

Accountability and Transparency at ICANN

An Independent Review

Appendix D: The .xxx Domain Case and ICANN Decision-Making Processes
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Abstract

In 2000, ICANN initiated a “proof of concept” stage to begin the adoption of new generic TLDs. ICM Registry unsuccessfully proposed .xxx and .kids. In 2003, after some exchanges with ICANN regarding its first proposal, ICM submitted a revised bid for the creation of .xxx for ICANN’s call for sponsored TLD proposals. The ICANN Board adopted a resolution to begin negotiating the commercial and technical terms of a registry agreement with ICM in June 2005; however, under pressure from a variety of constituencies, ICANN reversed its decision and denied ICM’s proposal in 2007. ICM filed a request for Independent Review in 2008—the first such request to be heard before the Independent Review Panel (IRP) in ICANN’s history. In 2010, a three-person panel of arbiters (which comprised the IRP) decided in favor of ICM.

This case study outlines the key events surrounding the .xxx proposals from 2000 to June 17, 2010, without re-examining the merits of the application itself. This chronology is designed to examine two specific dimensions of the .xxx process: (1) the role of the Independent Review Panel (IRP), and (2) the interaction between the Governmental Advisory Committee (GAC) and the ICANN Board during ICANN’s evaluation of the ICM .xxx proposal, registry agreement negotiations with ICM and, ultimate rejection of ICM’s application.

Case Study Sources and Methodology

For more information on our sources and methodology, please see Appendix A.

This case study is based on publicly available materials, including public comments, ICANN documents, academic studies, media reports, and expert opinions. It provides a summary of the facts regarding the .xxx domain process, with a specific focus on two aspects of the case: the Independent Review Panel (IRP), including ICM’s request for Independent Review, and the role of the Governmental Advisory Committee (GAC) throughout the Board’s review of the .xxx proposals, including its interaction with the Board. As per Exhibit B, Section 1 of the Services Agreement between the Berkman Center and ICANN, its goal is to help identify key issues, challenges and areas of disagreement related to the .xxx application process. The observations below will contribute to the Berkman team’s final report.

In addition to publicly available sources, this case study includes statements, opinions and perceptions of those we interviewed in the course of developing this case. These perceptions and opinions play an important role in the interpretation of ICANN decisions and their reception by the community. The statements of interviewees do not reflect the opinions or conclusions of the study team. While we have made every effort to remove factual inaccuracies, we do not attest to the accuracy of the opinions offered by interviewees. The interviews were conducted on the condition of confidentiality.

Note: As per the Services Agreement, this case study focuses on events prior to June 17, 2010. However, aspects of the .xxx case are still evolving. As such, this study may not reflect the most recent developments in this case.

Disclosure: Professor Jack Goldsmith, Henry L. Shattuck Professor of Law, Berkman Center Faculty Co-Director and member of the Berkman team, has submitted testimony for ICM in the .xxx case. In the context of the Berkman-internal peer review process, he provided comments on the scope and structure of an earlier draft of this case study.

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1 ICM's Proposal for the .xxx sTLD

1.1 ICANN's Call for New gTLDs in 2000

1.1.1 Overview of the "Proof of Concept" Round

The core of ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers," a mandate that includes responsibility for the allocation of domain names and management of the Domain Name System (DNS).¹ Since the 1980s, seven top-level domains (TLDs) have been in the DNS (.com, .edu, .gov, .int, .mil, .net, and .org), only three of which were available for public registration without restriction (.com, .net, and .org).² From the outset, one of ICANN's primary tasks was to develop a set of policies and best practices for the solicitation, creation, and management of new generic TLDs (gTLDs).³

The Domain Name Supporting Organization (DNSO), one of ICANN's original three supporting organizations (which was replaced by the Generic Names Supporting Organization (GNSO) in December 2002),⁴ was responsible for making recommendations on the "operation, assignment, and management of the domain name system and other related subjects."⁵ In 1999, the DNSO tasked a set of working groups with studying whether the creation of new gTLDs would be desirable, in light of intellectual property rights and other issues.⁶ On April 19, 2000, the DNSO recommended that the ICANN Board develop a set of policies to guide the introduction of a "limited number" of new gTLDs.⁷ The ICANN Board adopted this recommendation on July 16, 2000⁸ and began accepting TLD applications on September 5, 2000, with the goal of completing registry negotiations by the end of the year.⁹ Applicants were permitted to submit proposals for

¹ ICANN Bylaws, Article I, Section 1, September 30, 2009, <http://www.icann.org/en/general/archive-bylaws/bylaws-30sep09-en.htm>.

² ICANN, "Top-Level Domains (gTLDs)," May 6, 2009, <http://www.icann.org/en/tlds>. One other specialized TLD had also been implemented: .arpa, which is reserved to support the Internet Architecture Board's technical infrastructure projects (see <http://www.iana.org/domains/arpa/>). More than 250 country-code TLDs (ccTLDs) also exist, a handful of which are written in non-Latin characters and are categorized as Internationalized Domain Names (IDNs).

³ See ICANN, "Top-Level Domains (gTLDs)," May 6, 2009, <http://www.icann.org/en/tlds>.

⁴ The DNSO was eventually succeeded by the Generic Names Supporting Organizations (GNSO) in 2003. See DNSO, <http://www.dnso.org/>

⁵ ICANN Bylaws, Article VII, Section 3(a), November 6, 1998, <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

⁶ A 1999 WIPO report stated that new gTLDs could be introduced slowly if intellectual property rights received adequate protection; see ICANN, "The Management of Internet Names and Addresses: Intellectual Property Issues," April 30, 1999, http://www.icann.org/en/wipo/FinalReport_1.html. The DNSO's Working Groups B and C were established to address the WIPO report and other intellectual property concerns; see DNSO, "Meeting of the Names Council in San Jose on 25 June 1999," June 25, 1999, <http://www.dnso.org/dns/notes/19990625.NCsj-admin.html>.

⁷ DNSO, "DNSO Names Council Statement on new gTLDs," April 19, 2000, <http://www.dnso.org/dns/notes/20000419.NCgtlds-statement.html>.

⁸ ICANN, "Resolutions of the ICANN Board on New TLDs," July 16, 2000, <http://www.icann.org/en/tlds/new-tld-resolutions-16jul00.htm>.

⁹ ICANN, "New TLD Application Process Overview," August 3, 2000, <http://www.icann.org/en/tlds/application-process-03aug00.htm>.

either a “sponsored TLD” (sTLD) or an “unsponsored TLD”¹⁰ and each application was required to satisfy nine criteria:

1. The need to maintain the Internet’s stability.
2. The extent to which selection of the proposal would lead to an effective “proof of concept” concerning the introduction of TLDs in the future.
3. The enhancement of competition for registration services.
4. The enhancement of the utility of the DNS.
5. The extent to which the proposal would meet previously unmet types of needs.
6. The extent to which the proposal would enhance the diversity of the DNS and of registration services generally.
7. The evaluation of delegation of policy-formulation functions for special-purpose TLDs to appropriate organizations.
8. Appropriate protections of rights of others in connection with the operation of the TLD.
9. The completeness of the proposals submitted and the extent to which they demonstrate realistic business, financial, technical, and operational plans and sound analysis of market needs.¹¹

“General-Purpose” TLD proposals were grouped into four categories: “General” (for nonspecific proposals, including .biz and .info), “Personal” (for personal content, including .name and .san), “Restricted Content” (for specific types of content, including .xxx and .kids), and “Restricted Commercial” (including .law and .travel).¹²

1.1.2 ICM’s Proposal for .xxx and .kids

ICANN received 47 applications with proposals for new sponsored and unsponsored TLDs.¹³ Three organizations submitted proposals for .xxx,¹⁴ including ICM Registry, Inc. (ICM), which applied to create .xxx and .kids, arguing that, together, the pair of new TLDs would enhance

¹⁰ Sponsored TLDs (sTLDs) are intended to represent the needs of a particular “sponsored community,” and are required the support of a “sponsoring organization” to be responsible for a defined level of policy formulation for operation of the domain. Unsponsored domains do not carry either of these requirements. See ICANN, “New TLD Application Process Overview,” August 3, 2000, <http://www.icann.org/en/tlds/application-process-03aug00.htm>.

¹¹ ICANN, “Criteria for Assessing TLD Proposals,” August 15, 2000, <http://www.icann.org/en/tlds/tld-criteria-15aug00.htm>.

¹² ICANN, “Report on New TLD Applications,” November 9, 2000, <http://www.icann.org/en/tlds/report/>. In addition to “General-Purpose TLDs,” ICANN also grouped proposals as “Special-Purpose” (synonymous with “sponsored”) and “New Services” (which was intended for technical services not currently supported by the existing DNS, including telephony, message routing, LDAP services, and “georeferenced information.”

¹³ ICANN, “TLD Applications Lodged,” October 10, 2000, <http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

¹⁴ ICANN, “TLD Applications Lodged,” October 10, 2000, <http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

online child safety by clearly delineating child-friendly and adult-only content areas.¹⁵ ICM also contended that both the adult industry and child-friendly content producers would comply with ICM's policies voluntarily, claiming that "adult content leaders fully back the establishment of these TLDs" and that "eminent children's entertainment and educational organizations are promising extensive investments in the child-friendly domain."¹⁶

Out of these 47 applications, ICANN selected seven during the exploratory phase: four unsponsored TLDs (.biz, .info, .name, .pro) and three sponsored (.aero, .coop, .museum).¹⁷ In applying the evaluation criteria to ICM's .xxx application, ICANN determined that ICM's proposal for a .kids TLD did meet unmet needs but was unlikely to succeed from a business standpoint.¹⁸ ICANN also found that ICM did not propose "any business or technical methods to effectively restrict content for a .kids TLD."¹⁹ Regarding .xxx, ICANN stated: "[It] does not appear to meet unmet needs. Adult content is readily available on the Internet. To the extent that some believe that an .xxx TLD would segregate adult content, no mechanism (technical or non-technical) exists to require adult content to migrate from existing TLDs to an .xxx TLD." ICANN also noted that the controversial nature of a sex-centric TLD made it ill-suited to the goals of the "proof of concept" phase: "the evaluation team concluded that at this early 'proof of concept' stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs."²⁰

Ultimately, ICANN decided to not accept ICM's proposals for .xxx and .kids, providing the following justification:

Because of the inadequacies in the proposed technical and business measures to actually promote kid-friendly content, the evaluation team does not recommend selecting a .kids domain in the current phase of the TLD program. In addition, because of the controversy surrounding, and poor definition of the hoped-for benefits of, .xxx, we also recommend against its selection at this time.²¹

In response, ICM filed a Reconsideration Request on December 15, 2000, requesting "clarification from the Board with respect to inaccurate statements made involving [the .xxx] registry

¹⁵ ICANN, "Registry Operator's Proposal to ICANN," September 18, 2000, <http://www.icann.org/en/tlds/kids3/Default.htm>. ICM's application also hypothesized that the adult oriented content on other domains (e.g., affiliated sites) could be easily filtered by IP addresses and proprietary DNS listings in addition to filtering the .xxx content. Ibid.

