken into account in granting a security for costs in international arbitration. Section 38(3) of the EAA 1996. Further, contractual arrangement that each party bears its own costs or that each party deposits certain amount of money as an advance to cover the costs may prevent the grant of security for costs. See Craig/Park/Paulsson, ICC Arbitration 2000, 467-68.

<sup>248</sup> Sandrock, 30.

<sup>249</sup> Id.

<sup>250</sup> See Chapter 1, para. 1-15 above.

<sup>251</sup> ICC Second Interim Award 7544 of 1996, extracts published 11 (1) ICC Int'l Ct Arb Bull 56-60 (2000). To this end, it should be noted that Section 39(2) of the EAA 1996 expressly permits parties to empower their tribunal with the power to grant security for payment. Even if the *lex arbitri* prohibits the provisional payment such payment may be made in accordance with the *lex causae* or law of the place of enforcement. This approach seems to be adopted by, for example, Swiss law. See Wirth, 35.

<sup>252</sup> ICC Second Partial Award 5808 of 1994 (unpublished).

<sup>253</sup> The tribunal cited Article 809(2) of the French New CCP. This Article provides that where the existence of the obligation cannot seriously be denied, the court may order an interim payment on account.

<sup>254</sup> ICC Second Interim Award 7544 of 1996, extracts published 11 (1) ICC Int'l Ct Arb Bull 56-60 (2000).

<sup>255</sup> See, in this regard, id (after “weighing up the probability as to whether, after the claims and counterclaims have been fully argued before it, the net result will be in favour of” the moving party, the tribunal reached the positive conclusion). However, in ICC case 9984, the arbitral tribunal did not uphold the request for a provisional payment. In this case, the claimant made a request for interim payment of the certain amount of money that was, as self reported, not contested. But the tribunal ruled that the amount was, in fact, seriously contested and whether or not to grant the measure “is too closely linked with the solution of whole dispute”. ICC Partial Award 9984 of 1999 (unpublished).

<sup>256</sup> ICC Second Interim Award 7544 of 1996, extracts published 11 (1) ICC Int'l Ct Arb Bull 56-60 (2000) (requiring a security for damages “in order to cover the risk that the final decision might not be consistent with the decision reached ... [on an interim basis], and not to prejudice the right of set-off ...” in the amount of the provisional payment ordered). Indeed, the ECJ too held, in *van Uden*, that an interim payment does not constitute a provisional measure within the meaning of the Brussels Convention unless, *inter alia*, the repayment to the defendant of the sum awarded is guaranteed should the applicant proved to be unsuccessful. (1998) ECR I-7136-37, paras 45-47.

<sup>257</sup> See, e.g., *Island Creek Coal Sales Co. v. The City of Gainesville, Florida*, 764 F2d 437, 438-39 (2d Cir. 1985).

<sup>258</sup> Otherwise, such transfer of power may arise from the general arbitral procedural powers. See, e.g., Berger, *International Economic Arbitration*, 349.

<sup>259</sup> UN Doc A/CN.9/WG.II/WP.110, para. 52.

<sup>260</sup> A measure in the absence of the adverse party or without notification to it.

<sup>261</sup> It is observed during the preparation of the UNCITRAL Arbitration Rules that parties were to be given a right to be heard in regard of interim measures except for “urgent matters”. UN Doc A/CN.9/97/Add. 3, reprinted in VI UNCITRAL Yearbook 184, 185 (1975).

<sup>262</sup> For instance, the German Constitutional Court upheld the validity of *ex parte* measures against the claim of a breach of a constitutional principle of *auditur et altera pars* for protecting party interests and; thus, effectiveness of adjudication. Schaefer, Part 4.2.2.2. Similarly, the U.S. Supreme Court found no infringement of the constitutional due process requirement of notice and opportunity to be heard with the issuance of *ex parte* measures. That is, however, subject to a subsequent opportunity to be given to the respondent for the challenge of the measure. See Reichert, 374; and Randall K. Anderson, “The United States of America” in: Bösch (ed.), 741, 754-755. Likewise, for English law, see, e.g., *Petroleum Investment Company Limited v. Kantupan Holdings Company Limited*, [2002] 1 All ER (Comm) 124 (indicating that “[u]nless giving notice would be impossible or impracticable e.g., because of the urgency of the situation, an application for an injunction should only be made without notice to the respondent in circumstances where it would be likely to defeat the purpose of seeking the injunction if forewarning were given”). It is submitted that *ex parte* measures are available in certain Arab states provided that a right to be heard is subsequently given. Aboul-Enein, 82. In addition, although Section 684.16(1) of the Florida International AA, which, in principle, prohibits *ex parte* proceedings for an interim measure of protection, Section 684.16(3) of the Florida International AA permits *ex parte* measures provided that the tribunal immediately extends the right to modify or terminate such measure to all parties not notified. Further, laws of the following countries generally permit *ex parte* court-ordered provisional measures: Australia (Coleman/Sharp in: Bösch

(ed.), 39), Austria, (Kutschera/Mitsch, id., 68), Belgium (Guyot, id., 98), Brazil (Stuber, id., 124), Canada (Cullen, id., 149), China (Xhang/Bing, id., 169), Denmark (Walther-Rasmussen, id., 188), England (see, e.g., Section 44(3) of the EAA 1996. See also Groves, 190.), Finland (Ojantakanen/Relander, Bösch (ed.), 244), France (Buchman, id., 269), Greece (Adamantopoulos, id., 325), Hong Kong (Robin S. Peard, "Hong Kong", id., 331, 345), Ireland (Duncan S. J. Grehan, "Ireland", id., 349, 365), Italy (Tocchi, id., 382), the Republic of Korea (Chung, id., 398), Liechtenstein (Braxator/Wanger, id., 418), Mexico (Oehmichen/Pikoff, id., 449), Morocco (Kettani, id., 465), Norway (Aagaard, id., 514-15), Panama (Boutin, id., 530), Puerto Rico (Rafael A. Nadal Arcelay, "Puerto Rico", id., 563, 573), Scotland (Semple, id., 607-608), Singapore (Thomas R. Klötzel, "Singapore", id., 613, 629), the Republic of South Africa (Hay, id., 643), Sweden (Göthberg, id., 686-87), Switzerland (Peter, id., 716), Turkey (Article 101 of the CCP). On examination of *ex parte* measures from the human rights perspective, see, e.g., Collins, 179-191 (indicating that *ex parte* measures are, under certain circumstances are permitted in various legal system and international bodies). See also Article 17.2 of the UNIDROIT Principles. Obviously, arbitral powers to grant *ex parte* measures is subject to applicable law. Under English and Scottish law, for instance, arbitral *ex parte* measures is not allowed. See Veeder, Cross-Border Enforcement, 19 and 23, respectively. But see, e.g., Donovan, Survey of Jurisdictions in: van den Berg (ed.), Contemporary Questions, 129-130.

<sup>263</sup> See Chapter 3, para. 3-5 above.

<sup>264</sup> See Naimark/Keer, 25.

<sup>265</sup> This, however, does not mean that there has not been any such decision.

<sup>266</sup> The right to be heard (*audi alteram partem*) is a facet of the principle of natural justice, or of due process. This right is a universally recognised fundamental right. See, e.g., V. S. Mani, "Audi Alteram Partem – Journey of a Principle From the Realms of Private Procedural Law to the Realms of International Procedural Law", 9 Indian Journal of Int'l Law 381-411 (1969). This right's infringement may cause, in international arbitration, setting aside of the outcome of an award or refusal of the enforcement under, for instance, Article V(l)(b) of the New York Convention, and Article 5 of the Inter-American Convention.

<sup>267</sup> For the other objections, see, e.g., UN Doc A/CN.9/487, para. 70; UN Doc A/CN.9/523, para. 21; and Yves Derains, "Arbitral *Ex Parte* Interim Relief, Dis Res J 61 (August/October 2003) ("*Ex Parte* Relief). On a very convincing rebuttal of these objections, see, e.g., James E Castello, "Arbitrators Should Have the Power to Grant Interim Relief *Ex Parte*", Dis Res J 60 (August/October 2003).