¹⁶ ICANN, "Registry Operator's Proposal to ICANN: Volume 2," September 18, 2000, http://www.icann.org/en/tlds/kids3/HTML/Volume_2.html.

¹⁷ ICANN, "Second Annual Meeting of the Board Minutes," November 16, 2000, <http://www.icann.org/en/minutes/minutes-annual-meeting-16nov00.htm>.

¹⁸ ICANN, "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group," November 9, 2000, <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>.

¹⁹ ICANN, "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group," November 9, 2000, <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>.

²⁰ Ibid.

²¹ Ibid.

proposal.”²² Primarily, ICM took issue with the ICANN Board’s claim that the majority of the adult community did not support the creation of .xxx, and argued that “most” adult content providers supported the domain. ICM also maintained that it proposed to operate the .kids registry “only in the event that there was no other credible submission for a .kids registry.”²³ Finally, ICM disagreed with the TLD evaluators’ conclusion that .xxx did not meet an “unmet need,” arguing that the proliferation of online adult material necessitated the creation of the kind of domain policies ICM had proposed.

The Reconsideration Committee decided to take no action, stating, “ICM Registry’s reconsideration request does not seek reconsideration of the Board’s November 16, 2000 decision . . . accordingly, there is no action for the Board to take with respect to the Board’s actual decision at this time.”²⁴ It noted that “no new TLD proposal has been rejected by ICANN”; rather, a small set of potentially successful applicants had been selected with the aim of testing a diversity of approaches to the creation of new TLDs. The Committee also noted that “the fact that a new TLD proposal was not selected under those circumstances should not be interpreted as a negative reflection on the proposal or its sponsor.”²⁵

1.2 ICANN’s Request for Proposals for New sTLDs in 2003

1.2.1 Overview of the RFP

On October 18, 2002, ICANN President Stuart Lynn issued a report titled “A Plan for Action Regarding New TLDs,” which advocated extending the “proof of concept” phase by allowing applicants who had participated in the 2000 round to resubmit their TLD proposals.²⁶ On December 15, 2002, in response to the “Plan for Action,” the ICANN Board directed ICANN staff to develop a strategy for soliciting further TLD applications.²⁷ This resulted in a draft Request for Proposals (RFP) for the creation of new sponsored TLDs, posted publicly on June 24, 2003.²⁸

The 2003 RFP differed from the 2000 “proof of concept” solicitation in two important ways. First, it was restricted to proposals for *sponsored* TLDs. Applicants were required to demonstrate that

²² ICANN, “Reconsideration Request 00-15,” December 16, 2000, <http://www.icann.org/en/committees/reconsideration/icm-request-16dec00.htm>. ICANN’s Reconsideration Policy (which has since been superseded) had been established to implement Article III, Section 4(a) of the original Bylaws. ICANN, “Reconsideration Policy,” March 4, 1999, <http://www.icann.org/en/committees/reconsideration/recon-policy-04mar99.htm>.

²³ See “Reconsideration Request,” *Ibid.*

²⁴ Although unclear in the Recommendation, it appears the Reconsideration Committee’s mandate is only to *reconsider* decisions and issue recommendations, rather than clarify Board decisions. See ICANN, “Reconsideration Request 00-15: Recommendation of the Committee (Revised),” September 7, 2001, <http://www.icann.org/en/committees/reconsideration/rc00-15-1.htm>.

²⁵ *Ibid.*

²⁶ ICANN, “A Plan for Action Regarding New TLDs,” October 18, 2002, <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm>.

²⁷ ICANN, “ICANN 2002 Annual Meeting in Amsterdam,” December 14–15, 2002, <http://www.icann.org/en/meetings/amsterdam>.

²⁸ ICANN, “Establishment of new sTLDs: Request for Proposals (Draft for public comment),” June 24, 2003, <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm>.

the sTLD served the needs of a well-defined “sponsored community,” and the proposal was required to carry the support of a “sponsoring organization,” which would assume certain responsibilities in developing policies for the TLD. Second, the ICANN Board would not evaluate applications directly. Rather, applications were to be evaluated by several panels of independent evaluators who would submit reports on each proposal to the ICANN Board; the reports, while nonbinding, were intended to play a significant role in shaping the Board’s decisions.²⁹

On June 25, 2003—the day after the draft RFP was posted for public comment—ICANN held a public discussion on the draft materials during a Public Forum in Montréal. Some commenters argued that a single day was inadequate for public review, particularly given the controversy that persisted around the proposed TLD policies.³⁰ On the following day, the ICANN Board resolved to extend the public comment period for two months, through August 25, 2003.³¹

ICANN received more than 70 responses by email, which it posted publicly during the comment period.³² The At-Large Advisory Committee (ALAC) also submitted a formal response, recommending substantive changes to make the RFP more equitable and proposing a set of principles to guide the introduction of future gTLDs.³³

On October 13, 2003, the ICANN Board decided it would temporarily shelve the sTLD application process, citing the constraints of the recent amendments to the Memorandum of Understanding with the United States Department of Commerce—particularly the requirement that ICANN quickly “commence a full scale review of policy in this area.”³⁴ The Generic Names Supporting Organization (GNSO)³⁵ strongly objected, however, and on October 31, 2003, the ICANN Board reversed its decision and resolved to move forward with the sTLD RFP. Additionally, the Board resolved to revise the terms of the RFP based on commentary from the ALAC, the GNSO, and the public at large. Specifically, it resolved that the RFP would not be limited to applicants who had submitted proposals during the 2000 “proof of concept” round and that eligible sponsoring organizations need not be not-for-profit entities. Finally, it resolved that a final version of the RFP would be posted on December 15, 2003, including an application timeline, the details of the selection criteria, and an explanation of the evaluation process.³⁶

²⁹ Ibid. See also ICANN, “Independent Evaluators of sTLD Proposals,” <http://icann.org/en/tlds/new-stld-rfp/panel.htm>.

³⁰ See Edward Hasbrouck, “Sponsored TLD RFP,” June 26, 2003, <http://hasbrouck.org/icann/montreal.html>.

³¹ ICANN, “Preliminary Report: Regular Meeting of the Board - Montréal,” June 26, 2003, <http://www.icann.org/en/minutes/prelim-report-26jun03.htm>.

³² ICANN, “Submissions to the stld-rfp-comments forum,” <http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/threads.html> (no date).

³³ ICANN, “ALAC Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes,” October 9, 2003, <http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/msg00067.html>.

³⁴ ICANN, “Preliminary Report: Special Meeting of the Board,” October 13, 2003, <http://www.icann.org/en/minutes/prelim-report-13oct03.htm>.

³⁵ As of 2003, the GNSO became the successor to the DNSO. See DNSO website, <http://www.dns0.org>.

³⁶ ICANN, “ICANN Board Resolutions in Carthage, Tunisia,” October 31, 2003, <http://www.icann.org/en/announcements/advisory-31oct03.htm>. The final version of the sTLD RFP is available at ICANN, “New sTLD Application,” December 15, 2003, <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-part-15dec03.htm>.

1.2.2 ICM's Proposal for .xxx

ICM submitted its .xxx sTLD proposal on March 16, 2004. ICM named the “online adult-entertainment community” as the sponsoring community, defining this community as “those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself.”³⁷ ICM named the International Foundation for Online Responsibility (IFFOR) as its sponsoring organization.³⁸ The role of IFFOR, a Canadian non-profit, would be to protect child safety, guard the safety and privacy of users, and promote responsible business practices in the adult industry. According to the proposal, ICM intended to donate a certain portion of each domain registration fee to promote IFFOR’s policymaking and advocacy efforts.³⁹

1.2.3 ICANN's Review and Initial Approval

On March 19, 2004, ICANN publicly announced that it had received ten sTLD applications in response to its RFP: .asia, .cat, .jobs, .mail, .mobi, .post, .tel (NetNumber, Inc), .tel (Telnic Ltd.), .travel, and .xxx. This announcement included invitations to post comments on specific proposals, in addition to a solicitation for general public comments. It also noted that the public comment period would be open during the month of April 2004 and that applications would be reviewed by independent evaluators beginning in May of that year.⁴⁰

In mid-July 2004, the independent evaluators sent reports on the ten applications to ICANN indicating that only .cat and .post satisfied the full range of evaluation criteria.⁴¹ The report declared that ICM’s proposal satisfied the technical, business, and financial criteria, but fell short of meeting the sponsorship criteria.⁴² In particular, the report stated that “the difficulty of establishing a clean definition of adult content makes it equally difficult to establish the contours of the adult community. They determined, moreover, that ICM “hypothesizes a set of interests on behalf of a community . . . but little testimony from that community has been provided in support of either its common interests or its cohesiveness.”⁴³ Finally, the evaluators note that although there was significant support for the proposal from the North American community, “virtually no support was available from the rest of the world.”⁴⁴

³⁷ ICANN, “New sTLD RFP Application: .xxx,” March 16, 2004, <http://www.icann.org/en/tlds/stdl-apps-19mar04/xxx.htm>.

³⁸ ICANN, “New sTLD RFP Application: .xxx,” March 16, 2004, <http://www.icann.org/en/tlds/stdl-apps-19mar04/xxx.htm>.

³⁹ *Ibid.*

⁴⁰ ICANN, “Progress in Process for Introducing New Sponsored Top-Level Domains,” March 19, 2004, <http://www.icann.org/en/announcements/announcement-19mar04.htm>. See also, ICANN, “Public Comments for Proposed Sponsored Top-Level Domains,” March 31, 2004, <http://www.icann.org/en/tlds/stdl-apps-19mar04/stdl-public-comments.htm>.

⁴¹ See ICANN, “Status Report on the sTLD Application Process,” December 3, 2005, <http://www.icann.org/en/tlds/stdl-apps-19mar04/stdl-status-report.pdf>.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 24–25.

ICANN announced that it would allow sTLD applicants to provide supplemental material in response to the independent evaluators' concerns.⁴⁵ From October through November 2004, ICM submitted a range of supplemental application material, primarily addressing the .xxx proposal's deficiencies regarding sponsorship criteria.⁴⁶

2 Involvement of the GAC in the .xxx Process

2.1 The Role of the GAC in ICANN

According to the ICANN Bylaws,⁴⁷ one of the primary purposes of the Governmental Advisory Committee (GAC) is 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.”⁴⁸

The GAC may submit “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.”⁴⁹ Apart from receiving unsolicited advice or comment, the Board is required to “notify the Chair of the GAC in a timely manner of any proposal raising public policy issues on which it or any of ICANN’s supporting organizations seeks public comment.”⁵⁰ Separately, the Board is required to “request the opinion” of the GAC in cases where “policy action affects public policy concerns” and the policy being considered for adoption “substantially affect[s] the operation of the Internet or third parties.”⁵¹

Regardless of whether solicited or not, any GAC advice “on public policy matters” triggers a Bylaw provision whereby the Board is required to take such advice into account “both in the formulation and adoption of policies.”⁵² If the Board decides not to follow this advice, the Board is then required to notify the GAC and “state the reasons why it decided not to do so” and “try, in

⁴⁵ ICANN, “ICANN Meetings in Kuala Lumpur,” July 23, 2004, <http://www.icann.org/en/meetings/kualalumpur/captioning-public-forum-23jul04.htm>.