<sup>268</sup> Six out of seventy arbitration rules surveyed expressly require that adverse party shall be heard. See Article 7(11) of the CIA Arbitration Rules; Article 17(2) of the Copenhagen Court of International Arbitration, Arbitration Rules 1981; Article 11 of the FAA Arbitration Rules 1980; Article 22 of the LCIA Arbitration Rules; Rule 25 of the SIAC Arbitration Rules; and Rule 39(4) of the ICSID Arbitration Rules. See also Article 66(2) of the ICJ Rules.

<sup>269</sup> Rule 39(4).

<sup>270</sup> Note E to the 1968 ICSID Arbitration Rules, reprinted in 1 ICSID Rep. 99.

<sup>271</sup> Id.

<sup>272</sup> See Schreuer, 750.

<sup>273</sup> Schwartz, Provisional Measures, 59.

<sup>274</sup> See, e.g., ICC Final Award 8893 of 1997 (unpublished). The requirement to grant the right to a hearing for interim measures of protection, arguably, arises from Article 21(3) of the ICC Arbitration Rules 1998. This argument was raised by Schwartz, Provisional

Measures, 59. He referred to Article 15(4) of the ICC Arbitration Rules 1988, which corresponds Article 21(3) of the 1998 ICC Arbitration Rules. This last Article provides that “all parties shall be entitled to be present” at the hearings. Schwartz argues that this rule “arguably prevents an ICC arbitral tribunal from convening a hearing, even for interim or conservatory purposes, on an *ex parte* basis”. *Id.*

<sup>275</sup> Caron, *Interim Measures*, 500; and Brower/Brueschke, 224-225. See also, e.g., *Component Builders Inc. v. Iran*, Case No. 395, Order (10 January 1985), reprinted in 8 Iran-US CTR 3, 4.

<sup>276</sup> Article 15(2) provides that “at any stage of the proceedings each party is given a full opportunity of presenting his case”.

<sup>277</sup> See Chapter 5, note 262 above.

<sup>278</sup> These rules mainly require that in utmost urgency an order may be given upon the presentation of a request provided that the other party shall be heard subsequently. See Article R37 of the Court of Arbitration for Sport Arbitration Rules 1994.

<sup>279</sup> This practice seems to be accorded with the observation of a delegate, in the drafting process of the UNCITRAL Arbitration Rules: “The parties should have a right to be heard before the arbitrators take interim measures . . . , *except in urgent cases*”. (Emphasis added.) UN Doc A/CN.9/97/Add. 3, Annex I, reprinted in VI UNCITRAL Yearbook 185.

<sup>280</sup> For a detailed analysis of the Tribunal's practice concerning temporary measures, see Chapter 5, para. 5-57 – 5-61 above.

<sup>281</sup> Berger, *International Economic Arbitration*, 337. See also, e.g., Blessing, *Introduction*, para. 879; Bucher/Tschanz, para. 175; and Wirth, 38. But see, e.g., Schwartz, *Provisional Measures*, 59; and Bernardini, 27. The last author suspects the legal validity of the above solution. His suspicion relies on the argument that, contrary to domestic court proceedings, there is no recourse against arbitrators' order issued on an *ex parte* basis. Bernardini, 27. However, this argument fails to take into account the fact that such an order could be amended or revoked by the same arbitrators following the hearing of both parties. See Jacques-Michel Grossen, “Comment” in ICC (ed.), *Conservatory Measures*, 115, 116; and Blessing, *Introduction*, para. 866.

<sup>282</sup> See, e.g., Redfern/Hunter, para. 4-51.

<sup>283</sup> Derains, *Ex Parte Relief*, 62.