⁴⁶ ICANN, “Appendix E – Supplemental/Follow-up Materials,” November 30, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.

⁴⁷ ICANN Bylaws, August 5, 2010, <http://www.icann.org/en/general/bylaws.htm>. ICANN’s Bylaws have been amended 26 times from the original Bylaws. Archives of previous versions are available on the ICANN website at <http://www.icann.org/en/general/archive-bylaws>.

⁴⁸ *Ibid.*, Article XI, Section 2.1(a). ICANN’s original Bylaws did not include the phrase “where they may affect public policy issues,” which was appended to the original in 2002. ICANN Bylaws, Article XI, Section 2.1(a), November 6, 1998, <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

⁴⁹ *Ibid.*, Article XI, Section 2.1(i). It is unclear whether the terms “comment” and “advice” are distinct concepts and are intended to have different meaning.

⁵⁰ *Ibid.*, Article XI, Section 2.1(h).

⁵¹ *Ibid.*, Article III, Section 6.1(c). Although this provision does use the term “advice,” which by itself is consistent with the use in Article XI, Section 2.1; “advice” appears to be used interchangeably with “opinion.” Consequently, the precise scope of this provision is unclear, especially with regard to how it interplays with Article XI, Section 2.1.

⁵² *Ibid.*, Article XI, Section 2.1(j). Unlike the other provisions in Article XI, this provision uses the term “advice of the Governmental Advisory Committee” explicitly. This appears to suggest that the circumstances where the Board’s requirement to give notice and explanation of actions inconsistent with advice is limited; however, it is somewhat unclear if that was the intended purpose of this provision.

good faith and in a timely and efficient manner, to find a mutually acceptable solution.”⁵³ If no solution is reached between the Board and the GAC, the Board is required to “state in its final decision the reasons why” the advice was not followed.

The ICANN Bylaws also permit the GAC to “appoint one non-voting liaison to the ICANN Board of Directors.”⁵⁴ The GAC Liaison to the Board is “entitled to attend Board Meetings, participate in Board discussions and deliberations.” The Liaison has “access (under conditions established by the Board) to materials provided to Directors for use in Board discussions” and may “use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee.”⁵⁵ The individual elected as the GAC Chair has been consistently appointed to the position of GAC Liaison to the Board. Although not described within the ICANN Bylaws or the GAC Operating Principles,⁵⁶ interviewees stated that the GAC Liaison to the Board is generally expected to brief the Board on issues of concern amongst GAC members.⁵⁷ In addition, interviewees indicated that the Board believes the presence of the GAC Chair at Board Meetings, even if in the capacity of a Liaison to the Board, satisfies the “notification” requirement for proposals raising public policy issues without additional communications.⁵⁸ Other interviewees questioned this practice and stated that this interpretation of the Bylaws was not shared by GAC members.⁵⁹

According to the GAC Operating Principles, the GAC advises the Board on matters relating to “governments, multinational government organizations and treaty organizations, and distinct economies as recognized in international fora.”⁶⁰ The Operating Principles reflect the GAC’s internal operating principles and procedures, however, the articulations within this document are not necessarily binding on the ICANN Board.⁶¹ The Operating Principles specifically state that “advice from the GAC to the Board is communicated through the Chair.”⁶² When the GAC is unable to reach a consensus, the Chair is required to “convey the full range of view expressed by Members to the Board.”⁶³

⁵³ Ibid., Article XI, Section 2.1(j).

⁵⁴ Ibid., Article VI, Section 9.1(a) and Article XI, Section 2.1(g).

⁵⁵ Ibid., Article VI, Section 9.5.

⁵⁶ The ICANN Bylaws contain a provision which permits the GAC to adopt “its own charter and internal operating principles or procedures to guide its operations.” This provision appears to be manifested by the GAC Operating Principles. GAC Operating Principles, March 2010, http://gac.icann.org/system/files/GAC_Operating_Principles_1.pdf. Importantly, the Operating Principles note that the ICANN Bylaws are authoritative over any differences “in interpretation between the principles set out in these Operating Principles and ICANN’s Articles of Incorporation and Bylaws.” See also GAC Operating Principles, Article XV, Principle 54.

⁵⁷ Interviews, September and October 2010.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ GAC Operating Principles, Article I, Principle 1, March 2010.

⁶¹ Ibid., Article XV, Principle 54.

⁶² Ibid., Article XII, Principle 46.

⁶³ Ibid., Article XII, Principle 47.

2.2 The Role of the GAC in the .xxx Process: 2004

Between ICM's submission of its .xxx proposal on March 19, 2004 and the submission of the independent evaluators' report on July 13, 2004, there is little documented discussion of the sTLD applications during ICANN Board and GAC meetings.⁶⁴ Following receipt of this report, the Board determined that sTLD applicants would be permitted to submit supplemental information to address the evaluators' concerns, beginning in August 2004. ICM began submitting supplemental materials in October 2004.⁶⁵

On October 18, 2004, the ICANN Board held the first meeting since July 2004 during which a discussion of the sTLDs was documented. The corresponding meeting minutes indicate that "Kurt Pritz, the ICANN Vice President of Business Operations[,] provided a detailed summary of the current process of and status regarding the ten sponsored top-level domain applicants" and Paul Twomey, ICANN's President and CEO, also provided information on the sTLD applicants.⁶⁶ Mohamed Sharil Tarmizi, Chairman of the GAC, was present during this meeting as the "GAC Liaison."⁶⁷ No corresponding resolutions were made by the Board at this meeting.⁶⁸ Another meeting was held on November 15, 2004.⁶⁹ The minutes note that "Kurt Pritz again provided an update on the status of the process for each of the ten [sTLD] applicants," and there was a "limited discussion by the Board regarding the process points," but no resulting resolutions.⁷⁰

In a five-page letter to Tarmizi, dated December 1, 2004, Dr. Twomey requested "input from the GAC on the public policy elements" on several issues pending before the Board.⁷¹ Twomey also observed that, "it seems to me that the interaction between the GAC and ICANN staff would merit from some increase in intensity" and suggested "establish[ing] a GAC position for transmission to the Board on the public policy elements" of issues pending before the ICANN Board.⁷² Twomey also noted in this letter that "it may be worthwhile considering how the

⁶⁴ Between March and July 2004, both the Board and the GAC held meetings, but did not discuss the sTLD applications in significant detail. The Board held meetings on April 19, May 11, May 21, May 25, and June 29, 2004. See ICANN, "2004 Board Meeting Minutes," 2004, <http://www.icann.org/en/minutes/index-2004.html>. The GAC held meetings on February 29 – March 3, and July 17 – 20, 2004. See GAC, "GAC Meetings," <http://gac.icann.org/meetings>. See ICANN, "Status Report on the sTLD Evaluation Process," December 3, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf>; Independent Evaluators, "Evaluation Report on New sTLD Applications," July 12, 2004, <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>.

⁶⁵ ICANN, "Appendix E – Supplemental/Follow-up Materials," November, 30, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.

⁶⁶ ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

⁶⁷ *Ibid.* A liaison to the Board is a non-voting member, who is permitted to attend Board meetings. The Bylaws specify that the GAC must appoint the position of liaison annually. See ICANN Bylaws Art. VI. Sec. 9.

⁶⁸ ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

⁶⁸ ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

⁶⁹ ICANN, "Special Meeting of the Board Minutes," November 15, 2004, <http://www.icann.org/en/minutes/minutes-15nov04.htm>.

⁷⁰ *Ibid.*

⁷¹ Paul Twomey to Mohamed Sharil Tarmizi, ICANN Correspondence, December, 1 2004, <http://www.icann.org/correspondence/twomey-to-tarmizi-01dec04.pdf>.

⁷² *Ibid.*

interaction could be increased between the GAC and the other Supporting Organizations and Advisory Committees for the mutual benefit of both sides.”⁷³

The next section of this letter laid out the issues pending before the Board for which Twomey requested GAC input. In the following paragraph, Twomey outlined the status of the sTLD applications:

*ICANN continues to move forward on three (3) fronts in the area of **generic Top-Level Domains**. First of all, following the 10 applications for new sponsored TLD’s (sTLDs) and the evaluation of their bids by independent evaluators, we have commenced contract negotiations with the applicants for .TRAVEL and .POST. In parallel, the applicants are responding to the reports of the independent evaluators, and in some instance have entered into direct discussions with the evaluation panels in order to clarify some issues. Any outstanding issues between the independent panels and the applicants will be resolved by ICANN’s Board and we expect to move towards contract negotiations with some other applicants as well. Secondly, ICANN is about to launch the re-bid of the .NET agreement as foreseen in the relevant contract. GAC members can follow the process via the information we post to the ICANN web-site. Thirdly, as mentioned, we have published the draft of a Strategy for the Introduction of New gTLD’s.*⁷⁴

2.3 The Role of the GAC in the .xxx Process: 2005

Despite receiving a number of supplemental materials from ICM in support of its application in late 2004, as of early 2005 the ICANN Board was still uncertain that ICM had satisfied the requirements for the .xxx sTLD. On January 24, 2005, the Board held a special meeting to discuss the status of ICM’s application. At this meeting, Kurt Pritz “introduced the .XXX application materials, evaluators’ responses and the applicant’s supplemental materials” and “there was extensive Board discussion regarding the application,” focused on ICM’s proposed sponsored community.⁷⁵ According the minutes, the Board determined that it would be useful for ICM to give a presentation and invited ICM to do so at a later Board meeting.⁷⁶ ICM delivered the presentation on April 3, 2005 in Mar del Plata, Argentina, a few days prior to the scheduled ICANN Board meeting,⁷⁷ to an audience of Board members and a number of Board liaisons, including Tarmizi.⁷⁸

⁷³ Ibid.

⁷⁴ Ibid., 4 (emphasis in the original).

⁷⁵ ICANN, “Special Meeting of the Board,” January 23, 2005, <http://www.icann.org/en/minutes/minutes-24jan05.htm>.

⁷⁶ Ibid.

⁷⁷ The ICANN Board held its regular meeting in Mar del Plata, Argentina on April 8, 2005.

⁷⁸ ICM, “Request for IRP,” June 6, 2008, at 28, <http://www.icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

Concurrently, the GAC convened in Mar del Plata on April 2–5 in 2005 for the first of three scheduled meetings in 2005.⁷⁹ The Mar del Plata Communiqué does not indicate that the GAC held any discussions related to the sTLDs or the .xxx application specifically.⁸⁰

On April 3, 2005,⁸¹ Tarmizi sent a letter to Paul Twomey responding to Twomey’s previous request for GAC input on December 1, 2004.⁸² In this letter, Tarmizi stated that the GAC had no objections to any of the sTLD applications:

*No GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round. However should sTLDs use ENUM, that should not interfere with established international policies for the E164 numbering system. ICANN should ensure that sponsors of sTLDs encompass the entirety of the relevant user community, and that eventual distortions of competition are effectively avoided.*⁸³

Following the April 3 special Board meeting, the Board met again for a regular meeting on April 8, 2005 in Mar del Plata.⁸⁴ The meeting minutes reflect that the Board hoped to reach a decision within thirty days:

*We have had a fairly extensive discussion about .ASIA and .XXX. We continue to evaluate those. The others will be attended as we can get to them. But, I want to say for the record, that we will attempt within the next 30 days to come to a conclusion one way or the other about .ASIA and .XXX.*⁸⁵

Approximately one month later, on May 3, 2005, the Board held another special meeting, and had a “broad discussion . . . whether or not the [.xxx application] met the criteria within the RFP particularly relating to the definition and coherence of the ‘sponsored community’.”⁸⁶ No conclusion was reached in these meetings, and “the Board agreed it would discuss this issue again at the next Board meeting.”⁸⁷

On June 1, 2005, the Board held another special meeting and discussed the .xxx application at length with a “particular focus on the ‘sponsored community’ issues.”⁸⁸ At this meeting, the

⁷⁹ GAC, “Meeting 22: Mar del Plata Communiqué,” April 5, 2005, http://gac.icann.org/system/files/GAC_22_Mar_del_Plata.pdf. The other meetings scheduled for 2005 included: Meeting 23: Luxembourg on July 9-12, 2005, and Meeting 24: Vancouver on November 28 – December 1, 2005. Cf. GAC, “Meetings,” <http://gac.icann.org/meetings>.

⁸⁰ Ibid.

⁸¹ The ICANN meeting minutes on this date and the Tarmizi letter do not indicate whether the letter was written and sent before or after the Board meeting on this date.

⁸² Mohamed Sharil Tarmizi to Paul Twomey, April 3, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm>.

⁸³ Ibid.

⁸⁴ ICANN, “Mar Del Plata Meeting,” April 8, 2005, <http://www.icann.org/en/meetings/mardelplata/captioning-BoD-meeting-08apr05.htm>.

⁸⁵ Ibid.

⁸⁶ ICANN, “Special Meeting of the Board,” May 3, 2005, <http://www.icann.org/en/minutes/minutes-03may05.htm>.

⁸⁷ Ibid.

⁸⁸ ICANN, “Special Meeting of the Board,” June 1, 2005, <http://www.icann.org/en/minutes/minutes-01jun05.htm>.

Board resolved to enter into negotiations with ICM for the technical and commercial terms of a contractual agreement relating to the delegation of the sTLD.⁸⁹ Whether this resolution indicated that ICM had adequately met the sTLD sponsorship criteria later became a factual dispute in the arbitration proceedings under the Independent Review Process beginning in 2008.⁹⁰

The GAC held its second meeting of the year in Luxembourg on July 7–12, 2005.⁹¹ The Luxembourg Communiqué does not specifically mention ICM’s application, the proposed .xxx sTLD, or the Board’s June 1, 2005 resolution to enter into contract negotiations with ICM. However, the Luxembourg Communiqué makes the following reference with regard to “new TLDs”:

*The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top-level Domains strategy. The GAC looks forward to providing advice to the process. The GAC also encourages the Board to actively consult all constituencies with regard to the development of this strategy.*⁹²

This is the only reference in the Luxembourg Communiqué to the introduction of new TLDs; there are no references to sTLDs specifically.⁹³ The phrase “significant public policy issues” is not defined further in this document.⁹⁴

Following the Luxembourg meetings, the ICANN Board met in September and resolved that the ICANN General Counsel and the CEO and President, “are directed to discuss possible additional contract provisions or modifications for inclusion in the .xxx registry agreement” which, among other things, ensure the “development and implementation of policies consistent with the principles in the ICM application.”⁹⁵ The ICANN Board posted the first draft registry agreement for the .xxx sTLD on the ICANN website for public comment on August 9, 2005.⁹⁶

Three days later, on August 12, in a letter addressed to “the ICANN Board,” Tarmizi expressed the GAC’s discomfort with the possibility of a .xxx sTLD:

In other GAC sessions, a number of other governments also expressed some concern with the potential introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a

⁸⁹ Ibid.

⁹⁰ See ICM Request for Independent Review Process, June 6, 2008, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

⁹¹ GAC, “Meeting 23: Luxembourg Communiqué,” July 12, 2005, http://gac.icann.org/system/files/GAC_23_Luxembourg.pdf.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ ICANN, “Special Meeting of the Board,” September 15, 2005, <http://www.icann.org/en/minutes/minutes-15sep05.htm>.

⁹⁶ ICM and ICANN, “.Draft Sponsored TLD Registry Agreement,” August 1, 2005, <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf>.

*strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.*⁹⁷

Tarmizi disclosed that he had been “approached by some of the [governments with concerns]” and had “advised them that apart from the advice given in relation to the creation of new gTLDs in the Luxembourg Communiqué that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about specific concerns.” In the same letter, Tarmizi also asked the Board to “allow time for additional governmental and public policy concerns to be expressed before reaching a final decision.”⁹⁸

Following this, Michael Gallagher, Assistant Secretary of the US Department of Commerce and Administrator of the NTIA, wrote to Vint Cerf “to urge the Board to ensure that the concerns of all members have been adequately heard and resolved before the Board takes action on [the .xxx] application.”⁹⁹ The ICANN website’s “Correspondence” page¹⁰⁰ currently dates this letter August 15, 2005.¹⁰¹ The posted digital copy of this letter has two date stamps on it: August 11 and “received August 15.”¹⁰² This letter additionally noted that the Department of Commerce had received a large number of negative comments from the public regarding the proposed sTLD.¹⁰³

On August 15, the same day the Gallagher letter was posted to ICANN’s website, ICM officially requested an additional month to allow ICANN to address the concerns raised by the GAC.¹⁰⁴ Consequently, consideration of the proposed agreement was postponed until the September 2005 Board meeting.¹⁰⁵

On September 6, 2005, Marcelo de Carvalho Lopes, the Secretary of Information Technology Policy of Brazil, wrote to Mohamed Sharil Tarmizi and stated that “significant impacts in local concerns have been introduced [as a result of the .xxx proposal] without adequate consultation with national governments.”¹⁰⁶ Lopes also requested that “any new decision concerning the introduction of any other TLDs should only be taken after a careful analysis of the real need for

⁹⁷ Mohamed Sharil Tarmizi to ICANN Board, August 12, 2005, ICANN Correspondence <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm>.

⁹⁸ Ibid.

⁹⁹ Michael Gallagher to Vint Cerf, August 15, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>.

¹⁰⁰ ICANN, “Correspondence,” <http://www.icann.org/correspondence>.

¹⁰¹ Ibid.

¹⁰² During the Berkman team’s interview process, some interviewees noted there was confusion as to whether the letter was received on August 11 or on August 15, 2005. Compare <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf> with the Correspondence Page date: <http://www.icann.org/correspondence>.

¹⁰³ Ibid.

¹⁰⁴ Stuart Lawley to Vint Cerf, August 15, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf>. See also ICM, “Request for Independent Review Process,” June 6, 2010, p 34, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

¹⁰⁵ Ibid.

¹⁰⁶ Marcelo de Carvalho Lopes to Mohamed Sharil Tarmizi, September 6, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>.

such introduction within the Internet and due consultation” with all affected parties and governments.¹⁰⁷

In a special meeting on September 15, 2005, the Board resolved to continue discussions with ICM and to address “additional provisions or modifications for inclusion” in the agreement “to ensure there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application.”¹⁰⁸ On September 16, Peter Zangl, Deputy Director of the European Commission’s Information Society, Media Directorate General and a member of the GAC, wrote to Vint Cerf and asked ICANN to allow the GAC to review the independent evaluators’ reports on the sTLD proposals before the Board reached a final decision on .xxx. Zangl also requested that the ICANN Board explain their reasons for accepting the ICM’s application in response to the 2003 RFP round after it was denied in the 2000 “proof of concept” round.¹⁰⁹ A response to this letter was not issued until mid-January 2006.¹¹⁰

Although the proposed .xxx registry agreement was again on the agenda for discussion at the special meeting of the Board held on October 12, 2005, the meeting minutes do not recount any discussion concerning the agreement, ICM, or .xxx.¹¹¹ However, the minutes note that “there was discussion regarding the nature of other matters on the Board’s agenda and the remaining agenda items were put over until the next possible time for the Board to take up such matters.”¹¹² Prior to the end of 2005, the ICANN Board held three more meetings: a special meeting on October 24, a special meeting on November 8, and the Vancouver Meeting in early December.¹¹³ The .xxx sTLD and proposed registry agreement were not listed on the agendas for these meetings nor mentioned in the meeting minutes.

In a letter to Paul Twomey dated November 23, 2005, Jonas Bjelfvenstam, the State Secretary for Communications and Regional Policy in Sweden, expressed the Swedish disapproval for the .xxx domain. Bjelfvenstam almost made the following remarks regarding the GAC’s role in the ICANN decision-making process:

I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time of the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9 - 12,

¹⁰⁷ Ibid.

¹⁰⁸ ICANN, “Special Meeting of the Board,” September 15, 2005, <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>.

¹⁰⁹ Peter Zangl to Vint Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf>.

¹¹⁰ Vint Cerf to Peter Zangl, January 30, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf>.

¹¹¹ ICANN, “Special Meeting of the Board,” October 12, 2005, <http://www.icann.org/en/minutes/minutes-12oct05.htm>.

¹¹² Ibid.

¹¹³ See ICANN, “2005 Board Meetings,” 2005, <http://www.icann.org/en/minutes/index-2005.html>.

2005, in Luxembourg. However, we all probably rested assure that ICANN's negative opinion on .xxx, expressed in 2000, would stand.

From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting; one month would be insufficient time for governments to independently consider and respond to the subject matter. In this specific case, several countries raised serious concerns at the GAC meeting. However, there was too little information at hand to have an informed and fruitful discussion and hence no conclusions were reached on the subject.¹¹⁴

The letter requested that the ICANN Board “postpone conclusive discussion on .xxx until after the upcoming GAC meeting in November 29–30, 2005, in Vancouver” so that the GAC could discuss matters. Bjelfvenstam asked the Board to provide “in detail how it means .xxx fulfils the criteria set in advance (‘criteria for Independent Evaluators’).”¹¹⁵

On the same day, November 23, Paul Twomey responded to Bjelfvenstam’s letter.¹¹⁶ In his response, Twomey explained that the ICANN Board had put off “any decision on [the .xxx] application until at least the ICANN Board meeting on 4 December 2005.”¹¹⁷

The GAC’s third and final meeting in 2005 was held over November 28–December 1 in Vancouver, British Columbia. In the GAC’s Vancouver Communiqué, the only relevant note on the .xxx application was the following:

The GAC also welcomed a report from ICANN on the status of Board approval of sponsored TLDs, as well as the Evaluation Report requested by GAC members. In that regard, the GAC welcomed the decision to postpone the Board’s consideration of the .XXX application from its December 4th, 2005 meeting until such time as the GAC has been able to review the Evaluation Report and the additional information requested from ICANN.¹¹⁸

2.4 The Role of the GAC in the .xxx Process: 2006

As of January 1, 2006, the Board had not yet voted on the pending .xxx registry agreement. The next significant events occurred following the GAC’s meeting in Wellington in March. Until then, ICANN continued to negotiate the terms for the proposed .xxx registry agreement while responding to written communication from the members of the community.