<sup>284</sup> See, e.g., Ejder Yılmaz, *Geçici Hukuki Himaye Tedbirleri*, v. 1 (Ankara: Yetkin 2001), 888; Muhammet Özekes, *Medeni Usûl Hukukunda Hukuki Dinlenilme Hakkı* (Ankara: Yetkin 2003), 213-214; Hakan Pekcanitez/Oğuz Atalay/Muhammet Özekes, *Medeni Usul Hukuku*, 3rd. ed., (Ankara: Yetkin 2004), 495; and Hakan Pekcanitez/Oğuz Atalay/Meral Sungurtekin Özkan/Muhammet Özekes, *İcra ve İflas Hukuku*, 2nd. ed., (Ankara: Yetkin 2005), 281.

<sup>285</sup> See, e.g., Gaillard/Savage (ed.), paras 1296-1299.

<sup>286</sup> Indeed, oral hearings were held in four of the Iran-US Claims Tribunal's initial twenty-nine cases on interim measures. Caron, *Interim Measures*, 500. In this regard, see, e.g., *Component Builders, Inc. v. Iran*, Case No. 395, Order (19 February 1985) (unpublished) quoted in *Interim and Interlocutory Award No. ITM/ITL 51-395-3*, reprinted in 8 Iran-US CTR 216, 219 (holding that “neither the Tribunal Rules nor the Tribunal practice requires that . . . a Hearing be held on requests for interim measures . . .”). Further, Judge Mosk, in his concurring opinion, argued

the rule [Article 15(2) of the Tribunal Rules], although somewhat ambiguous, should not be read to provide a right to a hearing in connection with a request for interim measures. The request for interim measures here is for the purpose of preserving the rights of the Parties pending the Tribunal's award, and thus the

issue raised by the request is arguably a procedural matter. Moreover, the purpose of the rule seems to be to guarantee a right to a hearing in connection with a decision on the merits of the case.

Concurring Opinion of Richard M. Mosk of 21 October 1983 to *Ford Aerospace v. The Air Force of Iran*, Case No. 159, Interim Award No. ITM 28-159-3 (20 October 1983), reprinted in 3 Iran-US CTR 384, 387. Caron further adds

It is Richard M. Mosk's substantive/procedural distinction that ultimately justifies the conclusion that there is no right under the UNCITRAL Rules to a hearing in the case of interim measures. A tribunal constantly makes decisions without hearings. The vast majority of these decisions are merely procedural and, although important, do not ordinarily dispose of the rights of the parties. Although the procedural/substantive distinction is not always easy to make, it is clear that if disposition of the rights of the parties is the test then interim measures more properly are regarded as procedural. Indeed, the doctrines relating to interim measures all aim at avoiding final adjudication of rights; alleged rights are affected for at most a limited time, and provision for security ameliorates even such temporary effects.

Caron, Interim Measures, 502. On the substantive/procedural nature of interim measures see Chapter 3, note 45 above.

<sup>287</sup> On the exercise of the discretion to determine such necessity, Pellonpää & Caron state

As to decisions on interim measures (those which do not affect the final disposition of the rights of the parties nor terminate the whole proceedings), the decision whether or not to grant a requested hearing should be made in light of the particular circumstances. Sometimes the urgency of the matter may not allow a hearing; in other cases the very nature of the measure requested may recommend that oral hearing be heard. The principle of party autonomy suggests that a hearing be granted whenever requested by both parties. Even where requested by only one of the parties, the arbitral tribunal should keep in mind that Article 15(2) spells out the principle of right to a hearing. Should a party request a hearing abusively, that party may be forced to bear the costs resulting from an unnecessary hearing. (Citation omitted.)

Pellonpää/Caron, 39-40.

<sup>288</sup> See, Caron, Interim Measures, 502.

<sup>289</sup> On such duty see also Chapter 4, para. 4-43 above. The breach of this duty may result in damages for which the moving party may be held responsible. See also id.

<sup>290</sup> However, an arbitral tribunal ought to carefully consider whether a measure requested is "so severe that the possible damage can hardly be covered by the payment of any security by the applicant" or "the amendment or withdrawal of the interim measure is not sufficient to restore the *status quo ante*". In such cases, the tribunal should give the right to be heard to the other party. Berger, *International Economic Arbitration*, 338. Further, the tribunal may consider, for the protection of the respondent's rights, whether by



granting an *ex parte* measure it infringes this party's confidence to the arbitration and whether they may face with its accusation of "trial by ambush". *Id.*

<sup>291</sup> For other safeguarding measures, see *Castello*, 9-10.

<sup>292</sup> *Berger*, *International Economic Arbitration*, 337. It is noteworthy that it would be a prudent practice to indicate within the text of the measure granted, for the sake of clarity and as an indication to the respondent, that the amendment or revocation of the measure is reserved. This prudent practice could even be followed for the measures granted in *inter partes* proceedings. It should also be noted that "under extreme circumstances" an *ex parte* measure should not be permitted. That is particularly where the security for costs would not cover the potential damage or where the "subsequent amendment or withdrawal would not be sufficient to restore the status quo". *Marchac*, 131; and *Berger*, *International Economic Arbitration*, 338.

<sup>293</sup> See Rule 39(2) of the ICSID Arbitration Rules.

<sup>294</sup> Note C to the 1968 ICSID Arbitration Rules, reprinted in 1 ICSID Rep. 99. Based on this assumption, in ICSID arbitration, "the president of the Tribunal may, if he considers the request as urgent, propose a decision to be taken by correspondence (Rule 16(2)), or even convene the Tribunal for a special session". *Id.* In compliance with the above approach, the tribunal took its decision on a provisional measure by correspondence in *AGIP v. Congo*. Award, (8 January 1988), reprinted in 4 ICSID Rep 311.

<sup>295</sup> See also Article 26(4) of the Swiss Rules of International Arbitration 2004.

<sup>296</sup> Where the applicable rule or law contains no restriction, the scope of costs should include costs for proceedings, the arbitral tribunal, and parties. However, such rules as Article 26 of the UNCITRAL Arbitration Rules, restrict the measure that could be granted to "subject matter" in dispute. Thus, it is argued that, under these Rules, the party's costs are not recoverable. See *Baker/Davis*, 143; and *van Hof*, *Commentary*, 177. In this regard, see also UN Doc A.CN.9/SR 166, 187. Nevertheless, Article 26 should be read as providing interim protection in regard of rights related to subject matter in dispute. See Chapter 3, note 102 above. Accordingly, since the costs are concerning interim protection is related to rights regarding subject-matter in dispute, they should too be recoverable.

<sup>297</sup> The apportionment of costs may be made in an interim (partial) or in final award. It should be noted that the costs initially borne by the moving party in the provisional measure proceedings. See, in this regard, *Pellonpää/Caron*, 449; *Baker/Davis*, 143; and *Caron*, *Interim Measures*, 504.

<sup>298</sup> These are the applications aimed, in part or in full, to disrupt or delay arbitrations. See Chapter 3, para. 3-5 above.

<sup>299</sup> However, it should also be noted that where there is no specific party agreement as to the costs of arbitral interim measures, it is arguable that the parties' agreement about the costs of arbitration proceedings should be applicable; for instance, each party bears its own costs or the costs follow the success. See, e.g., *Redfern/Hunter*, paras 8-85 – 8-92.

<sup>300</sup> ICC Final Award 10062 of 2000 (unpublished).

<sup>301</sup> ICC Partial Award 10704 of 2000 (unpublished).

<sup>302</sup> Case No. 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 *Iran-US CTR* 44-48. The Tribunal issued three different awards on this issue. It should, in this regard, be noted that the costs may be contained in an interim or partial award or may finally be distributed in a final award. That may be done, for instance, in accordance with Article 38 of the UNCITRAL Arbitration Rules. *Pellonpää/Caron*, 449; and *Baker/Davis*, 143. Further, this author is aware of an unpublished case arbitrated under the UNCITRAL Arbitration Rules where the sole arbitrator ruled that the

losing party born the costs of provisional measure proceedings, including costs of parties. It is interesting to note that the winning party in the provisional measure proceedings failed to convince the arbitrator on the merits of its case. See also The AAA Task Force on the International Rules, "Commentary on the Proposed Revisions to the International Arbitration Rules", ADR Currents, 6, 7 (Winter 1996 -97); and Final Report on Awards, para. 10 (recommending that "[o]rders in relation to costs, including any proposed allocations of costs between the parties, should be left to the final award"). Indeed, experience demonstrates that costs regarding provisional measures are generally distributed in the final award.