¹¹⁴ Jonas Bjelfvenstam to Paul Twomey, November 23, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/bjelfvenstam-to-twomey-23nov05.htm>.

¹¹⁵ Ibid.

¹¹⁶ Paul Twomey to Jonas Bjelfvenstam, November 23, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/twomey-to-bjelfvenstam-23nov05.pdf>.

¹¹⁷ Ibid.

¹¹⁸ GAC, “Communiqué 24—Vancouver,” December 1, 2005, http://gac.icann.org/system/files/GAC_24_Vancouver_Communique.pdf.

On January 17, 2006, Vint Cerf issued a seven-page letter responding to Peter Zangl's September 16, 2005 letter.¹¹⁹ In this letter, Cerf highlighted some of the procedural and substantive differences between the 2000 "proof of concept" round and the 2003 RFP and addressed a number of issues related to the GAC that were raised in Zangl's original letter. Cerf explained that the GAC was first formally informed of the pending sTLD applications in a "1 December 2004 letter from Dr. Twomey" to the GAC which "request[ed] input on the public policy elements of a number of issues and highlighting major developments in ICANN."¹²⁰ Cerf stated that "the Chairman of the GAC responded to Dr. Twomey on 3 April 2005," and "noted [in this letter] that, as of that date, '[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round.'"¹²¹ Cerf then noted that "on 1 June 2005, the Board voted to begin discussion of proposed commercial and technical terms with ICM" and that "this decision generated more GAC interest in the application than had been shown earlier."¹²² Cerf also stated that during this time period, Paul Twomey reported to the GAC that "no comments had been received from governments regarding the application" and the GAC had not "raised the issue in any formal comment to ICANN, such as by inclusion in a Communiqué."¹²³ Finally, Cerf pointed out that the next formal correspondence received by ICANN was the August 12, 2005 letter from the GAC Chairman that described the overall discomfort of the GAC.¹²⁴

On February 11, 2006, Paul Twomey sent Mohamed Sharil Tarmizi a letter that was essentially identical in substance to the letter Vint Cerf sent to Peter Zangl on January 17.¹²⁵ In addition to summarizing the Board's interaction with the GAC to date, the Twomey letter also noted that ICANN had "received letters from some members of the Governmental Advisory Committee (GAC) about the . . . application submitted by ICM Registry for .xxx" and summarized the ICM application and the Board's interaction with the GAC since the application was received in 2004.¹²⁶

On March 17, 2006, Peter Zangl replied to Vint Cerf's January 17, 2006 letter.¹²⁷ In his letter, Zangl thanked Cerf for the reply and acknowledged that ICANN is responsible for making the final decision. Zangl also made the following remarks:

¹¹⁹ Vint Cerf to Peter Zangl, January 17, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf>. See also Peter Zangl to Vint Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-16sep05.pdf>.

¹²⁰ *Ibid.*, 2. The letter also includes a hyperlink to the Paul Twomey letter sent to Mohamed Sharil Tarmizi on December 1, 2004.

¹²¹ *Ibid.*, 2-3 (some punctuation omitted).

¹²² *Ibid.*, 3.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Paul Twomey to Mohamed Sharil Tarmizi, February 11, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf>. Cf. Vint Cerf to Peter Zangl, January 17, 2006, <http://www.icann.org/en/correspondence/cerf-to-zangl-30jan06.pdf>.

¹²⁶ *Ibid.*

¹²⁷ Peter Zangl to Vinton Cerf, March 17, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-17mar06.pdf>. See also Vint Cerf, to Peter Zangl, January 17, 2006, <http://www.icann.org/en/correspondence/cerf-to-zangl-30jan06.pdf>.

I would emphasize however that the request for additional information made by the GAC in Vancouver results from the conclusion of the evaluation team that a number of the applications, including .xxx 'do not meet all of the selection criteria' and that, moreover, their 'deficiencies cannot be remedied within the applicant's proposed framework'. Importantly, the evaluators 'recommend that ICANN not consider these applications further'.

In order to carry about our duties effectively in the GAC therefore, you will understand why it would be useful to know why the Board decided to proceed with the application, in particular given such explicit advice from the evaluators. I note and appreciate the extensive information you have provided in your letter about the Board's deliberations, but I do not feel that this specific question is succinctly addressed. I would be grateful therefore if there is additional information that you, on behalf of the Board, can share with us on these issues.

On March 20, 2006, John M. R. Kneuer, the Acting Assistant Secretary at the US Department of Commerce and Acting Assistant Secretary for the NTIA, wrote to Mohamed Sharil Tarmizi.¹²⁸ His letter advised the GAC that the proposed .xxx registry agreement did not reflect a number of key commitments offered by ICM within the contract's provisions and requested that the GAC bring this to the attention of the ICANN Board prior to the Wellington, New Zealand meeting.¹²⁹ The letter also included a description of the provisions that the NTIA said were not reflected in the agreement.¹³⁰

On March 25, 2006, Stuart Lawley, ICM's CEO, sent a letter to Tarmizi responding to the comments made by the NTIA on March 20.¹³¹ In this letter, Lawley stated that the letter from the NTIA was incorrect and argued that the issues raised by the NTIA were already addressed by a number of specific commitments that had been negotiated between ICANN and ICM.¹³²

A few days after the exchange of letters, the GAC met in Wellington, New Zealand.¹³³ The Wellington Communiqué expressed the most critical remarks with regard to the .xxx application to date by the GAC. In particular, the Communiqué stated that "the GAC does not believe the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application had overcome the deficiencies noted in the Examination Report."¹³⁴ The Communiqué further requested "a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top-

¹²⁸ John M. R. Kneuer to Mohamed Sharil Tarmizi, March 20, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/kneuer-to-tarmizi-20mar06.pdf>.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Stuart Lawley to Mohamed Sharil Tarmizi, March 25, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/lawley-to-tarmizi-25mar06.pdf>.

¹³² Ibid.

¹³³ GAC, "Communiqué 25—Wellington," March 28, 2006, http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf.

¹³⁴ Ibid., 3. See also Paul Twomey to Mohamed Sharil Tarmizi, February 16, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/twomey-to-tarmizi-16feb06.pdf>.

level domain selection criteria.”¹³⁵ The Communiqué also stated that ICM committed to “a range of public interest benefits as part of the bid to operate the .xxx domain” and that “these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement.” It also listed a number of such provisions that the GAC wanted to be addressed.¹³⁶

In a separate section of the Wellington Communiqué, titled “GAC–ICANN Board Cooperation,” the Communiqué noted that “the GAC acknowledges that there is a need for the GAC to consider changes in its working methods in order to enable it to interact more routinely with the ICANN Board and the community.”¹³⁷

The day after the GAC Communiqué was issued, the ICANN Board held its regular meeting in Wellington.¹³⁸ At this meeting, the Board resolved that “the President and the General Counsel are directed to analyze all publicly received inputs” and “to continue negotiations with [ICM].”¹³⁹ The resolution stated that the President and General Counsel also are “to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies,” evaluate the proposed amendments to the registry agreement and provide the Board with recommendations.¹⁴⁰

On April 28, 2006, the ICANN Board held a special meeting and discussed, among other things, the status of the proposed .xxx sTLD registry agreement.¹⁴¹ John Jeffrey, the ICANN General Counsel, provided an update on the negotiations and the changes that had been made to the proposed registry agreement since the Wellington meetings. Jeffrey noted that ICM had provided “a final version of their proposal for a response to all concerns from the community and relating to the GAC Communiqué.”¹⁴² Vint Cerf indicated that he would like to “have an up or down vote at the 10 May Meeting.”¹⁴³ John Jeffrey also stated that “the ICM version [of the proposed agreement], including a letter from ICM, would be published later that day for public comment.”¹⁴⁴

Mohamed Sharil Tarmizi, who was present at this Board meeting, “requested an update on whether there would be a response to the GAC regarding the items that set out in the Communiqué in Wellington.” Paul Twomey stated that “a response would be provided before the 10 May Meeting.”¹⁴⁵ Over the remainder of the Board meeting, the minutes indicate the Board members discussed concerns regarding the proposed registry agreement, including the manner

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid., 2-3.

¹³⁸ ICANN, “Meeting of the Board, Wellington, NZ,” March 31, 2006, <http://www.icann.org/en/minutes/minutes-31mar06.htm>.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ ICANN, “Special Meeting of the ICANN Board,” 18 April, 2006, <http://www.icann.org/en/minutes/minutes-18apr06.htm>.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

of compliance and whether policy enforcement provisions would be sufficient to cover a community “as complex as the adult entertainment community.”¹⁴⁶

Paul Twomey sent a letter addressed to Tarmizi and members of the GAC on May 4, 2006.¹⁴⁷ The letter stated that Twomey was writing in response to the GAC’s request for information regarding the decision to proceed with the .xxx negotiations in June 2005. In this letter the ICANN Board again directed the GAC to the “11 February letter to explain ‘the Board decision, particularly with regard to the sponsored community and public interest criteria.’”¹⁴⁸ The letter further stated that “it is important to note that the Board decision as to the .xxx application is still pending” and that the June 2005 decision only permitted the ICANN staff to enter into negotiations for a proposed registry agreement. Twomey explained that this decision did not prejudice “the Board’s right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as the Board either approves or rejects the registry agreement relating to the .xxx application.”¹⁴⁹ The remainder of the letter explained the process of evaluation again as explained in the February 11 letter and, in particular, noted that “in all instances where the evaluators’ negative reports were reevaluated by the Board of Directors, the applicants answered all questions and clarified issues that had been of concern to the evaluators to the satisfaction of a majority of the Board.”¹⁵⁰

On May 9, 2006, Martin Boyle, the UK Representative to the GAC, sent a letter to Vint Cerf as a follow-up to the discussions held at the Wellington meeting.¹⁵¹ The letter describes the “firm view [of the UK] that if the dot.xxx domain name is to be authorized, it would be important that ICANN ensures the benefits and safeguards proposed by the registry, ICM, including the monitoring all dot.xxx content and rating of content on all servers pointed to by dot.xxx, are genuinely achieved from day one.”¹⁵² Boyle also pointed out that “it will be important for the integrity of ICANN’s position as final approving authority. . . to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards.”¹⁵³

Also on May 9, 2006, Tim Ruiz, Vice President of GoDaddy, sent a letter to ICANN to “encourage the ICANN Board to consider the proposed .xxx Registry Agreement only in regards to how it addresses the public policy concerns raised by the GAC.”¹⁵⁴ Ruiz also stated that the current

¹⁴⁶ Ibid.