<sup>303</sup> *Behring International, Inc. v. Iranian Air Force*, Case No 382, Interim Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-US CTR 47-48.

<sup>304</sup> Karrer, *Less Theory*, 103.

<sup>305</sup> See Schwartz, *Provisional Measures*, 53. Any such recovery, particularly from a court, is, apparently, subject to the permission under applicable law. The recovery is available under laws of such countries as Australia (Coleman/Sharp, Bösch (ed.), 42-3), Austria (Kutschera/Nitsch, id., 71-2), Belgium (Guyot, id., 99), Brazil (Stuber, id., 125-26), Canada (Cullen, id., 15), China (Zhang/Bing, id., 170), Denmark (Walther-Rasmussen, id., 191-92), Finland (Ojantakanen/Relander, id., 245-46), France (Buchman, id., 271), Germany (Bösch, id., 298-99), Italy (Tocchi, id., 383), Korea (Chung, id., 399-400), Liechtenstein (Braxaor/Wanger, id., 419-20), Luxembourg, (Molitor, id., 436), Mexico (Oechmichen/Pikoff, id., 450), Morocco (Kettani, id., 466), Norway (Aagaard, id., 515), Panama (Boutin, id., 532), Scotland (Semple, id., 608), Sweden (Göthberg, id., 687), Switzerland (Peter, id., 719-20), and the U.S. (Andersen, id., 756-57). The scope and grant of compensation are naturally subject to requirements set forth under the laws of each country concerned. If the damages are recovered from a court, arbitrators' decision on the merits is likely to be taken into account in determination of damages, as it is the case in Denmark. See id., 191.

<sup>306</sup> See Chapter 5, paras 5-102 – 5-103 above. Karrer indicates that whether costs are damages are not clear. Karrer, *Less Theory*, 103. See also, e.g., Redfern/Hunter, para. 7-24.

<sup>307</sup> Damages arising from disobedience of an arbitral provisional measure are examined elsewhere. See Chapter 6, paras 6-7 – 6-11 below.

<sup>308</sup> Schwartz, *Provisional Measures*, 53.

<sup>309</sup> On the issue of security for damages, see Chapter 5, paras 5-46 – 5-48 above.

<sup>310</sup> See Chapter 5, paras 5-1 – 5-2 above.

<sup>311</sup> See Chapter 5, note 2 above and accompanying text.

<sup>312</sup> See Chapter 5, para. 5-3 above.

<sup>313</sup> Id.

<sup>314</sup> See Chapter 5, note 4 above and accompanying text.

<sup>315</sup> See Chapter 5, para. 5-5 above.

<sup>316</sup> Id.

<sup>317</sup> On the initiation of proceedings for a provisional measure, see Chapter 5, paras 5-10 – 5-12 above.

<sup>318</sup> See Chapter 5, paras 5-13 – 5-15 above.

<sup>319</sup> See Chapter 5, paras 5-16 – 5-18 above.

<sup>320</sup> See Chapter 5, paras 5-19 – 5-21 above.

<sup>321</sup> See Chapter 5, paras 5-26 – 5-45 above.

<sup>322</sup> See Chapter 5, paras 5-46 – 5-48 above.

<sup>323</sup> See Chapter 5, para. 5-49 above.

<sup>324</sup> See Chapter 5, para. 5-24 above.

<sup>325</sup> See Chapter 5, para. 5-23 above.



- <sup>326</sup> See Chapter 5, paras 5-50 – 5-54 above.
- <sup>327</sup> See Chapter 5, paras 5-55 – 5-56 above.
- <sup>328</sup> Id.
- <sup>329</sup> See Chapter 5, paras 5-57 – 5-61 above.
- <sup>330</sup> See Chapter 5, paras 5-62 – 5-63 above.
- <sup>331</sup> See Chapter 5, paras 5-63 – 5-68 above.
- <sup>332</sup> See Chapter 5, paras 5-69 – 5-88 above.
- <sup>333</sup> See Chapter 5, paras 5-89 – 5-100 above.
- <sup>334</sup> See Chapter 5, paras 5-101 – 5-103 above.
- <sup>335</sup> See Chapter 5, paras 5-104 – 5-106 above.

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Ex. R-ER-18

# Bendoni-Derossi International v The Government of the Islamic Republic of Iran, Interim Award, IUSCT Case No. 375 (ITM 40-375-1), 7 June 1984

Interim Award in Case No. 375 (40-375-1) of 7 June 1984

## Facts

The claim in this case is based on an award of damages in the Claimant's favour made by a sole arbitrator under the rules of the International Chamber of Commerce ("ICC"). On 4 April 1984 the Respondent filed a Petition in which it stated that the Claimant had sought to enforce the ICC award by obtaining an attachment order in the Frankfurt am Main Regional Court on 9 June 1983 in respect of certain shares owned by the Respondent. The Respondent requested that the Tribunal issue an order staying such enforcement measures on the grounds that, once filed with the Tribunal, the claim was excluded from any other court by virtue of Article VII, paragraph 2, of the Claims Settlement Decree.

## Extract

"In an appropriate case, an international tribunal will grant interim measures of protection before determining jurisdiction over the merits of the claim, provided that it is satisfied that there is, at least, a prima facie showing that it has jurisdiction over the substantive claim. This test was more recently applied by the International Court of Justice in its Order of 10 May 1984 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Provisional Measures*, I.C.J. Reports 1984, p. 169, 179. The Court stated, at paragraph 24 of the Order:

[O]n a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an object on taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. . . .

"Without prejudice to the final determination of the jurisdictional issue, the Tribunal is not at present satisfied that it appears, prima facie, that there exists a basis on which it can exercise jurisdiction over the present claim.

"Article II, paragraph 1, of the Claims Settlement Decree confers on the Tribunal the power to decide:

claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights. . . .

"The present claim is variously described in the Statement of Claim as 'arising out of an arbitration award which was issued by the I.C.C. Court of Arbitration. . .' (page 6); a 'claim for the amount owing to [the Claimant] by Respondent as established by the said Award' (page 6); and an attempt 'to pursue the enforcement of the I.C.C. arbitration award by filing this claim before the Tribunal' (page 3).

"Though this is so presented as a debt owed by the Respondent to the Claimant, the Tribunal cannot escape the impression that what the Claimant is in effect seeking from the Tribunal is the enforcement of the I.C.C. arbitration award through the medium of the Security Account established pursuant to Paragraph 7 of the Decree of the Government of the Democratic and Popular

## Author

▶ Peter Sanders

## Organization

▶ Iran US Claims Tribunal

## Arbitrators/Judges

▶ Gunnar Lagergren  
Chairman  
▶ Mahmoud M. Kashan  
▶ Howard M. Holtzmann  
(concurring)

## Case date

▶ 7 June 1984

## Case number

▶ USCT Case No. 375  
(ITM 40-375-1)

## Parties

▶ Claimant: Bendoni-Derossi International  
▶ Respondent: The Government of the Islamic Republic of Iran

## Key words

▶ interim measures of protection against attachments before another forum  
▶ jurisdiction over claims seeking payment of arbitral award

## Source

▶ **Bendoni-Derossi International v The Government of the Islamic Republic of Iran, Interim Award, IUSCT Case No. 375 (ITM 40-375-1), 7 June 1984** in Peter Sanders (ed) Yearbook Commercial Arbitration 1985 Volume X Volume X (© Kluwer Law International Kluwer Law International 1985) pp 320-322

“ . . . .