¹⁴⁷ John Jeffrey to Mohamed Sharil Tarmizi and members of the GAC, May 4, 2006, ICANN Correspondence, <http://icann.org/correspondence/twomey-to-tarmizi-04may06.pdf>. See also Paul Twomey to Mohamed Sharil Tarmizi, February 11, 2006, <http://icann.org/en/correspondence/twomey-to-tarmizi-16feb06.pdf>.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Martin Boyle to Vint Cerf, May 9, 2010, ICANN Correspondence, <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm>.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Tim Ruiz to ICANN, May 9, 2010, ICANN Correspondence, <http://www.icann.org/correspondence/ruiz-to-board-09may06.pdf>.

round of TLD expansion was still not complete after two years and notes that “this fact will certainly discourage future applicants for new sponsored or un-sponsored gTLDs.”¹⁵⁵

On May 10, 2006, the Board held a special meeting and voted on the proposed .xxx registry agreement, following a “detailed discussion” of the agreement terms, including the promises made by ICM in support of the proposal, concerns regarding ICANN’s ability to enforce the terms through a contractual framework, the sponsorship criteria, GAC advice and community input.¹⁵⁶ By a 9–5 vote, the ICANN Board resolved to reject the current draft of the .xxx registry agreement (but not ICM’s application as a whole), citing concerns about the agreement’s enforceability, the sponsorship criteria, and other concerns voiced in the public comments received.¹⁵⁷ ICM filed a Request for Reconsideration on the same day;¹⁵⁸ however, after ICANN invited ICM to submit a revised draft of the registry agreement, ICM withdrew its Request.¹⁵⁹

Stuart Lawley, President of ICM, sent a letter to Vint Cerf on May 30, 2006 expressing his disappointment at the Board’s decision and at “the lack of communication from ICANN” on the current status of the application. Lawley noted that after reviewing the Board’s voting transcript he was “convinced” that “certain misconceptions prevented the Board from reaching a balanced and equitable judgment on the agreement.” In particular, Lawley described the May 9 letter from Martin Boyle, the UK GAC representative, as being “mischaracterized.” Lawley also stated that ICM was still committed to the project and had filed an expedited request for reconsideration. Finally, Lawley outlined an ICM initiative that “enable[s] certain responsible members of the online adult entertainment community . . . to submit a request to reserve a particular domain for their subsequent registration should ICANN authorize ICM to operate .XXX”¹⁶⁰

Between June 2006 and January 1, 2007, ICANN has no public records of GAC correspondence regarding the proposed .xxx registry agreement or the sTLD application. Additionally, the .xxx proposed registry agreement was not mentioned in any Board meeting minutes during this time period.

2.5 The Role of the GAC in the .xxx Process: 2007

On January 5, 2007, ICANN posted a “revised proposed” .xxx registry agreement between ICANN and ICM for public comments until February 5, 2007.¹⁶¹ On February 2, 2007, Tarmizi sent a letter to Vint Cerf in response to the January 5 announcement.¹⁶²

¹⁵⁵ Ibid.

¹⁵⁶ ICANN, “Special Meeting of the Board,” May 10, 2006, <http://www.icann.org/en/minutes/minutes-10may06.htm>.

¹⁵⁷ ICANN, “Voting Transcript of Board Meeting,” May 10, 2006, <http://www.icann.org/en/minutes/voting-transcript-10may06.htm>.

¹⁵⁸ ICM, “Request for Reconsideration of Board Action,” May 10, 2006, <http://www.icann.org/en/committees/reconsideration/icm-06-4/petition-20may06.pdf>.

¹⁵⁹ ICM, “Request for Reconsideration 06-4: Letter from J. Beckwith Burr to Reconsideration Committee,” October 29, 2006, <http://www.icann.org/en/committees/reconsideration/withdrawal-of-request-06-4-29oct06.htm>.

¹⁶⁰ Stewart Lawley to Vint Cerf, May 30, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/lawley-to-cerf-30may06.htm>.

¹⁶¹ ICANN Announcement, “ICANN Publishes Revised Proposed Agreement on .XXX,” January 5, 2007, <http://www.icann.org/en/announcements/announcement-05jan07.htm>.

The letter stated that the “GAC convened a teleconference on 17 January 2007 to discuss its reaction to [the call for comments]” and that the participating GAC members on the call “noted that the modifications to the proposed agreement are intended to address public policy issues raised by the GAC in its Wellington, New Zealand Communiqué of March 2006.” The letter also pointed out that “it is unlikely that the GAC will be in a position to provide any comments on .xxx, above and beyond that provided in the Wellington Communiqué, before the next meeting in Lisbon.”¹⁶³

The letter also stated that, despite the ICANN President’s letters sent on February 11 and May 4, 2006, the GAC had requested “written clarification from the ICANN Board regarding its decision June 1 2005” and “reiterate[s] the GAC’s request for a clear explanation of why the ICANN Board is satisfied that the .xxx application has overcome the deficiencies relating to the proposed sponsorship community.”¹⁶⁴ The letter also requested that ICANN provide the GAC with confirmation that the proposed .xxx registry agreement contained enforceable provisions covering “all of ICM Registry’s commitments.”

Finally, Tarmizi’s letter suggested that it would be appropriate for the GAC and the ICANN Board to hold “face-to-face discussions” in Lisbon in March 2007. In his concluding remarks, Tarmizi again stated that several GAC members remained “emphatically opposed from the public policy perspective to the introduction of an .xxx sTLD”—as was noted in the Wellington Communiqué—and that such sentiments were not contingent on the “specificities of the agreement.”¹⁶⁵

Two special meetings of the ICANN Board were held between February 5, 2007 and the March 2007 Lisbon meetings. The first meeting, held on February 12, 2007, included a lengthy discussion of the proposed .xxx agreement, which covered community and public comments, status of advice from the GAC, including a “clarification of the letter from the GAC Chair and Chair-Elect” and whether additional public policy advice was to be expected, and how ICM measures up to the RFP criteria.¹⁶⁶

Some of the notable points raised during this meeting were that more than 200,000 emails had been sent to ICANN and more than 1,300 comments had been submitted to the public comment forums since the initial ICM application. Of these, 600 comments and 55,579 emails had been received since the January 5, 2007 posting of the proposed registry agreement. The Board also discussed the extent of the burden being placed on ICM to show that the entire sponsoring community supports the creation of the .xxx domain. Some Board members raised what they described as a recent lack of support for the defined community observed in negative emails and public comments. Ultimately, the Board resolved that “a majority of the Board has serious concerns” about the underlying sponsored community support, and that ICM should provide

¹⁶² Mohamed Sharil Tarmizi to Vint Cerf, February 2, 2007, ICANN Correspondence, <http://www.icann.org/en/correspondence/tarmizi-to-cerf-02feb07.pdf>.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ ICANN, “Special Meeting of the Board,” February 12, 2007, <http://www.icann.org/en/minutes/minutes-12feb07.htm>.

further information to ICANN to help determine whether the sponsorship criteria had been met. Tarmizi stated during this meeting that the February 2, 2007 letter sent to Vint Cerf served as the GAC's official advice on the current proposed registry agreement.

ICM responded on March 8, 2007 to the Board's request for information and provided a list of "pre-reservants" compiled from the last six months.¹⁶⁷ This list was generated through ICM's "pre-reservation" initiative, which Stuart Lawley had discussed in his May 30, 2006 letter to Vint Cerf.¹⁶⁸ Attached to the letter were over 75,000 pre-reservations of domain name strings specifically requested by webmasters, totaling 546 pages. A number of statistics in favor of community sponsorship were also noted in this letter.

The Board held its next special meeting on March 12, 2007. At this meeting, the Board engaged in another lengthy discussion concerning the proposed .xxx registry agreement and whether the sponsorship criteria had been met. The Board meeting minutes noted that most members felt the Board should hold off voting on the application until, or after, the Lisbon meeting, which was two weeks away. The minutes also indicated that, again, Tarmizi noted that the Board could seek "additional advice from the GAC" prior to the Lisbon meetings, but such a request would need to be made "expeditiously." Tarmizi also noted that some GAC members remained adamantly against the creation of the .xxx sTLD.¹⁶⁹

The GAC representatives at this meeting (Tarmizi and Janis Karklins) asked if a response to the GAC's request for more information on the Board's June 2005 decision would be provided prior to the Lisbon meetings. In response, "the Chairman said that a response would be provided"; the minutes stated that "this was confirmed by Paul Twomey," who pointed out that some previous letters were responsive to the GAC's requests and some "additional clarity around the GAC's advice could be presented on this matter."¹⁷⁰

The GAC request was answered on March 14, 2007, in a one-page letter from Vint Cerf.¹⁷¹ Cerf again noted that the communications from ICANN on February 11 and May 4, 2006 contained the information the GAC requested. Cerf also stated that the Board was "still reviewing the materials and ha[d] not made a determination as to whether the revisions to the ICM Registry contract contain the necessary enforceable provisions." Cerf acknowledged that some members of the GAC were opposed to the creation of the .xxx sTLD and that they had requested that the final decision be delayed until the Lisbon meetings.

¹⁶⁷ Stuart Lawley to Vint Cerf and ICANN Board, March 8, 2007, ICANN Correspondence, <http://www.icann.org/correspondence/cover-letter-pre-reservation-aatt.pdf>.

¹⁶⁸ Stuart Lawley to Vint Cerf, May 30, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/lawley-to-cerf-30may06.pdf>.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Vint Cerf to Mohamed Sharil Tarmizi, March 14, 2007, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-tarmizi-karklins-14Mar07.pdf>.

The GAC Lisbon meetings were held in late March. The Lisbon Communiqué was issued on March 28, 2007.¹⁷² With regard to .xxx, the Lisbon Communiqué remarked that the “Wellington Communiqué remains a valid and important expression of the GAC’s views on .xxx” and that the GAC “does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria.”¹⁷³

The Communiqué also brings attention to the Canadian government’s comments, which had been posted to the ICANN public forums. These comments raised concerns that ICANN was moving towards an “ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate.”¹⁷⁴

Following the GAC meetings in Lisbon, the ICANN Board also held a meeting on March 30, 2007.¹⁷⁵ During this meeting, the Board determined that the ICM application failed to meet the sponsored community criteria in the RFP specification and, based on the extensive public policy issues raised in the GAC Communiqués, it would not be appropriate for the Board to approve the ICM application or the revised agreement. Consequently, the Board voted to reject the ICM application in its entirety.

2.6 Perceptions of the GAC’s Role in the .xxx Process Based on Berkman Case Study Interviews

Individuals who have been interviewed in the course of developing this case study shared different observations regarding the interaction between the GAC and the ICANN Board during the evaluation of the .xxx application. Some interviewees suggested a clash of institutional cultures that inhibited better communication. Others cited a lack of appreciation on the part of the ICANN Board for the role of the GAC and the difficult political challenges faced by an inter-governmental body, all with domestic constituencies to which they must answer. Other observers indicated that the schedule of the policy-making process did not allow sufficient time for GAC to offer advice to the ICANN Board. Some of those interviewees described a lack of clarity regarding what constituted GAC advice to the ICANN Board. Others suggested that the GAC did not offer timely advice on the .xxx decision because members believed that the case was closed.¹⁷⁶

¹⁷² GAC, “Communiqué 28—Lisbon,” March 28, 2007, 4, http://gac.icann.org/system/files/GAC_28_Lisbon_Communique.pdf.