“The Tribunal at this stage of the proceedings does not consider it a reasonable interpretation of the Agers Decisions that it should act as a court *ssu ng exequatur* or that it should otherwise be empowered to enforce arbitral awards of other, independently constituted arbitral tribunals. This Tribunal is not a national court; it has a specific international character. It is not a manifestation of any one national public authority, and it cannot invest such other awards with any validity or status under any system of national law that those awards do not already possess.”

**Separate Opinion of Howard M. Holtzmann of 8 June 1984**

The American Arbitrator, Howard M. Holtzmann, who concurring in the denial of interim relief agreed with the reasoning of the Lagergren and Kashan opinion.

“The Government of Iran requested the Tribunal to issue an interim measure of protection to stay an attachment which the Claimant had obtained from a Regional Court in the Federal Republic of Germany. The Interim Award denied that request on the incorrect ground that it does not appear, *prima facie*, that the Tribunal has subject matter jurisdiction over the claim in this case. In my view, a sufficient *prima facie* showing of jurisdiction has been made and, therefore, the interim measure of protection should not have been refused on jurisdictional grounds. Nevertheless, I believe that the interim measure of protection was properly denied, because an attachment such as the one obtained by the Claimant is contemplated by, and compatible with, the Tribunal Rules. Accordingly, there is no basis for stay of such an attachment.


“ . . . .

“In applying the principles enunciated by the International Court of Justice to the circumstances of this case, I emphasize that since the Interim Award deals only with a request for an interim measure of protection, the standard to be applied now is whether the documents before us provide, *prima facie*, a basis on which jurisdiction might be founded. The definitive answer to whether the Tribunal does, or does not, have jurisdiction will come only at a later stage of the proceedings, after the issue has been fully briefed by the parties. . . .

“ . . . .

“The Claimant's position reflects the widely recognized principle of commercial arbitration that an arbitration award creates a contractual basis for a legal action. When many countries legislate or treaties provide summary procedures by which a national court may enforce arbitral awards by *ssu ng orders of exequatur* or by other special means, many legal systems at the same time recognize that such summary enforcement procedures are not the exclusive method for obtaining payment of an arbitral award. Accordingly, the laws of many countries provide for the alternate procedure for securing payment of an unpaid award by a suit for breach of contract.”

Following a discussion of authorities supporting the contractual nature of an arbitral award, Mr. Holtzmann writes:

“The Interim Award appears to base its conclusion that the Tribunal does not have jurisdiction to grant an interim measure of protection in this case on the  [page "322"](#) incorrect assumption that the Claimant is asking us to 'act as a court *ssu ng exequatur*', or to provide some other summary procedure for enforcement. A reading of the Statement of Claim reveals, however, that this is not an accurate description of the action here. The Claimant does not ask the Tribunal to issue *exequatur* or to order other summary enforcement pursuant to a national statute or an international treaty. Rather, the Claimant explicitly bases its claim on an alleged breach by the Respondent of its contractual obligation to honor the debt arising from the ICC Award. In view of the widespread recognition in so many legal systems of such an action for breach of contract - independent of and different from *exequatur* or other summary enforcement procedures - the documents before the Tribunal provide, *prima facie*, a basis on which the subject matter jurisdiction over this claim might be founded.

“ . . . .

“In view of my conclusion that the Tribunal has *prima facie* jurisdiction for the purpose of granting an interim measure of protection in this case, it is necessary to consider whether the

particular measure requested by the Respondent should be granted.

“Article 26, paragraph 3 of the Tribunal Rules - which is unchanged from UNCITRAL Arbitration Rules - provides that

A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

“I would have denied the stay requested by the Respondent on the ground that Article 26 of the Tribunal Rules makes it clear that the Claimant, in obtaining an order of attachment from the German Court, did not do anything ‘incompatible’ with the proceedings before this Tribunal. Moreover, Respondent has made no showing of urgency justifying the issuance of interim relief: the court order was entered in June 1983, ten months before Respondent sought a stay.”

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\* Separate opinion of Howard M. Gotzmann concurring (8 June 1984).

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