¹⁷³ Ibid.

¹⁷⁴ Ibid. at 5.

¹⁷⁵ ICANN, “Meeting of the ICANN Board, Lisbon,” March 28, 2007, http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876524.

¹⁷⁶ Interviews, September and October 2010.

3 The Independent Review Panel: ICM v. ICANN

3.1 Independent Review Requests and the Independent Review Panel in ICANN's Bylaws

The Independent Review Panel (IRP) is one of three existing mechanisms purposed for the review of ICANN Board activities and decisions (the other two mechanisms are the Ombudsman and Reconsideration Requests). Article IV, Section 3 of the ICANN Bylaws states that, “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.”¹⁷⁷ Once submitted, a request for independent review is “referred to an Independent Review Panel (IRP)” which compares the “contested actions of the Board to the Articles of Incorporation and Bylaws” and ultimately declares “whether the Board has acted consistently with” the provisions contained therein.¹⁷⁸

At the request of either disputing party, the request for independent review can be heard by a three-member panel of arbiters; however, if the parties do not opt for a three-member panel, the request is considered by a one-member panel.¹⁷⁹ In either case, the panel that considers the request for independent review has the power to:

- a) request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- b) declare that an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- c) recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon opinion of the IRP.¹⁸⁰

The IRP makes “its final declaration based solely on the documentation, supporting materials, and arguments submitted by the parties” and “specifically designate[s] a prevailing party.”¹⁸¹ The “party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider,” and “each party shall bear its own expenses.”¹⁸²

To date, ICM v. ICANN is the only request for independent review that has been heard by an IRP on the merits.¹⁸³ In this case, the IRP consisted of a three-member panel of arbitrators contracted

¹⁷⁷ ICANN Bylaws, Article IV, Section 3(2), August 5, 2010, <http://icann.org/en/general/bylaws.htm>.

¹⁷⁸ *Ibid.*, Article IV, Section 3. As a side note, use of the term “IRP” appears to be used differently in documents and either refers to the “Independent Review Process” or the “Independent Review Panel.” Except where otherwise noted, this report intends the term IRP to refer to the Independent Review Panel.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, Article IV, Section 3(8).

¹⁸¹ *Ibid.*, Article IV, Section 3(12).

¹⁸² *Ibid.*, Article IV, Section 3(12).

¹⁸³ See ICANN, “IRP,” <http://www.icann.org/en/irp>

by the International Centre for Dispute Resolution.¹⁸⁴ The panel included Judge Stephen M. Schwebel, Jan Paulson, and Judge Dickran Tevrizian.¹⁸⁵

3.2 ICM's Request for Independent Review

On June 6, 2008, ICM submitted a request for independent review, alleging that ICANN acted in a manner “inconsistent with its Articles of Incorporation and Bylaws” by improperly administering the 2003 RFP and rejecting ICM’s .xxx application in March 2007.¹⁸⁶ ICM requested for the IRP to declare that: (1) ICANN’s March 2007 rejection of the ICM application was inconsistent with the ICANN Bylaws and Articles of Incorporation, (2) ICANN “must immediately execute a registry agreement on terms and conditions substantially similar to ICM’s draft registry agreement posted on ICANN’s website on February 6, 2007,” and (3) the IRP’s “determination regarding whether any of ICANN’s actions were inconsistent with ICANN’s Articles of Incorporation and Bylaws is *binding* on ICANN.”¹⁸⁷

In support of these allegations, ICM argued that several events throughout ICANN’s evaluation of the .xxx application were inconsistent with the Articles of Incorporation and Bylaws. Additionally, ICM argued that the five reasons ICANN gave in support of its rejection were inconsistent with the Articles of Incorporation, Bylaws, and the way the other applicants were treated.¹⁸⁸

Primarily, ICM argued that the June 1, 2005 Board decision constituted an approval of the ICM proposal in light of the RFP criteria, including the sponsorship criteria.¹⁸⁹ ICM argued that ICANN had used a “two-step” process with the other applicants, whereby applicants were first approved on the merits of the RFP criteria, “followed by registry agreement negotiation” and execution.¹⁹⁰ According to ICM, the .xxx application was the only application that deviated from this process by reopening the sponsorship criteria.¹⁹¹ ICM also stated that there was a lack of “evidence before the Board that ICM’s support in the community was eroding.”¹⁹² Ultimately, ICM claimed that “ICANN’s reopening of the sponsorship criteria—which it did only to ICM—was unfair, discriminatory, and pretextual, and a departure from transparent, fair, and well documented policies.”

¹⁸⁴ See ICANN, “Resolutions Adopted at Special ICANN Board Meeting” Special Meeting of the Board via Telephone 19 April 2004 <http://www.icann.org/en/minutes/resolutions-19apr04.htm>, when the ICANN Board designated the International Centre for Dispute Resolution as the Independent Review Provider..

¹⁸⁵ Declaration of the Independent Review Panel, ICDR. Case No. 50 117 T 00224 08, (February 19, 2010) (hereinafter referred to as the “IRP Declaration”), available at <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>.

¹⁸⁶ ICM, “Request for Independent Review Process,” June 8, 2008, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

¹⁸⁷ *Ibid.*, 1-2 (emphasis added).

¹⁸⁸ IRP Declaration, 45.

¹⁸⁹ *Ibid.* See also ICM, “Request for Independent Review Process.”

¹⁹⁰ ICM, “Request for Independent Review Process,” 25-26.

¹⁹¹ *Ibid.*

¹⁹² IRP Declaration, 45.

The IRP request also claimed that the independent evaluations identified greater deficiencies in other sTLD applications (including .jobs and .mobi) and accepted those proposals with comparatively little resistance from ICANN.¹⁹³ For example, ICM stated that “following the negotiations, the proposed .travel and .jobs registry agreements were posted on the ICANN website on 24 March 2005, and were approved two weeks later, on 8 April 2005.”¹⁹⁴ According to the IRP request, “the process for each application still followed the original two-step process of criteria approval followed by registry agreement negotiation” and in “no case other than with the .xxx application” did the Board later reverse its decision after it had voted in favor of negotiations.¹⁹⁵

As additional evidence, ICM claimed “several ICANN senior officials and Board members,” including Vint Cerf, Kurt Pritz, and Joichi Ito made comments that reflected that the June 1, 2005 decision was a determination that ICM had satisfied the RFP criteria.¹⁹⁶ In particular, ICM claimed that Cerf had “informed the GAC that ICM’s application had satisfied the selection criteria” at the July 2005 ICANN meeting in Luxembourg.¹⁹⁷

Finally, the IRP request pointed out that “the GAC was invited to and was often represented at meeting in which ICM’s application (and others) were discussed and debated” and furthermore “[the GAC] was regularly provided with briefing papers regarding the sTLD RFP process, and it was permitted to participate in the Board’s discussions regarding ICM’s application.”¹⁹⁸ The core of this argument focuses on the lack of “any objects to the .xxx sTLD . . . at the outset, when the sTLD evaluation criteria were debated and ultimately approved” and when “ICANN resolved to commence registry agreement negotiations with ICM.”¹⁹⁹ ICM alleged in the IRP Request that the GAC raised no objections to the creation of .xxx and that it was only after the United States Department of Commerce began voicing its concerns in March 2006 that the GAC began to take a dissenting view, expressed mainly in its correspondence with ICANN and in the Wellington and Lisbon Communiqués.²⁰⁰

The IRP request also referenced statements from ICANN Board members who raised doubts about the decision on March 30, 2007 to reject ICM’s proposal. Peter Dengate Thrush was quoted as saying that ICANN’s argument that .xxx does not represent a “sponsored community” was “particularly thin,” and that “if ICANN is going to raise this kind of objection, then it better think seriously about getting out of the business of introducing new TLDs.”²⁰¹ Similarly, Susan Crawford argued that if no consensus existed against the .xxx TLD in the adult community,

¹⁹³ Ibid., 25.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., 25-26.

¹⁹⁶ Ibid., 29.

¹⁹⁷ Ibid., 29.

¹⁹⁸ Ibid., 30.

¹⁹⁹ Ibid., 31.

²⁰⁰ Ibid., 37.

²⁰¹ Ibid., 46.

then, “given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root.”²⁰²

ICM also argued that ICANN had never precisely identified what “public policy” issues were raised by the ICM agreement that would warrant the rejection of the application in its entirety.²⁰³ In particular, ICM claimed that ICANN’s interpretation of the Wellington Communiqué and governmental correspondence, which had asserted that ICM was to take responsibility for “enforcing the world’s various and different laws concerning pornography” was “sufficiently absurd as to have been made in bad faith” and discriminatory.²⁰⁴

Among the remaining arguments, ICM also contended that its proposed registry agreement contained sufficient provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of illegal or offensive content. Moreover, ICM claimed that ICANN’s view that the ICM proposal raised “significant law enforcement compliance issues” indicated that the “GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if [ICM] proved unable to, ICANN would have to do so.” According to ICM, the GAC’s advice required ICANN to impose responsibilities on ICM that were inconsistent with ICANN’s technical mandate.

3.3 ICANN’s Response to ICM’s Request for Independent Review

ICANN filed its “Response to ICM’s Request for Independent Review” on September 8, 2008.²⁰⁵ In response to ICM’s allegations of inconsistency, ICANN argued that: (1) ICANN’s consideration of the ICM proposal was “*more* open and transparent than one would find in virtually any other context in conjunction with any other organization”; (2) the June 1, 2005 decision to enter into negotiations did not bind ICANN to award ICM a registry agreement and retained the ability to reject ICM’s application; and (3) ICANN could have rejected the application solely based on the recommendations from the Independent Evaluation Panel, but instead attempted to work “closely and in good faith with ICM to cure apparent problems with the application and ultimately decided such problems could not be addressed by the agreement.”²⁰⁶

Additionally, ICANN argued that the “Bylaws support a deferential standard of review” to be applied in the Independent Review Process, “particularly with respect to ICM’s claims.”²⁰⁷ On this point, ICANN argued that “as long as the Board’s discussions are open and transparent, its

²⁰² Ibid., 47.

²⁰³ Ibid., 46.

²⁰⁴ Ibid.

²⁰⁵ ICANN, “ICANN’s Response to ICM’s IRP Request,” September, 8, 2008, <http://www.icann.org/en/irp/icm-v-icann/icann-response-to-icm-request-08sep08.pdf>.

²⁰⁶ Ibid., 3-4.

²⁰⁷ Ibid., 4.

decisions are made in good faith, and the relevant parties have been given an opportunity to be heard, there is a strong presumption that the Board’s decisions are appropriate.”²⁰⁸

In support of these arguments, ICANN included an explanation of its “decision-making processes” and “process for independent review” within its response.²⁰⁹ In this section, ICANN argued that “the Independent Review Process is not a form of traditional dispute resolution, i.e., mediation or arbitration,” and described the Independent Review Process as a mechanism “intended to provide the community with a formal process for reviewing specific decisions of the ICANN Board.” ICANN pointed to Article IV, Section 3(15) of its Bylaws and claimed that the “IRP’s declaration is not binding on the parties” and “the Board, ‘where feasible,’ is only required to “consider the IRP’s declaration at the Board’s next meeting.”²¹⁰ ICANN also pointed out that “the Bylaws expressly provide that the Independent Review should be conducted via ‘email and otherwise via the Internet to the maximum extent feasible.” On this point, ICANN argued that “the Independent Review Process does not specifically contemplate the need for a live hearing.”²¹¹

ICANN’s central factual contention was that its initial approval of the ICM proposal in 2005 and the subsequent contract negotiations were tentative and did not constitute a commitment to award a registry agreement. ICANN argued that its negotiations with ICM were intended to determine whether the terms of a registry agreement could satisfy the ICANN Board’s concerns about the proposal’s compliance with the sTLD sponsorship criteria. “The entire premise of ICM’s request—that proceeding to contract negotiations amounted to a guarantee that ICM would obtain a contract for the .XXX TLD—is simply false.”²¹²

ICANN argued further that its final rejection of ICM’s proposal in 2007 “came after extensive review, analysis and debate among ICANN Board members” and was not a sign of capriciousness in its decision-making processes. Instead, ICANN argued its decision reflected the following reasons:

- a) ICM’s application and revised agreement failed to meet, among other things, the “sponsored community” requirement of the RFP specification;
- b) [The Board’s decision was based] on the extensive public comment and the GAC’s Communiqués, the agreement raised considerable public policy issues/concerns. The application and agreement did not resolve the issues raised by the GAC’s Communiqués, and the Board did not believe the public policy concerns could be credibly resolved with the mechanisms proposed by ICM;
- c) The application raised significant law enforcement compliance issues because of countries’ varying laws relating to content and practices that define the nature of the application; and

²⁰⁸ Ibid.

²⁰⁹ Ibid., 5.

²¹⁰ Ibid., 9.

²¹¹ Ibid., 9.

²¹² Ibid., 4.

- d) The Board agreed with the GAC's Lisbon Communiqué, that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding content on the Internet, which is inconsistent with its technical mandate.²¹³

ICANN requested that the IRP declare that the ICANN Board's decisions, "absent a showing of bad faith," are entitled to deference from ICM and the IRP.²¹⁴ Additionally, ICANN argued that, contrary to ICM's claims, it acted in full accord with its Bylaws and its Articles of Incorporation.²¹⁵

3.4 Establishing the IRP Process

The IRP process is governed by the International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution (ICDR) with supplementary procedural modifications specifically tailored to ICANN.²¹⁶ The ICANN Bylaws offer the IRP provider, ICDR, considerable latitude to "establish operating rules and procedures." In terms of the procedural aspects of the Independent Review, the ICANN Bylaws state the following:

*In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.*²¹⁷

In its "Response to ICM's Request for Independent Review," ICANN argued that this provision indicated that the "Independent Review Process does not specifically contemplate the need for a live hearing."²¹⁸ Additionally, ICANN argued that this provision also provided the option for a quick, low cost review, conducted over telephone and email.

The Berkman team was unable to locate an official document on record in which the IRP, ICM, or ICANN acknowledge a resolution to these questions raised by ICANN. However, according to interviewees, the IRP apparently determined in an unpublished decision that although the Bylaws and Supplementary Procedures encourage conducting the Independent Review quickly over telephone, Internet, and other electronic means, the procedures give the ICDR panelists clear discretion to hold live hearings.²¹⁹ Indeed, what followed was a twenty-month full arbitration process with full documentation, witness testimony, expert opinion and cross-examination.

²¹³ Ibid., 38–39.

²¹⁴ Ibid., 39 ff.

²¹⁵ Ibid., 43 ff.

²¹⁶ ICDR, "Supplementary Procedures for ICANN Independent Review Process," <http://www.adr.org/sp.asp?id=32197>.

²¹⁷ ICANN Bylaws, Article IV, Section 3(10), August 5, 2010, <http://icann.org/en/general/bylaws.htm>.

²¹⁸ ICANN, "ICANN's Response to ICM's IRP Request," September 8, 2008, <http://www.icann.org/en/irp/icm-v-icann/icann-reponse-to-icm-request-08sep08.pdf>.

²¹⁹ Interviews, September and October 2010.

3.5 Memorial on the Merits, Witness Statements, and Expert Reports

On January 22, 2008, ICM filed its memorial on the merits, outlining ICANN's organizational history and its successive calls for proposals for new TLDs. ICM reaffirmed its argument that ICANN had violated its Articles of Incorporation and its Bylaws and that ICANN's actions were inconsistent with "relevant principles of International Law" and "relevant principles of California law."²²⁰ ICM also submitted testimony from Stuart Lawley (Chairman and President of ICM), J. Beckwith ("Becky") Burr (former advisor to the FTC, former advisor to the NTIA, and legal counsel to ICM in connection with its 2004 sTLD submission), Elizabeth Williams (consultant to ICANN during its solicitations for TLD proposals), Milton Mueller (professor at the Syracuse University School of Information Studies), and Jack Goldsmith (professor at Harvard Law School).²²¹

In its response to ICM's memorial on the merits, ICANN argued that ICM had mischaracterized the laws applying to the IRP proceedings, that ICM's factual claims were incorrect, and that ICANN had acted in complete accord with its Articles of Incorporation and its Bylaws.²²² ICANN also submitted testimony from Vint Cerf (then-VP at Google, former Chairman of the Board at ICANN), Paul Twomey (then-CEO and President of ICANN, former Chairman of the GAC), Alejandro Pisanty (former Board member of ICANN), and David Caron (professor of law at UC Berkeley, arbitrator).²²³

3.6 The IRP's Declaration

On February 19, 2010, the IRP decided 2–1 in favor of ICM.²²⁴ Three key holdings came from this decision. First, the panel determined that the holdings of the IRP are advisory in nature and do not constitute binding arbitral awards.²²⁵ Second, the panel determined that "the actions and decisions of the ICANN Board are not entitled to deference whether by application of the 'business judgment rule' or otherwise; they are to be appraised not deferentially but objectively."²²⁶ Finally, the IRP also determined that "the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .xxx TLD met the required sponsorship criteria."²²⁷

²²⁰ ICANN, "ICM's Memorial on the Merits," January 22, 2009, <http://www.icann.org/en/irp/icm-v-icann/icm-memorial-on-merits-22jan09-en.pdf>, iv – v.

²²¹ ICANN, "Witness Statements and Expert Report Submitted in Support of ICM's Memorial on the Merits," January 22, 2009, <http://www.icann.org/en/irp/icm-v-icann/supporting-documentation-for-icmmemorial-22jan09-en.pdf>.

²²² ICANN, "ICANN's Response to ICM's Memorial on the Merits," May 8, 2009, <http://www.icann.org/en/irp/icm-v-icann/icann-response-for-icm-memorial-on-merits-08may09-en.pdf>.

²²³ ICANN, "Witness Statements and Expert Report submitted in support of ICANN's Response to ICM's Memorial on the Merits," May 8, 2009, <http://www.icann.org/en/irp/icm-v-icann/supporting-documentation-icann-response-08may09-en.pdf>.

²²⁴ ICANN, "Independent Review Panel Declaration," February 19, 2010, <http://www.icann.org/en/irp/icmv-icann/irp-panel-declaration-19feb10-en.pdf>.

²²⁵ *Ibid.*, 70.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

The IRP noted that although there “is a measure of ambiguity in the pertinent provisions of the Bylaws,” the use of the phrase “*to declare* whether an action or inaction of the Board was inconsistent” supported an interpretation that IRP decisions were intended to be advisory, and not binding on the ICANN Board. In particular, the IRP likened this to a recommendation rather than a binding order. Moreover, the IRP also described the provision of Article IV, Section 3(15), which states, “where feasible, the Board shall consider the IRP declaration at the Board’s next meeting” as a “relaxed temporal proviso” where the Board has “to do no more than *consider* the IRP declaration.”²²⁸ Ultimately, the Board found that the loose nature of the language “emphasize[d] that [the IRP declaration] is not binding.”²²⁹ Next, the IRP determined that Independent Review is conducted *de novo* and, thus, “ICANN Board decisions do not enjoy a deferential standard of review.”²³⁰ On this point, the IRP determined that the Articles of Incorporation and Bylaws, which require, among other things, “ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to decisions of the ICANN Board.” The IRP also found that that as a California corporation, ICANN may call on the “business judgment rule” when relevant provisions in the Articles of Incorporation and Bylaws are otherwise absent.²³¹

After analyzing the events surrounding the June 1, 2005 Board decision to enter into negotiations with ICM, the IRP determined that the “reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy.”²³²

3.7 IRP Process Observations Based on Berkman Case Study Interviews

As previously noted, the ICM request for independent review was the first to be heard by an IRP. The case poses several questions related to the IRP process and the interpretation of the relevant sections of the Bylaws.

Given the cost and lengthiness of the IRP proceedings, several interviewees questioned whether the IRP provides an accessible and widely applicable means for reviewing the ICANN Board’s decisions. Some interviewees stated that the high cost of the proceedings meant that it offers a venue for only the wealthiest of participants and is not a viable option for the vast majority of ICANN stakeholders. Others asserted that the cost, risk, and duration of the IRP will mean that no others will be likely to appeal ICANN decisions via this mechanism, even among those with the financial resources to do so.²³³

In addition to the questions raised about limits of the IRP as an accountability mechanism, others questioned how ICANN’s interpretation of the process reflects on ICANN’s commitment to

²²⁸ Ibid., 61 (emphasis added).

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid., 62.

²³² Ibid., 68.

²³³ Interviews, September and October 2010.

accountability. Some interviewees expressed the belief that ICANN's interpretation of the IRP—that the process should not entail live testimony, that ICANN should be offered deference under the business judgment rule, and that the IRP's decision should not be binding on the ICANN Board—was inconsistent with an organization with a mandate to ensure that it is accountable to its stakeholders.²³⁴

Perceptions also varied with regard to the ultimate effectiveness of the IRP as an accountability mechanism in this specific case. Some asserted that this process demonstrated accountability, given that an applicant for a new TLD was able to initiate the review process and argue their case on the merits before independent arbitrators, and in doing so compelled ICANN to defend the basis of its actions. Moreover, IRP's decision appears to have convinced ICANN to reverse its decision. Other interviewees expressed the opinion that the absence of a binding resolution from the IRP is indicative of the fundamental lack of accountability at ICANN.²³⁵

²³⁴ Interviews, September and October 2010.

²³⁵ Interviews, September and October 2010.